

**JAYATISSA  
VS.  
NANDAWATHIE AND OTHERS**

COURT OF APPEAL.  
IMAM, J.,  
SRISKANDARAJAH. J.  
CALA 213/02.  
DC KANDY 18909/L.  
JULY 6, 2005.

*Civil Procedure Code section 86(2), section 88(2), section 761, section 763(1), section 763(2), section 839 - Writ pending appeal Inquiry.- Writ executed within 14 days of order without notice-Legality ?-Recall of writ ?*

An *ex-parte* judgment was entered on **10.01.2000**. The application to purge default was delivered on **24.05.2002**. The respondents tendered an application for writ – Writ of ejectment was issued on **28.05.2002** without notice to the defendant-petitioner. The writ of execution was executed on **29.05.2002** (at 11 a. m.) The defendant-petitioner filed a notice of appeal on **29.05.2002** (at 11.25 a. m.), but journalized on 31.05.2002.

It was contended by the defendant-petitioner that the writ of ejectment was applied for and executed by the respondents within 14 days of the order of 24.05.2002 and hence is inconsistent with the provisions of section 761 of the Code as a notice of appeal has been tendered by him, the respondents are bound to give notice to the petitioner of the application for writ pending appeal. The respondents contended that, as there is no valid appeal tendered by the petitioner, there can be no objection to the validity of the execution proceedings.

**HELD:**

- (1) It is manifestly clear that the writ of execution applied for and executed by the respondents within 14 days of the order made by Court on 24.05.2002 is inconsistent with the provisions of section 761 of the Code.
- (2) The respondents are bound to give notice to the petitioner of the application for writ pending appeal which they have not done, for then the petitioner could have established that he would suffer 'substantial loss' which opportunity was deprived of by the aforesaid acts of the respondents.

**APPLICATION** for Leave to Appeal from an order of the District Court of Kandy.

*Cases referred to :*

- (1) *Careem vs. Amerasinghe* Sri Lanka Law Reports Vol. 1 page 25.
- (2) *Brooke Bond (Ceylon) Ltd. vs. Gunasekera* - 1990 1 Sri LR 71.
- (3) *Edward vs. De Silva* 46 NLR 342.

*Hemasiri Withanachchi with S. N. Vijithsingh* for defendant petitioner.  
*L. C. Seneviratne PC with R. Prematilaka* for plaintiff respondent.

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March 20, 2006.

**IMAM, J.**

The Defendant-Petitioner (hereinafter referred to as the 'Petitioner') has tendered this application seeking to set aside the orders dated 28.05.2002 and 29.05.2002 made by the Learned District Judge of Kandy in DC Kandy Case No. 18909/L to direct the Learned District Judge to recall the writ issued in the aforesaid case and restore the possession of the premises in dispute to the 'Petitioner'. The Petitioner further seeks that the learned District Judge of Kandy holds an inquiry in relation to the Writ pending appeal in terms of section 763 of the Civil Procedure Code and section 23 of the Judicature Act *inter-alia* other reliefs sought for.

On 28.01.2004 this Court granted Leave to Appeal on the questions as to whether in terms of section 761 of the Civil Procedure Code the Court had jurisdiction to entertain an application for execution of decree pending appeal and as to whether there is a proper application before Court for execution.

The facts of this case are briefly as follows : The Plaintiffs-Respondents (hereinafter referred to as the 'Respondents') instituted this action (X1) for a declaration of title to the two lands described in the schedule 'අ' to the plaint, for the ejection of the 'Petitioner' therefrom, for an Enjoining Order and an Interim Injunction restraining the 'Petitioner' from alienating this property until the final determination of this action. The Petitioner filed answer and amended answer (X2), subsequent to which the case was fixed for trial for 10.01.2000. The Petitioner failed to appear at the trial and on his Attorney-at-Law Mr. Dayaratne informing Court that he had not received any instructions from the petitioner and hence was not appearing for him, on application made by counsel appearing for the Respondents the learned Additional District Judge fixed the case for *ex-parte* trial and concluded the *ex-parte* trial having led the evidence of Kasturi Aratchchige Nandawathie the 1st Plaintiff-Respondent and having marked Documents P1 to P5. The *ex-parte* proceedings and Judgment of 10.01.2000 are marked as X3 and X4 respectively. Consequently the Judgment (X4) and *ex-parte*

Decree was served on the Petitioner only on 18.08.2000 as per Journal Entry (35) in X12. Subsequently the Petitioner tendered a Medical Certificate (X5) dated 20.01.2000 and filed an application under-section 839 of the Civil Procedure Code to set aside the *ex-parte* proceedings (X3) and *ex-parte* Judgement (X4). The Petitioner tendered an amended petition dated 23.05.2001 (X6) and affidavit (X6a) to which the Respondents submitted objections dated 06.06.2001 (X7). The Learned Additional District Judge held an inquiry on the aforesaid application of the Petitioner (X8 a, b and c) and delivered his order dated 24.05.2002 (X11) by which he dismissed the application of the 'Petitioner' made under-section 839 of the Civil Procedure Code and further held that *ex-parte* Judgment (X4) was served on the 'Petitioner' and that the 'Petitioner' had failed to establish the contrary. On 28.05.2002 the Respondents tendered an application for Writ of Ejectment of the 'Petitioner' and sought that writ be executed through the Fiscal as borne out by the Journal Entry contained in (X12). The learned Additional District Judge signed the Writ of Execution and made order that the Fiscal be issued with it.

The Fiscal Report (X13) stated that on 29.05.2002 the Writ of Execution had been executed by the Fiscal at 11 a. m. and that vacant possession had been handed over to the Respondents which is confirmed in Journal Entry 55 which is dated 31.05.2002. The Petitioner filed Notice of Appeal on 29.05.2002 at 11.25 a. m. which was accepted by the Registrar of the District Court, although it was journalized on 31.05.2002, as set out in journal Entry 54 of X12.

It is contended by the Petitioner that the writ of Execution was applied for and executed by the 'Respondents' within 14 days of the Order dated 24.05.2002 (X11) made by the Learned Additional District Judge and hence is inconsistent with the provisions of section 761 of the Civil Procedure Code. The Petitioner submits that as the Notice of Appeal has been tendered by him, the Respondents are bound to give Notice to the Petitioner of the application for Writ pending appeal as then the Petitioner could establish that he would suffer 'Substantial loss' and that as this procedure has not been adopted by the 'Respondents' the entire execution proceedings are not in accordance

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with the law and that the Petitioner should be restored to the possession of the property the subject matter of this case.

The Respondents aver that the Petitioner's contention can have validity only if a valid appeal has been filed by the Petitioner. An appeal it is pointed out has 2 stages namely the filing of Notice of Appeal and the filing of Petition of Appeal. The Respondents contend that as there is no valid appeal tendered by the Petitioner, that there can be no objection taken to the validity of the execution proceedings in this case and hence that the Petitioner's objections must be rejected.

I have examined the application of the Petitioner and the position taken up by the Respondents. Although *ex-parte* Judgment and Decree were entered on 10.01.2000 it is only after the aforesaid were served almost after 9 months on the Petitioner as per journal entry (35) dated 18.08.2000 in X12, that the Petitioner appeared in the District Court, on which date the Decree was made absolute. On 28.08.2000 the Petitioner tendered a Petition and Affidavit and sought to purge his default. Thus the Petitioner has acted in conformity with section 86(2) of the Civil Procedure Code and made an application within 14 days of the service of the Decree entered against him. On an amended petition and affidavit being tendered by the Petitioner on 23.05.2001 and Objections dated 06.06.2001 being submitted by the Respondents', the Default Inquiry was held before the Learned Additional District Judge of Kandy on 10.10.2001, where the Petitioner, his wife and the care taker of the quarters in which the Petitioner and his wife resided at Kotmale gave evidence. On 24.05.2002 the learned Additional District Judge dismissed the Petitioner's application holding *inter-alia* that the Petitioner did not call the Fiscal as a Witness to contradict the Fiscal's affidavit filed in the District Court to the effect that the Fiscal had served the Decree on the Petitioner. The Petitioner in his evidence marked the Medical Certificate of Ayurvedic Dr. Siriwardene dated 20.01.2000 (X5) which stated that the Petitioner could not attend Courts during the period 09.01.2000 to 14.01.2000 which was due to the fact that he had sprained his left leg which made it difficult for him to walk. The Petitioner in his evidence stated that after 10.01.2000 he has been living in Kotmale in the quarters of his wife who is employed as a nurse.

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The Petitioner filed Notice of Appeal on 29.05.2002 at 11.25 a. m. before the Registrar of the District Court who accepted the Notice of Appeal, but it had been journalized on 31.05.2002. The Fiscal report (X13) states that on 29.05.2002 the Writ of Execution had been executed by the Fiscal at 11 a.m. As the Learned Additional District Judge made order on 24.05.2002 the Respondents could not have applied for Writ of Possession until the expiry of 14 days during which period the Petitioner could have filed the Notice of Appeal. The Petitioner states that at the time of filing the Notice of Appeal he learnt that Writ had already been executed on 29.05.2002 at 11 a.m. Unless the Writ is recalled and the possession of the premises in dispute is restored to the Petitioner, the Petitioner would suffer irremediable loss as the livelihood of the Petitioner depended on the business carried out in the premises in dispute. The Order made by the learned Additional District Judge refusing to set aside the *ex-parte* judgment gives rise to an appeal in terms of section 88(2) of the Civil Procedure Code. This position was followed in *Peter Singho vs. Wydeman* (1 Sri Kantha Law report page 88). The *Ex-parte* Judgment which was confirmed after inquiry cannot be executed until after the expiry of the time allowed for appeal as set out in section 761 of the Civil Procedure Code which states 'No application for execution of an appealable decree shall be instituted or entertained until after the expiry of the time allowed for appealing therefrom, provided however that where an appeal is preferred against such a decree, the Judgment-Creditor may forthwith apply for execution of such decree under the provisions of section 763.'

In *Careem vs. Amerasinghe*<sup>(1)</sup> it was held that an Application for Writ pending appeal made within the appealable period of 60 days is void. For the purpose of section 761 of the Civil Procedure Code the time permitted for appealing from an appealable decree is 14 days, being the time allowed for the giving of Notice of Appeal.

In *Brooke Bond (Ceylon) Ltd. vs. Gunasekera* <sup>(2)</sup> it was held by Atukorale, J that "if a Judgment and Decree is entered on the 1st day of the month, ordinarily an application for execution of the decree shall not be entertained until after the expiry of the 14th day of that month....."

On 28.05.2002 the 'Respondents' tendered an application for Writ of Ejectment of the Petitioner and sought that writ be executed through the Fiscal as borne out by the Journal Entry contained in X12, which was signed by the Additional District Judge and directed that it be issued to the Fiscal. The Fiscal report (X13) stated that on 29.05.2002 the Writ of Execution had been executed by the Fiscal at 11 a.m. and that vacant possession has been handed over to the Respondents which is confirmed by Journal Entry (55) dated 31.05.2002. The Petitioner filed Notice of Appeal on 29.05.2002 at 11.25 a.m. which was accepted by the Registrar of the District Court although it was journalized on 31.05.2002 as set out in Journal Entry (54) of X12.

Hence, it is manifestly clear that the Writ of Execution was applied for and executed by the Respondents within 14 days of the order made by the Learned Additional District Judge dated 24.05.2002 (X11) and is thus inconsistent with the provisions of section 761 of the Civil Procedure Code. Furthermore under these circumstances the Respondents are bound to give notice to the Petitioner of the application for Writ pending Appeal which they have not done for then the Petitioner could have established that he would suffer 'Substantial Loss' which opportunity the Petitioner was deprived of by the aforesaid acts of the Respondents.

Section 763(1) of the Civil Procedure Code states that "In the case of an application being made by the Judgment - Creditor for execution of a Decree which is appealed against, the Judgment-debtor shall be made Respondent....."

Section 763(2) states that "The Court may order Execution to be stayed upon such terms and conditions as it may deem fit, where (a) the Judgment-debtor satisfies the Court that 'substantial loss' may result to the Judgment-Debtor unless an order for stay of execution is made ; and

(b) Security is given by the Judgment-Debtor for the due performance of such Decree or order as may ultimately be binding upon him."

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It was held in *Edward vs De Silva* <sup>(3)</sup> that "In an application for execution of decree after an appeal has been filed by the Judgment-Debtor it is the duty of the Judgment-Creditor to make the Judgment-Debtor a party Respondent....."

However, in this case the procedure in section 763 of the Civil Procedure Code has not been followed by the 'Respondents' thus depriving the 'Petitioner' of satisfying the Court that 'Substantial loss' could be caused to him. The Order of the Learned Additional District Judge dated 24.05.2002 is a correct order on the facts and the law and I see no reason to interfere with it. However, for the aforesaid reasons, I am of the view that the orders dated 28.05.2002 and 29.05.2002 are not in conformity with the law.

Hence, it is my view that in this case the District Court had no jurisdiction to entertain an application for Execution of Decree pending appeal. For the aforesaid reasons there is no proper application before the District Court for execution.

Thus I permit the Appeal of the Petitioner in this regard and set aside the orders of the Learned Additional District Judge dated 28.05.2002 and 29.05.2002 as prayed for in paragraph (ii) of the petition. As the order of the Learned Additional District Judge dated 24.05.2002 is a correct order, I direct the District Judge of Kandy to recall the writ issued in DC Kandy Case No. 18909/L as sought for in prayer (iii) of the petition.

I further order the District Judge of Kandy to hold an inquiry in relation to the Writ pending appeal in terms of section 763 of the Civil Procedure Code and section 23 of the Judicature Act, as prayed for in prayer (iv) of the Petition. I make no order with regard to costs.

**SRISKANDARAJAH, J. – I agree.**

*Application allowed.*