

**PREMASIRI
v
GUNAPALA**

COURT OF APPEAL
IMAM, J.
CALA NO. 383/03
D.C. WALASMULLA
MARCH 22, 2004

Writ pending appeal – Civil Procedure Code, section 763(1) – Judicature Act, section 23 – Substantial loss – Affidavit-Is the Commissioner for Oaths an all Island Justice of the Peace? – Oaths Ordinance, section 12.

Held :

- (1) Irreparable loss and damage would be caused to the defendant-petitioner, if stay of execution of the decree is not granted.
- (2) A Commissioner of Oaths is not confined to a particular district and can operate anywhere in the Island irrespective of where his or her permanent address is. His appointment is similar to an all Island Justice of the Peace. Thus notwithstanding that her address is at Anuradhapura, the affidavit which has been affirmed in Colombo is valid in law.

Cases referred to:

- (1) *Charlotte Perera v Thambiah* – (1983) 1 Sri LR 352 at 360
- (2) *Sokkai Ram Sart v Nadar* – 41 NLR 89
- (3) *Mack v Sanmugam* – 3 Sri Kantha Law Reports Vol. 3 page 89
- (4) *Don Piyasena v M. Jayasuriya* – (1986) 1 Sri LR 6
- (5) *Grindlays Bank Ltd., v Mackinnon Mackenzie Ceylon Ltd.*, (1990) 1 Sri LR 19
- (6) *Perera v Gunawardena* – (1993) 2 Sri LR 27
- (7) *Saleem v Balakumar* – (1981) 2 Sri LR 74
- (8) *Amarange v Seelawathie Weerakoon* – (1990) 2 Sri LR 352

Chandana Premathilaka for petitioner

David Weeraratne for plaintiff-respondent.

IMAM, J.

This is an application for Leave to Appeal filed by the defendant- 01
respondent-petitioner (hereinafter referred to as the defendant) to
set aside the order of the learned Additional District Judge of
Walasumulla dated 3.10.2003. Counsel for both sides agreed to an
order being made by this Court on the written submissions ten-
dered on 22.3.2004.

The plaintiff-petitioner-respondent (hereinafter referred to as the
plaintiff) filed the aforesaid case No. L/404 in the District Court of
Walasmulla on 07.2.1996 against the defendant seeking *inter alia*
a declaration that the land set out in the schedule to the plaint 10
namely Lot 78 which is 0.171 hectares in extent depicted in Final
Village Plan No. 209 made by the Surveyor-General belongs to the
plaintiff, an Order to evict the defendant and those under him from
the said land and to obtain vacant possession thereof.

The plaintiff stated in the plaint that his father Ratnayake
Diyapotage Jaanis was the *permit holder* of the said land belong-
ing to the State and on 22.10.1990 the said Jaanis was given a
grant by His Excellency the President by way of a Swarnabhoomi
Deed under the *Land Development Ordinance*. The plaintiff further
stated that upon the death of his father who resided in the house in 20
the aforesaid land, the defendant in 1992 had entered the land *with*
the consent of the plaintiff who was nominated as his *successor* by
his father. By way of Notice dated 07.02.1996, although the plain-
tiff noticed the defendant to vacate the property, the defendant did
not comply and remained in the land.

The defendant in his answer dated 22.01.1997 stated that he
and his family had been in *possession* and *occupation* of the said
land since 1984 independently and without any one's consent, and
that he had constructed a house, obtained electricity, planted jak
and pepper as permanent vegetation, and had been registered as 30
a Voter at the said address since 1989. The defendant further stated
in the answer that the plaintiff cannot seek a declaration of title
in respect of the aforesaid land by virtue of the Swarnabhoomi
Deed, *as such a grant under The Land Development Ordinance*
does *not confer an Absolute Title* upon the *grantee*, and as *Title*
remains with the State, this action cannot be maintained without

making the State a party. At the Trial 17 issues were raised. The plaintiff gave evidence and produced a certified copy of the grant dated 22.10.1990, and stated that his father had been conferred title to the said land by virtue of the grant. The defendant too gave evidence and said that he and his family members had been in possession of the said land since 1984, constructed a house and that he was responsible for the plantations therein. The defendant further called several witnesses to give evidence with regard to his possession of the land since 1984. 40

The learned Additional District Judge gave *judgment in favour of the plaintiff* by granting him the reliefs prayed for in (a) (අ) and (c) of the prayer to the plaint, and ordered the eviction of the defendant as prayed for by the plaintiff.

The plaintiff *subsequently* filed an application in the District Court under section 763 of the Civil Procedure Code for the *execution of the decree pending Appeal*. The defendant filed objections, and the matter was taken up for *inquiry on 28.08.2003*. Both parties had tendered written submissions and relevant papers, without calling any witnesses, consequent to which the learned Additional District Judge delivered Order on 03.10.2003 and allowed the plaintiff's application for *writ pending Appeal*. 50

It was submitted on behalf of the plaintiff that the defendant (judgment debtor) did not adduce *evidence to establish substantial loss* that would be caused to him in the event of the writ being executed. 60

The relevant statutory provisions in the issue or staying of writ pending appeal are contained in *section 23* of the Judicature Act and *section 763(2)* of the Civil Procedure Code. Samarakoon, C.J. in *Charlott Perera v Thambiah* ⁽¹⁾ at p. 360 said that the matter of *staying of execution pending appeal* is governed by the provisions of *section 23* of the *Judicature Act* read with *section 763(2)* of the Civil Procedure Code; the former permits the Court to stay *Writ of Execution if it sees fit* and the latter permits it to stay if the *judgment debtor* satisfies the Court that *substantial loss* may result. 70

Stay of execution of the decree pending appeal is granted when the proceedings would cause *irreparable loss and injury* to the appellant, and where the damages suffered by execution would be substantial, as held in *Sokkalah Ram Sart v Nadar*. ⁽²⁾

In *Mack v Sanmugam*⁽³⁾ it was held that Stay of Execution will be granted if there is any doubt of the justice of the decision and execution will cause damage to the appellant which will be both irreparable and exhaustive.

The requirement of proof of substantial/irreparable loss/Injury has been declared in a number of subsequent cases as well such as *Don Piyasena v Mayawathie Jayasuriya*⁽⁴⁾, *Grindlay's Bank Ltd v Mackinnon Mackenzie & Co. Ceylon Ltd.* (1995)⁽⁵⁾ and *Perera v Gunawardena* ⁽⁶⁾. 80

In *Saleem v Balakumar* ⁽⁷⁾ it was held that writ must be stayed until the final disposal of the Appeal if the Court is satisfied that there is a substantial question of law to be adjudicated upon at the hearing.

In *Perera v Gunawardena*, *supra* it was observed that some consideration of the degree of hardship to the judgment-creditor may also be relevant in such an application. 90

In *Amarange v Seelawathie Weerakoon*⁽⁸⁾, it was held that substantial loss is *not necessarily monetary loss*, and the expression must have a relative meaning and *must vary with the facts of each case*.

I examined the order of the learned District Judge dated 03.10.2003. In this Leave to Appeal application the defendant in his prayer (i) to the petition has sought a stay order until the final determination of this application. This Court issued a stay order on 21.10.2003 which has *continuously been extended* to cover the next date on which the case was called. If a stay order is not issued until the *final determination* of this application, Irreparable Loss and *Damage* would be caused to the defendant-respondent-petitioners. Hence I issue a Stay Order *staying further proceedings* in case No. L/404 in the District Court of Walasmulla until the final determination of this Application as prayed for in prayer (i) of the said petition. 100.

The plaintiff-respondent's Counsel's submission that the affidavit pertaining to this application was *defective* as the 'Jurat' stated that the affidavit was affirmed on 20.10.2003 at Colombo where-

as the Commissioner for Oaths and/or Justice of Peace had been 110
in Anuradhapura according to the Rubber Seal, was considered by
me. The said Affidavit too was examined by me. A Commissioner
for Oaths is not confined to a particular District and can operate any
where in the island irrespective of where his or her permanent
address is. His or her appointment under section 12 of the Oaths
Ordinance is similar to an all Island JP. Thus notwithstanding her
address at Anuradhapura. I am of the view that the aforesaid affi-
davit is valid in law.

For the aforesaid reasons, I grant Leave to Appeal to the defen-
dant-respondent-petitioner from the order of the learned Additional 120
District Judge of Walasmulla dated 03.10.2003. No costs.

Leave to appeal granted.