

SIDEEK  
v.  
FUARD

SUPREME COURT.  
G. P. S. DE SILVA, C.J.,  
KULATUNGA, J. AND  
RAMANATHAN, J.  
S.C. APPEAL NO. 66/94 WITH  
S.C. APPEAL NO. 21/94  
C.A. APPLICATION NO. 205/93  
D.C. MT. LAVINIA NO. 2909/RE  
JANUARY 18, 1995.

*Execution of Decree pending appeal – Power of the District Court to stay execution – Judicature Act, Section 23 – Discretion of Court – Substantial question of Law as a ground for stay of execution.*

The decree sought to be executed was entered after an *ex parte* trial on the ground of defendant's default. After the case was fixed for trial there was a fire in the Record Room which destroyed the record. On the day fixed for the trial, the Defendant was absent and the record was reconstructed with copies of pleadings furnished by the Plaintiff following which the *ex-parte* trial was held, the Defendant's application to set aside the *ex-parte* decree was refused. Pending the Defendant's appeal from that order, the court allowed the Plaintiff's application for execution.

**Held:**

The court, in the exercise of its discretion under Section 23 of the Judicature Act, may stay execution of a decree on the ground of a substantial question of law. Such questions arise namely, whether after the record was destroyed it could reasonably be said that the trial date stood; and whether the reconstruction of the record without notice to the Defendant was lawful.

**APPEAL** from the judgment of the Court of Appeal.

*H. L. de Silva, P.C.* with *S. Mahenthiran* for Plaintiff-Appellant in SC 66/94 and Defendant-Respondent in SC 21/94.

*A. K. Premadasa, P.C.* with *C. E. de Silva* for Defendant-Respondents in SC 21/94 and Petitioner in SC 21/94.

February 13, 1995.

**G. P. S. DE SILVA, C. J.**

This was a tenancy action. The plaintiff instituted these proceedings on 27.7.1989 seeking, *inter alia*, the ejectment of the defendant from the premises in suit. The defendant in his answer dated 25.6.90 sought, *inter alia*, the dismissal of the action.

The trial was fixed for 23.4.91. However, on 15.3.91 the record room of the District Court caught fire and the record of this case (along with several records in other cases) was destroyed. On 23.4.91 the plaintiff was present and was represented by counsel. The defendant was absent and there was no representation on his behalf. Counsel for the plaintiff tendered to court copies of the plaint, answer and replication and moved that the case be fixed for *ex parte* trial. Trial was held *ex parte* on 9.5.91; decree was entered in favour of the plaintiff and was served on the defendant. The defendant's application to set aside the *ex parte* decree was refused; the defendant has preferred an appeal against that order of the District Court and the appeal is now pending in the Court of Appeal.

The plaintiff made an application for execution of decree pending appeal. After inquiry, the District Judge allowed the application. Thereupon the defendant moved the Court of Appeal by way of revision to set aside the order of the District Court allowing the application for execution of decree pending appeal. The Court of Appeal, acting in revision, set aside the order. The plaintiff has now preferred an appeal to this court against the judgment of the Court of Appeal.

The District Court has the power to stay execution of a decree pending appeal "when it shall see fit to make an order to that effect" (section 23 of the Judicature Act as amended by Act No. 37 of 1979). It is a discretion that is vested in the Court; a discretion which, of course, must be exercised judicially. It was the contention of Mr. A. K. Premadasa for the defendant-respondent that there was a substantial question of law to be considered at the hearing of the appeal, namely, whether the reconstitution of the record on 23.4.91 **without notice to the defendant** was valid and whether the subsequent proceedings were in accordance with law. On the other hand,

Mr. H. L. de Silva for the plaintiff-appellant argued that there was nothing wrong in reconstituting the record, for the reason that the case had not proceeded beyond the stage of pleadings and the defendant did not contest the authenticity of the pleadings, Mr. de Silva stressed that the reconstitution of the record did not involve disputed questions. The copies of the plaint, answer and replication were readily available.

There is little doubt that the court was faced with an exceptional situation. The fire in the record room had destroyed the record. In a very unusual situation such as this, a crucial question that arises is whether it could reasonably be said that the trial date (23.4.91) stands. An equally fundamental question is whether the reconstitution of the record on 23.4.91 without notice to the defendant was lawful. The Court of Appeal has rightly stressed the fact that the proceedings had on 23.4.91 were without "the principal record of the action". (Section 92 of the Civil Procedure Code).

Mr. H. L. de Silva submitted that substantial question of law alone is not a ground upon which a court could stay execution of decree pending appeal. I do not agree. The question of law that arises may be of such a nature (as in the instant case) that the court in the exercise of its discretion may deem it fit and proper to make order staying execution of decree. (Section 23 of the Judicature Act as amended by act No. 37 of 1979). The Court of Appeal rightly held that the District Court was in error when it allowed execution of decree pending appeal.

For these reasons the judgment of the Court of Appeal is affirmed and the appeal is dismissed with costs fixed at Rs. 500/-.

Before I conclude I wish to state that of consent S.C. appeal 21/94 and this appeal were consolidated; parties agreed to abide by a single judgment.

**KULATUNGA, J.** – I agree.

**RAMANATHAN, J.** – I agree.

*Appeal dismissed.*