SHELTON PERERA
v
LAKSHMAN

COURT OF APPEAL
AMARATUNGA, J.
CALA 489/2002
D.C. NEGOMBO 3939/L
AUGUST 4, 26, AND
SEPTEMBER 8, 2003

Civil Procedure Code – Writ pending appeal – Substantial loss – Substantial question of law – Case heard by one judge- Judgment given by his successor – He who decide must hear – Is it a substantial question of law ? – A fundamental question as to throw a doubt about the justice of the decision required – Judicature Act, section 23.

Held: *Per* Amaratunga, J.

"The existence of a substantial question of law to be decided in the appeal is not in itself a separate ground to stay execution. It is one of the grounds recognised by the courts as a sufficient basis to exercise the discretion available to a judge under section 23 of the Judicature Act to stay execution, if he sees it fit to do so."

(i) When a substantial question of law is apparent from the decision appealed against, a judge inquiring into an application for execution pending appeal is not expected to subject the judgment to meticulous scrutiny like an appellate court to find a question of law which counsel in their ingenuity would raise at the hearing.

(ii) The principle of natural justice that those who decide must hear is one that is applicable whenever the rights of the parties are affected- however the parties have agreed that the learned judge would adopt the evidence recorded before his predecessor and pronounce judgment on that evidence – having agreed to that course of action, it is not possible now for the defendant to cry "foul" when the decision has gone against him.

APPLICATION for leave to appeal from the order of the District Court of Negombo.

Cases referred to:

1. *Saleem* v *Balakumar* - (1981) 2 Sri LT 74
2. *Mack* v *Shanmugam* - 3 Sriskantha L.R. 89
3. *Kandasamy* v *Gnanasekeram* (1983) 2 Sri L.R 1(SC)
4. *Wijerama* v *Paul* - 75 NLR 361
5. *Manuel* v *Pina* - CA 239/89 (F) CAM 21.10.1999
6. *Perera* v *Gunawardena* - (1993) 2 Sri LR at 32

W. *Dayaratna* with *R. Jayawardane* for petitioner.

Sunil F.A.Cooray for respondent.

September 11, 2003

AMARATUNGA, J.

This is an application for leave to appeal against the decision of the learned Additional District Judge of Negombo allowing the plaintiff-respondent's application to execute the decree pending appeal. The plaintiff has filed action against the defendant seeking a declaration of the plaintiff's title to the property described in the schedule to the plaint and an order to eject the defendant from that property. The case of the plaintiff was that the defendant was an overholding licensee. The case of the defendant was that he entered the property under an informal agreement to sell and that he paid a part of the purchase price. According to the findings of the learned trial Judge the defendant was allowed to occupy the premises in question in lieu of interest for a loan the plaintiff has obtained from the defendant. After trial, judgment was entered in favour of the plaintiff and the defendant has preferred an appeal against the judgment.

In his judgment the learned trial Judge has directed the plaintiff to deposit sum of Rs 115,000/- in Court to be paid to the defendant. The plaintiff has deposited that sum in court. When the plaintiff made an application to execute the writ pending appeal, the defendant filed his objections and the learned Judge held an inquiry at which both the plaintiff and the defendant gave evidence.

According to the evidence given by the defendant at the inquiry his family consisted of himself, his wife and two children. However he has stated that his two brothers and their families, an unmarried sister, a sister's daughter and an uncle's son also lived in this house. One brother was a Public Health Inspector. The uncle's son was doing vegetable business. The sister's daughter was 20 years of age and had finished her schooling. He has not stated that all those persons were being maintained by him or that they did not have other places to live. He has not shown any legal obligation on him to provide living accommodation to them. Thus any loss or inconvenience caused to those persons as a result of execution of the decree cannot be treated as substantial loss to the defendant.

He has admitted in cross-examination that he is a successful businessman, has two lorries and operated a transport business. In his objections he has stated that he ran five vegetable stalls in the Negombo market. Thus in his own showing he was a man with substantial wealth. He has never stated that he had no sufficient funds to find alternate accommodation. It is not to be forgotten that there was a sum of Rs 115,000/- deposited in Court by the plaintiff for the defendant to take. If he was so inclined he could have utilized this money to find alternative accommodation. He has not stated that he ever attempted to find such accommodation. On the other hand the plaintiff's uncontradicted evidence was that he lived in a house for which he paid Rs 7000/- per month as rent. The defendant has admitted that his mother had a land and she blocked it out and gave it to her children. The defendant too got a block of land and it is situated about 100 meters away from the house he occupied.

The defendant has not stated how his children's education would be affected if he was ejected from the premises. He has stated that he operated his transport business from this house but he has not explained why he could not operate it from any other place. Having considered the material available the learned Judge has held that he has not set out how substantial loss would be caused to him if he was ejected from the premises. I agree with this finding. There was a total failure to prove substantial loss. In fact at the hearing before me the learned counsel did not press his case on the ground of substantial loss. He placed greater reliance on the

existence of a substantial question of law to be decided in the appeal. Now I shall deal with that aspect.

The existence of a substantial question of law to be decided in the appeal is not in itself a separate ground to stay execution. It is one of the grounds recognized by our Courts as a sufficient basis to exercise the discretion available to a Judge under section 23 of the Judicature Act to stay execution if he sees it fit to do so. The existence of such a question must be manifest from the proceedings of the main case and the judgment. Thus in *Saleem* v *Balakumar*(1) the question whether the agreement upon which the plaintiff relied on should have been executed in accordance with section 2 of the Prevention of Frauds Ordinance was quite visible. Similarly in *Mack* v *Shanmugam*(2) the question of law namely whether the defendant's tenancy rights of the premises in question got automatically extinguished upon the death of the landlord or whether the tenancy rights survived to the tenant after the death of the landlord were so apparent and Siva Selliah, J. referred to those questions as 'bristling questions of law'. When such questions are apparent a Judge is justified in exercising his discretion under section 23 of the Judicature Act. When a substantial question of law is not apparent from the decision appealed against, a Judge inquiring into an application for execution pending appeal is not expected to subject the judgment to meticulous scrutiny like an appellate court to find a question of law which counsel in their ingenuity would raise at the hearing of the appeal. In almost every appeal it is possible to raise some question of law for the consideration of the appellate court but all such questions cannot be branded as substantial questions of law. To use the words of Soza, J. in *Kandasamy* v *Gnanasekaram*(3) it has to be a question which creates a 'doubt about the justice of the decision'.

In this case one question of law urged on behalf of the defendant was that the case has been heard by one Judge and the judgment has been given by his successor. In support of the question of law arising in this situation the learned counsel for the petitioner has cited the case of *Wijerama* v *Paul* (4) where it has been held that the principle of natural justice that those who decide must hear is one that is applicable whenever the rights of parties are affected. However in this case this question of law has been urged without

paying due attention to the proceedings of 8/12/1999 (in the main case.) On that day both parties have agreed that the learned Judge could adopt the evidence recorded before his predecessor and pronounce judgment on that evidence. Having agreed to that course of action, it is not possible now for the defendant to cry out 'foul' when the decision has gone against him.

The other question of law urged was that since leave and license was granted to occupy the house to set off the interest payable for a loan obtained by the plaintiff from the defendant, no cause of action was available until the plaintiff paid the debt. Certainly this is a question of law a counsel could raise at the hearing of the appeal. He cited the case of *Manuel* v *Pina*..[5] But the contrary argument was pointed out by the counsel for the plaintiff. If leave and license was granted to occupy the house to set off the interest for the debt, once leave was withdrawn the defendant had to vacate the house and then sue the plaintiff to recover the debt and the interest. The case cited has no relevance as there is no written promise in this case to bring it within the decision in *Manuel* v *Pina*. When the contrary argument is considered it appears that the question raised is not a substantial question of law but only one of the arguments a counsel may raise in the appeal. Thus the question of law suggested by the learned counsel is not such a fundamental question as to throw a doubt about the justice of the decision. The learned Judge's statement, highlighted in the written submissions, that she could not examine the judgment for questions of law is another way of saying that she could not embark upon a voyage of discovery to find a question of law.

On the examination of the material available to the learned Judge, I am of the view that the defendant has failed to satisfy the Judge that there is a substantial question of law to be decided in the appeal. In *Perera* v *Gunawardana* [6] at 32 Fernando, J. has suggested the approach in which a Court should adopt in situations where the judgment debtor has failed to prove substantial loss or prejudice. His Lordship has stated that "Since the respondent has failed to establish the loss and prejudice that would be caused if execution was allowed, it can hardly be said that refusal to exercise discretion under section 23 was in any way illegal or improper. No prejudice is caused, for, as held in Charlotte Perera's case, there is

adequate provision to restore an evicted judgment-debtor to occupation if he succeeds in his appeal." Those remarks apply with greater force to the defendant who has no title to the property in question and who is not a tenant.

In this case there was no proof of substantial loss and there 140
was no apparent substantial question of law to be decided in the appeal. The learned District Judge was not expected to strain her imagination to find a question of law in order to exercise her discretion in favour of the defendant judgment-debtor. I therefore refuse leave to appeal and dismiss this application with costs in a sum of Rs. 7500/.

Application dismissed.