

MALEEHA
v.
HENDAVITHARANA AND ANOTHER

COURT OF APPEAL

JAYASINGHE, J.,

JAYAWICKREMA, J.

C.A.L.A. NO. 134/97.

D.C. COLOMBO NO. 8040/RE.

NOVEMBER 12, 26, 1999.

Writ pending Appeal – Civil Procedure Code s. 763, s. 763 (2) – Substantial Loss – Judicature Act, S. 23.

Held:

1. The defendant has been carrying on business in the premises for a period of nearly 50 years and it is also in evidence that the defendant is in the leather products trade which is localised in the 1st Cross Street, Pettah.

It is hardly necessary to emphasise the loss that would occasion to the defendant in the event of the defendant being required to move out of the locality. The shifting of the business out of the area itself would cause substantial and irreparable loss.

APPLICATION for Leave to Appeal from an order of the District Court of Colombo.

Cases referred to:

1. *Appuhami v. Fonseka and Another* [1996] 2 Sri L.R. 130.
2. C.A. 772/82 – D.C. Mt. Lavinia No. 1248/RE.
3. *Cooray v. Illukkumbura* – 1996 2 Sri L.R. 263.
4. *Mohamed v. Seneviratne* – [1989] 2 Sri L.R. 389.
5. *Mack v. Shanmugam* – 3 Srikantha 89 at 94.
6. *Sokkhal Ram Sait v. Kumaravel Nadar and four Others* – 13 CLW 52.
7. *Grindlays Bank Ltd. v. Mackinnon Mackenzie & Co.* – [1990] 1 Sri L.R. 19.
8. *A. D. H. Perera v. Tilaka Gunawardena* – Bar Association Law Journal – 1991 vol. IV parts 1-7.

A. K. Premadasa PC with C. E. de Silva for petitioner.

P. A. D. Samarasekera, PC with Kirthi Sri Gunawardena for respondent.

Cur. adv. vult.

December 16, 1999

JAYASINGHE, J.

The plaintiff-petitioner instituted action on 20.04.1993 in the District Court of Colombo against the defendant-respondent for ejection of the respondents from the premises in suit.

After trial the learned Additional District Judge delivered judgment in favour of the plaintiff-petitioner. On or about 20.10.1996 the petitioner made an application to execute the decree pending appeal. On 19.06.1997 the learned Additional District Judge made order staying the execution of the decree pending appeal. The present application is for leave to appeal by the petitioner against the said order of the learned Additional District Judge of Colombo. The learned District Judge in refusing writ pending appeal made order requiring the 1st defendant to deposit security by way of cash or a bank guarantee in a sum of Rs. 60,000. This requirement has been satisfied by the 1st defendant. Mr. A. K. Premadasa, President's Counsel submitted that execution of a decree under appeal can only be stayed if the judgment-debtor satisfies Court that substantial loss may result to the judgment-debtor unless an order for execution is made in terms of section 763 (2) of the Civil Procedure Code. Mr. Samarasekera, President's counsel objected to leave being granted on the basis that the 1st defendant has established that substantial loss and damage would be caused to the 1st defendant in the event of writ being issued; that there was no evidence placed before Court that any loss and/or damage would be caused to the plaintiff by reason of having to await the final determination of the appeal that has been preferred by the respondents and that the District Judge has correctly come to a finding that there would be substantial loss caused to the 1st defendant in the event of writ being issued and that there was also an important question of law to be decided in appeal as regards the question of subletting as set out in section 10 (1).

At the inquiry for writ pending appeal the 1st defendant did not give evidence. It was contended that he was seriously ill and was unable to be present in Court.

Mr. A. K. Premadasa urged that there was no evidence of substantial loss for the reason that the 1st defendant had not given evidence. However, the 2nd defendant who claimed to be the consultant of the 1st defendant gave evidence and produced "D1" a medical certificate in support of the physical condition of the 1st defendant. Mr. Samarasekera submitted that his failure to give evidence due to his physical condition should not militate against him and relied on *Appuhami v. Fonseka and Another*⁽¹⁾ where Gunasekara, J. held that "the failure of the defendant-petitioner who was old and feeble to have personally testified in regard to questions . . . would suffer in the event of a writ being issued cannot be held against him". Mr. Samarasekera also submitted that the defendant has been carrying on business in the premises in suit for over 50 years and that the said premises is located at 1st Cross Street, Pettah, where the predominant business was in leather products and that it was imperative to be in such a locality to be engaged in such business activity and that it was almost impossible to obtain alternative premises in the same locality. He submitted that the defendant's business would be completely ruined in the event of the 1st defendant having to leave the premises in suit. The plaintiff did not give evidence or call any evidence. He further submitted that there was sufficient evidence that constitute substantial loss as required by section 763 (2).

The requirement of substantial loss has come up for interpretation in a number of cases. Ranasinghe, J. in CA No. 772/82⁽²⁾ stated that ". . . the defendant-petitioner is one who has admittedly been in occupation of the premises in question as a tenant . . . for several years prior to the commencement of these proceedings. It, therefore, seems to us having regard to the difficulty experienced by tenants in rent-controlled premises in finding alternative accommodations that it would be far more equitable to permit the defendant-petitioner to be in occupation until the appeal which has been filed by him is disposed of". It is in evidence that the defendant has been carrying on business in the premises in dispute for a period of nearly 50 years and it is also in evidence that the defendant is in the leather products trade which is localized in the 1st Cross Street, Pettah. It is hardly necessary to emphasise the loss that would occasion to the defendant

in the event of the defendant being required to move out of this locality. Wijetunga, J. in *Cooray v. Illukkumbura*⁽³⁾ held that the advantage of continuing to occupy the same premises and the proportionate disadvantage suffered by being forced to leave them are not matters that should be regarded lightly . . . "The value of a business such as this would depend to a large extent on the length of time that it has been carried on in the same premises for it is to those premises that their customers would naturally have acquired the habit of going". In *Mohamed v. Seneviratne*⁽⁴⁾ the Court held that, the lodging of an appeal from the judgment of the District Court by an aggrieved party does not, *ipso facto*, have the effect of staying the execution of the judgment or decree during the pending of the appeal. The District Judge, however, has the power to stay the execution of a decree pending appeal if he "shall see fit" as in section 23 of the Judicature Act, as where the judgment-debtor "satisfies" the District Judge that "substantial loss" may result to the judgment-debtor, unless an order for stay of execution is made. The defendant had four schoolgoing children. Eviction in the circumstances would result in considerable loss or damage to the defendant. In *Mack v. Shanmugam*⁽⁵⁾ Siva Selliah, J. stated that, "the defendant-petitioner is a widow 72 years of age living on her sons' help without any alternative accommodation . . . she would be rendered homeless and suffer severe hardships and substantial and irreparable loss unless execution was stayed pending appeal . . . The only reason for eviction was, that her contractual rights as a tenant has ceased with death of the previous landlord and the District Judge had held that she was a trespasser. These were substantial questions of law to be decided in appeal which the District Judge has refused to consider as being irrelevant to the application . . . I am of the view that substantial loss does not necessarily carry with it a monetary connotation; such an interpretation may well be in relation to business premises. The word substantial loss must have a relative meaning that must vary with the facts of each case". In *Sokkalar Ram Sait v. Kumaravel Nadar & Four Others*⁽⁶⁾ it was held that stay of execution pending appeal is ordinarily granted only when the proceedings would cause irreparable injury to the appellant and when the damages suffered by the appellant by the execution pending appeal would be substantial. Here, the evidence in support of the contention that the loss was substantial and damages

irreparable was not strong. In *Grindlays Bank Ltd. v. Mackinnon Mackenzie & Co.*⁽⁷⁾ it was held that if the judgment-debtor desires stay of execution pending appeal, he should establish substantial loss. There appears to be no quarrel on this requirement. Substantial loss is a question of fact which the defendant must establish. It may not always be quantifiable may not have a monetary connotation. Yet, substantial and substantial considering the circumstances of the case. In *A. D. H. Perera v. Tilaka Gunawardena*⁽⁸⁾ Fernando, J. held that while ejection from any premises, residential or business would cause loss, the burden is on the judgment-debtor to satisfy the Court that such loss would be substantial. In any event, 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.

The 2nd respondent's evidence was that the respondents are engaged in the leather products trade which is localised in the 1st Cross Street, Pettah, area. That the respondents did not even consider relocating their business in the same locality as such an endeavour would require an investment as much as 4 or 5 million by way of a deposit and that it was impossible to raise such an amount of capital. His evidence was that the shifting of the business out of that area itself would cause substantial and irreparable loss. I am satisfied that these are not mere assertions, but very valid grounds to object to the issuance of writ. Since, there is also a substantial question of law that is required to be determined by this Court, we are not inclined to grant leave to appeal against the order of the learned Additional District Judge. Application for leave is refused with costs fixed at Rs. 2,100.

JAYAWICKREMA, J. – I agree.

Application for leave refused.