

**HUSAIRA
v.
SAMARANAYAKE**

SUPREME COURT
G. P. S. DE SILVA, CJ.,
PERERA, J. AND
WIJETUNGA, J.
S.C. APPEAL NO. 180/96
C.A. (REVISION) NO. 553/95
D.C. COLOMBO 7523/RE
AUGUST 8TH, 1997
SEPTEMBER 8TH, 18TH, 1997.

Execution of decree pending appeal – Judicature Act, s. 23 — Discretion of court to stay execution.

The District Court in allowing the application for execution of decree pending appeal assumed that the Judicature (Amendment) Act No. 16 of 1989 which removed the discretion of the court under s. 23 of the Judicature Act as amended by Act No. 37 of 1979 to stay execution was in force when in fact the amending Act No. 16 of 1989 had not been brought into operation. The Court of Appeal also mistakenly cited s. 23 of the Act as amended by Act No. 16 of 1989 and affirmed the order of the District Court.

Held:

The court had by reason of the mistake regarding the amending Act committed an error of law; but on the facts the defendant was entitled to an order staying execution of the decree in the exercise of the discretion under s. 23 of the Judicature Act as amended by Act No. 37 of 1979.

APPEAL from the judgment of the Court of Appeal.

S. Mahenthiran for the defendant-appellant.

Sanath Jayatilake for the plaintiff-respondent.

Cur. adv. vult.

14th October 1997

G. P. S. DE SILVA, CJ.

The plaintiff instituted this action in the District Court against the defendant (the tenant) seeking inter alia, her ejection from the premises in suit on the ground of arrears of rent. The defendant claimed that all arrears of rent were tendered to the plaintiff (landlord) in terms of section 22 (3) (c) of the Rent Act and therefore the plaintiff cannot have and maintain the action. At the trial no oral evidence was led. The parties relied on the documents filed of record and the written submissions. The District Court entered judgment in favour of the plaintiff. Thereupon the defendant preferred an appeal to the Court of Appeal. The appeal is now pending before the Court of Appeal.

The plaintiff thereafter sought to execute the decree while the appeal was pending. The defendant gave evidence at the inquiry before the District Court and endeavoured to resist the application for execution of decree. The District Court, however, allowed the application for execution of the decree. The defendant moved the Court of Appeal by way of revision and an application for "leave to appeal". The Court of Appeal affirmed the order of the District Court allowing the application for execution of decree. Hence the present appeal by the defendant to this court.

One of the provisions of law which enables the District Court to make order staying execution of judgment, decree or order is section 23 of the Judicature Act, No. 2 of 1978 as amended by the Judicature (Amendment) Act No. 37 of 1979. Section 23 as amended reads thus:

"23. Any party who shall be dissatisfied with any judgment, decree, or order pronounced by a District Court may (excepting where such right is expressly disallowed) appeal to the Court of Appeal against any such judgment, decree, or order from (*sic*) any error in law or in fact committed by such court, but no such appeal shall have the effect of staying the execution of such judgment, decree, or order unless the District Judge shall see fit to make an order to that effect, in which case the party appellant shall enter into a bond, with or without sureties as the District Judge shall consider necessary, to appear when required and abide the judgment of the Court of Appeal upon the appeal".

This section undoubtedly vests a discretion in the court to make an order staying execution, if it "shall see fit" to do so.

Unfortunately, both the District Court and the Court of Appeal had *erroneously assumed* that section 23 of the Judicature Act had been further amended by the *amending Act No. 16 of 1989*. Counsel for both parties have now conceded that the relevant provision of the amending Act No. 16 of 1989 has not been brought into operation. The law as it now stands is in terms of section 23 as set out above.

It seems to me that the short point that arises for consideration is whether on the facts this was a fit case for the exercise of the discretion of the court to stay execution of decree in terms of section 23 of the Judicature Act as amended. The defendant testified at the inquiry before the District Court. In her evidence given on 19.1.95 she stated that she was 78 years of age, she was in poor state of health, she suffered from difficulty in walking, she was short of hearing, has no income and no other place to reside. Old age, ill-health and the accompanying infirmities are very much an inescapable reality of life. These facts are very relevant and due weight should have been given to them in the exercise of the discretion vested in the court in terms of section 23. It seems to me that the Court of Appeal may well have considered these matters but for the fact that the court mistakenly cited section 23 as amended by Act No. 16 of 1989 and concluded:

"It is clear from the above provisions that the words 'shall see fit' have been omitted by the said amendment, thus taking away the discretion which was earlier conferred on the District Judge to stay writ when 'he shall see fit'."

This was an error of law and the judgment cannot therefore stand.

On a consideration of the facts and circumstances referred to by the defendant in her evidence, it seems to me that this was a fit case for the court to have made an order staying execution of decree in the exercise of its discretion in terms of section 23 of the Judicature Act as amended by Act No. 37 of 1979. In this view of the matter, the submission of Mr. Mahenthiran for the defendant-appellant that this appeal involves a substantial question of law does not arise for consideration.

For these reasons the appeal is allowed, the order of the District Court dated 03.08.95 and the judgment of the Court of Appeal are set aside. The execution of the decree of the District Court, against which an appeal has been preferred, is directed to be stayed pending the final determination of the said appeal. The defendant-appellant is directed to enter into a bond which would be considered necessary by the District Court in terms of section 23 of the Judicature Act as amended. For this purpose, the Registrar is directed to return the record to the District Court. In all the circumstances, I make no order as to costs.

PERERA, J. – I agree.

WIJETUNGA, J. – I agree.

Appeal allowed.
