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**ROSHAN  
VS  
SOMASIRI**

COURT OF APPEAL.  
SOMAWANSA, J. (P/CA) AND  
WIMALACHANDRA, J.  
CALA 423/2004.  
DC ATTANAGALLA 87/L.  
MAY 30, 2005.

*Civil Procedure Code, section 763(2) - Judicature Act, section 23 - Writ pending appeal - Substantial question of law - Matters to be considered - Onus on the judgment debtor.*

**HELD:**

1. For the appellate court to consider whether there is a substantial question of law to be decided in appeal, the relevant material has to be made available to court.
2. To consider the question of law urged in appeal the following matters need consideration :
  - (i) How strong was the appellant's case - for this purpose the court has to examine the evidence given by and on behalf of the appellant at the trial including the evidence given under cross examination;
  - (ii) The trial judge's answer to the issues framed at the trial;
  - (iii) The trial judge's reasons for answering the issues in the way he has done - the judgment.
3. It is the onus on the part of the defendant-petitioner to have placed before the District Judge at the inquiry such evidence, material and pleadings on his behalf from which it could be safely inferred that substantial questions of *law* do arise for consideration in appeal - and such material must be made available to the appellate court too.

**APPLICATION** for leave to appeal from an order of the District Court of Attanagalla.

**Cases referred to :**

- (1) *Don Piyasena vs. Mayawathie Jayasinghe* (1986) 1 Sri LR 6
- (2) *Grindlays Bank Ltd. vs. Makinnon Mackenzie and Com.* (1990) 1 Sri LR 19
- (3) *A. D. H. Perera vs. Gunawardane* (1993) 2 Sri LR 27
- (4) *Magilin vs. Illukkumbura* (1996) 2 Sri LR 263
- (5) *Mallika vs. Hendavitharana and another* (1999) 2 Sri LR 266
- (6) *Saleem vs. Balakumar* (1981) 2 SLR 274
- (7) *Ms. K. G. Karunasekera vs. Rev. Kallanchive Chandananda CA 526/99 - D. C. Kurunegala 320/L*

*David Weeraratne* for petitioner.

*Resmi Wimalaratne* for respondent.

*Cur. adv.vult.*

December 09, 2005.

**ANDREW SOMAWANSA, J. (P/CA)**

This is an application for leave to appeal from the order of the learned District Judge of Attanagalle dated 04.11.2004 allowing the plaintiff-respondent's application for execution of writ pending appeal and if leave is granted to set aside the aforesaid order dated 04.11.2004. The defendant-petitioner also prayed for and supported for an interim order staying the operation of the aforesaid order which was granted and has been extended from time to time.

When this application was taken up for inquiry both counsel agreed to tender written submissions on the question of granting leave and both parties have tendered their written submissions.

The relevant facts are the plaintiff-respondent instituted the instant action for a declaration that he is the lawful lessee of shop No. 3 morefully described in the schedule to the plaint, ejection of the defendant-petitioner and for damages. The defendant-respondent while denying the aforesaid averments took up the position that he is the tenant of the shop in suit which belongs to the Pradeshiya Sabhawa. At the conclusion of the trial the learned District Judge by his judgment dated 02.10.2003 held with the plaintiff and the defendant-petitioner appealed from the said judgment and thereafter the plaintiff-respondent moved for a writ of execution. At the conclusion of the inquiry into this application the learned District Judge by

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his aforesaid order dated 04.11.2004 allowed the application for execution of writ pending appeal. It is from this order that the defendant-petitioner is seeking leave to appeal.

At the inquiry only the defendant-petitioner gave evidence and the basis for his claim for substantial loss that would result if he is ejected is that he being the sole breadwinner of the family would lose his only source of income he has from the business carried on at the premises in suit, and would also interrupt his children's education.

Evidence reveals that the business he carried on at the shop in suit was selling buns, short eats, string hoppers, drinks, tea etc., which he himself admits could be carried on anywhere. He also states that though there is a judgment against him to eject him he did not look for an alternative place. It is interesting to note that other than his admission that he was carrying on business in the premises in suit he does not claim any interest or title to the same. Furthermore it is also interesting to note that no other evidence either oral or documentary has been led before the learned District Judge to establish his ipsi dixit evidence on the question of substantial loss that would be caused to him if he was evicted. On the aforesaid evidence I would say that the learned District Judge has come to a correct finding that no substantial loss would result to the defendant petitioner in the event the writ is executed. Though the learned District Judge did not consider and evaluate the evidence given by the defendant-petitioner in detail nevertheless he has come to a correct finding when he rejected the defendant-petitioner's plea of substantial loss on the basis of non-availability of evidence, to establish such substantial loss resulting in the event the writ of execution is allowed.

*In the case of Don Piyasena vs. Mayawathi Jayasuriya<sup>(1)</sup>*

"The provisions of section 23 of the Judicature Act and section 763(2) of the Civil Procedure Code make it clear that unless there is proof of substantial loss that may otherwise result, execution of decree will not be stayed merely on the ground that an appeal has been filed."

Also in the case of *Grindlays Bank Ltd., vs. Mackinnon Mackenzie & Co.*<sup>(2)</sup>

"If the judgment debtor desires stay of execution pending appeal, he should establish substantial loss. The usual course is to stay proceedings pending an appeal when execution would cause irreparable injury. Mere inconvenience and annoyance is not enough. The damage must be substantial and the defendant must prove it."

*In Perera vs. Gunawardena*<sup>(3)</sup>

"As the defendant-respondent had failed to satisfy the court that substantial loss may result unless execution was stayed, the plaintiff was entitled to execution pending appeal. While some consideration of the degree of hardship to the judgment-creditor may perhaps be relevant especially in borderline cases, there is certainly no burden on him to establish comparatively greater hardship as a condition of the grant of execution. The burden is on the judgment-debtor to satisfy the court that the loss would be substantial.

The owner of the business is not entitled to the maximum tenure the law allows. Such a proposition would effectively deny execution pending appeal and introduce a new test under the guise of interpretation.

Mere assertions of the judgment debtor's opinion that serious loss would result, unsupported by averments of fact in regard to the nature of the business, its turnover and profits (or losses), the difficulties and expenses which relocation would occasion and similar matters, are insufficient. The material upon which such assertions were based should have been made available to enable the court to assess the loss, and to determine, in relation, to the judgment debtor, whether such loss was substantial, and also to determine the quantum of security. While generally goodwill does attach to a business, there is no presumption that every business has a goodwill and certainly not as to the extent of the goodwill."

In this respect counsel for the defendant-petitioner has cited two decisions of *Magelin vs. Ilukkumbura*<sup>(4)</sup> where the facts and circumstances are materially different to that of the instant application. In that case the business being a pharmacy business with a large clientele and in fact the party to be ejected had taken constructive steps in trying to relocate the business. However in the instant action the defendant-petitioner had made no attempt whatsoever to find an alternative place and on his own admission runs a tea boutique which could be carried on anywhere.

He has also cited the case of ***Mallika vs. Hendavitharana and Another***<sup>6</sup> where again facts and circumstances are distinguishable. For in that case the party to be ejected was carrying on a specially localized business of leather trade and it was disclosed that shifting would actually cause severe hardship.

Counsel for the defendant-petitioner also contends that in the petition of appeal filed by the defendant-petitioner out of the 16 grounds of appeal stated therein there are at least 5 questions of law to be decided. Thus counsel citing the decision in *Saleem vs. Balakumar* page 274 submits that on the substantial question of law raised in the petition of appeal alone the writ should have been stayed. However, other than filing a copy of the petition of appeal there is no other material to show that this was an issue that was canvassed at the inquiry. In any event, even for this Court to consider this aspect of the matter viz: existence of substantial questions of law to be decided in appeal let alone whether the defendant-petitioner could succeed or not the relevant material has to be made available to this Court. However, except for the petition of appeal marked D (1) neither the evidence led at the trial, the judgment, nor the written submissions tendered by the defendant-petitioner have been annexed or tendered to this Court.

The points of law urged are not figments of one's imagination but questions which arose for consideration by the lower Court. In this respect I would refer to the decision of *Mrs. K. G. Karunasekera vs. Rev. Kallanchive Chandananda*<sup>(7)</sup> wherein the Court observed that to consider the questions of law urged in appeal following matters need consideration :-

- (i) How strong was the appellant's case (placed before the original Court as against his opponent's case) at the trial. For this purpose the Court has to examine the evidence given by and on behalf of the appellant at the trial including the evidence given under cross-examination.
- (ii) The trial Judge's answers to the issues framed at the trial.
- (iii) the trial Judge's reasons for answering the issues in the way he has done-the judgment.

Thus it is the onus on the part of the petitioner to have placed before the learned District Judge at the inquiry such evidence, material and pleadings on his behalf from which it could be safely inferred that substantial questions of law do arise for consideration in appeal and also must make available to this Court too if this Court is called upon to consider whether there are questions of law remaining to be urged and considered at the appeal stage.

In the circumstances, I am not in a position to determine whether there are any substantial questions of law to be decided in the appeal or whether the defendant petitioner would be in a position to succeed in the appeal on the said questions of law.

For the foregoing reasons, I see no basis to interfere with the order made by the learned District Judge. Accordingly leave to appeal is refused with costs fixed at Rs. 10,000.

**WIMALACHANDRA, J.**—I agree.

*Application dismissed.*

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