

FAREED
v.
THE COLOMBO FORT LAND AND BUILDING COMPANY
LIMITED

COURT OF APPEAL.
ABDUL CADER, J. AND RODRIGO, J.
C.A. (L.A.) 127/80—D.C. COLOMBO 1441/ZL
JANUARY 22, 1981.

Writ of execution—Application for writ pending appeal—Discretion of trial judge—Judicature Act, No. 2 of 1978, as amended by Act No. 37 of 1979, section 23.

In an application by the plaintiff-respondent for a writ of execution of a decree in his favour for ejection of the defendant-petitioner from the premises in suit pending appeal, the learned trial judge allowed the application. He also required the plaintiff to deposit a sum of Rs. 60,000 as security which was almost the entire value of the premises as alleged by the plaintiff in his plaint and not denied by the defendant. The defendant-petitioner applied for leave to appeal from the said order. It was urged on behalf of the defendant-petitioner that the business carried on in these premises was his only means of livelihood and that in the event of his appeal succeeding it would not be possible for the plaintiff to restore him to the premises.

Held

There is specific provision enacted by Act No. 37 of 1979 amending the Judicature Act, No. 2 of 1978, to permit execution of a decree pending appeal, unless the Court of first instance sees fit to stay execution. The circumstances of the present case were that the plea taken in defence by the defendant-petitioner was one that had been rejected in an earlier action. It did not appear that in the present case the court of first instance had exercised the discretion given it on any wrong principles of law and leave to appeal therefore should be refused.

APPLICATION for leave to appeal from an order of the District Court, Colombo

M. S. M. Hassan, for the defendant-petitioner.
Eric Amerasinghe, for the plaintiff-respondent.

Cur. adv. vult.

February 3, 1981
RODRIGO, J.

This is an application by the defendant-petitioner for leave to appeal from the order of the court of first instance dated

19.12.80 allowing the application by the plaintiff-respondent for a writ of execution of the decree obtained by him for ejection of the defendant-petitioner from the premises in suit.

The plaintiff had instituted the action for declaration of title against the defendant. The defendant has denied the averments of the plaintiff in the several paragraphs of the plaint in regard to the title set out by the plaintiff, but the defendant has specifically pleaded that he is a tenant of the plaintiff and was entitled to the protection of the Rent Act, No. 7 of 1972.

However, in an action bearing No. 1441/ZL filed in the District Court of Colombo by him (the defendant-petitioner in this case) against the plaintiff-respondent in this case, the court of first instance held that this present defendant-petitioner is not a tenant of the premises in question and that finding was affirmed by the Supreme Court by the judgment of Their Lordships delivered on October 2, 1975. This judgment had been considered by the court of first instance in respect of the application by the plaintiff-respondent for the writ of execution of the decree. Even in the application for leave before us the defendant-petitioner repeats his defence that he is in occupation of the premises as a tenant thereof. This plea is clearly *res adjudicata* in the case referred to and affirmed by the Supreme Court on October 2, 1975.

Some issues relating to one Razak who figured in an earlier case bearing No. 169/RE of the District Court of Colombo had been erroneously answered. This, however, does not effect the answer to the issue in the present case relating to the nature of occupation of the premises by the defendant-petitioner. The trial Judge had held that the defendant is not a tenant of the premises in suit. The defendant had nowhere seriously contested the claim of title to these premises by the plaintiff. By an amendment to the Judicature Act, No. 2 of 1978, by Act No. 37 of 1979 specific provision has been enacted to permit execution of the decree pending an appeal unless the Court of first instance sees it fit to stay execution. In this instance, the learned trial Judge had not seen it fit to stay the execution of the decree for the reasons he has given in his order. In the forefront of his order he has drawn attention to the result of the appeal in the earlier case referred to whereby the plea of tenancy by the defendant of the premises in suit had been rejected by Their Lordships of the Supreme Court.

In the circumstances, one cannot fail to suspect this to be a last ditch attempt by the defendant-petitioner to hang on to the premises as long as he can. It is urged that this is his only means of livelihood, that is to say the business carried on in these premises by him is his only means of livelihood. It is also urged that in the event of his succeeding in the appeal it will not be possible for the plaintiff to restore him to the premises. This may be true and the learned District Judge has required the plaintiff to deposit a sum of Rs. 60,000 as security being practically the full value of the premises as alleged by the plaintiff in his plaint and not denied by the defendant. The learned District Judge does not appear to be impressed with the defendant's prospects of success in his appeal. Counsel appearing for the defendant-petitioner has not been able to persuade us that the court of first instance had exercised the discretion given to it on any wrong principles of law.

We, therefore, dismiss the defendant-petitioner's application for leave to appeal from the order of the learned District Judge dated 19.12.80 and accordingly refuse leave to appeal from the order. The plaintiff is entitled to costs of this application.

ABDUL CADER, J.—I agree.

Leave to appeal refused.