

MOHAMED
v.
SENEVIRATNE

SUPREME COURT
RANASINGHE, C.J., JAMEEL, J. AND AMERASINGHE, J.
S.C. NO. 45/88
C.A. L.A. APPLICATION NO. 14/88
D.C. COLOMBO NO. 4459/RE
MAY 30, 1989

Landlord and tenant – Execution of decree – Stay pending appeal – Judicature Act (amended by Act, No. 37 of 1979) S.23 – Civil Procedure Code (amended by Act, No. 53 of 1980) Section 763(2) – Substantial loss.

The plaintiff obtained judgment and decree for ejection on the ground of reasonable requirement of the premises against his tenant the defendant who however appealed against this decree. The plaintiff however obtained writ of ejection pending appeal. The defendant appealed against this order and his appeal was dismissed. The defendant then sought special leave to appeal from this order.

Held:

- (1) 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 such 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" (Sec. 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 (Sec. 763(2) C.P.C.)
- (2) The facts were that the plaintiff occupied premises belonging to her; the defendant had shifted to the present premises in suit, to accommodate the plaintiff's request, from another premises No. 8/2, Ascot Avenue belonging to the plaintiff; the defendant had offered to go back to the old premises; plaintiff wanted really to sell the premises in suit; defendant had four school going children. Eviction in the circumstances would result in considerable loss and damage to the defendant.

Cases referred to:-

1. *Charlotte Perera v. Thambiah* [1983] 1 Sri LR 352
2. *Saleem v. Balakumar* [1981] 2 Sri LR 74.

APPEAL from order Appeal Court

P.A.D. Samarasekera, P.C. with *J. de A. Gunaratne* and *Parakrama Agalawatta* for defendant petitioner-appellant

A.K. Premadasa, P.C. with *Ms. S. Abeyratne* for plaintiff-respondent.

June 16, 1989.

RANASINGHE, C.J.,

The Plaintiff-Appellant instituted these proceedings, on the 28th of November 1980, for ejection of her tenant, the Defendant-Appellant, from premises bearing No. 24 Boteju Road, Thimbrigasyaya, on the ground that the said premises are reasonably required by her and the members of her family for their occupation.

The Defendant-Appellant filed answer praying for a dismissal of the Plaintiff-Respondent's action.

After trial, judgment was entered on 25.7.1986 for the Plaintiff-Respondent. The Defendant-Appellant appealed from the said judgment and decree to the Court of Appeal; and the said appeal is still pending before the Court of Appeal.

Plaintiff-Respondent has, in the meantime, filed this application for the execution of the decree of the District Court pending such appeal. The Defendant-Appellant resisted the said application. After inquiry, the District Court, on 9.2.89, allowed the said application; and directed that writ to issue as moved for by the Plaintiff-Respondent.

An appeal filed by the Defendant-Appellant, against the said Order, dated 9.2.88, was dismissed by the Court of Appeal on 23.9.88. The Defendant-Appellant has thereafter obtained special leave to appeal to this Court from the said Order of the Court of Appeal:

The provisions relating to the execution of a decree of the District Court pending an appeal are now embodied in Section 23 of the Judicature Act No. 2 of 1978, as amended by Act No. 37 of 1979, and in section 763(2) of the Civil Procedure Code, as amended by Act No. 53 of 1980.

The lodging of an appeal from a judgment of the District Court by an aggrieved party does not, ipso facto, have the effect of staying the execution of such judgment or decree during the pendency of the appeal. The District Judge, however, has the power to stay the execution of a decree pending appeal if he "shall see fit" to make an order to that effect (Section 23 of the Judicature Act), or 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" (Section 763(2) of the Civil Procedure Code).

These provisions have been considered by this Court in the case of *Charlotte Perera vs. Tambiah*(1); and by the Court of Appeal in the case of *Saleem vs. Balakumar*(2). It is clear that these two provisions are not "linked" and that an order for stay of execution pending appeal could be made by the District Court under either of these two sections.

The learned Additional District Judge, who made order refusing the application for stay of execution of the writ, has done so on the grounds: that no "substantial loss" has been proved: and that "no substantial question of law" has been shown to arise.

The Defendant-Appellant has, in the petition of appeal, averred that the learned trial judge has misdirected himself on the question of the reasonableness of the Plaintiff-Respondent's requirement of the premises in suit.

Learned Counsel for the Defendant-Appellant has submitted that, in considering this all important question, several facts and circumstances which were led in evidence at the trial, namely: that the Plaintiff-Respondent is at present in occupation of premises which too belong to her: that the Defendant-Appellant had at first been a tenant of the Plaintiff-Respondent in respect of premises bearing No.8/2 Ascot Avenue – which are the premises occupied at present by the Plaintiff-Respondent and are said to be unfit for occupation any further by any one – and had, at the request of the Plaintiff-Respondent, handed them back to the Plaintiff-Respondent and moved into the premises in suit: that the Defendant-Appellant has offered to go into occupation of the said premises bearing No. 8/2, Ascot Avenue: that the Defendant-Appellant maintained that the Plaintiff-Respondent's demand for the premises in suit is really motivated by her desire to sell the said premises bearing No. 8/2, Ascot Avenue, were all very material factors to be considered in deciding the question of the reasonableness of the Plaintiff-Respondent's demand, and that, the learned trial Judge has misdirected himself on this question.

The learned Additional District Judge has placed an interpretation upon the document 'D1', the contents of which are strongly relied on by the Defendant-Appellant to challenge the bona fides of the Plaintiff-Respondent's assertion that the premises in suit are reasonably required as a residence for herself and the members of her family.

The learned Additional District Judge seems also to have been influenced by the direction given by the trial Judge to the Plaintiff-Respondent to pay a sum of money equivalent to five years' rent to the Defendant-Appellant, to enable the Defendant-Appellant to find alternative accommodation.

The ground so urged on behalf of the Defendant-Appellant, though it may not strictly constitute a "substantial" question of law, is nevertheless a serious question of law which arises and which must be considered in the determination of the appeal filed by the Defendant-Appellant.

Furthermore, the learned Additional District Judge has, in his order stated that "no substantial loss of any sort has been urged by the Defendant" and that "by substantial loss is not meant the obvious and ordinary discomfort which any tenant may undergo having to leave the premises which he had occupied for sometime and having to find alternative accommodation." The Defendant-Appellant has stated in evidence that he has four school-going children. Even if the Defendant-Appellant has not proved by express evidence the nature and the extent of the loss he would suffer as a result of being ejected from the premises in suit which he had been in occupation of from the year 1976, and into which, he had, as already stated, voluntarily moved in order to accommodate the Plaintiff-Respondent, yet, the dispossession of the Defendant-Appellant, with his school-going children, from the said premises without the prospect of a roof over their heads, even though it may not be for a long period of time, must inevitably result in considerable loss and damage being caused to him.

Having regard to the foregoing, it seems to me that, had the Additional District Judge considered the matters set out above in their proper perspective, he would undoubtedly have seen it "fit" to let the status quo remain until the issues between the parties are finally determined by the appellate courts.

I, therefore, make order allowing the appeal of the Defendant-Appellant. The orders made both by the Additional District Judge, dated 9.2.88, and by the Court of Appeal dated 23.9.88, are set aside. The execution of the decree of the District Court, which has been appealed from, is directed to be stayed pending the final determination of the said appeal. Upon the receipt of the record of this case in the District Court the Defendant-Appellant is directed to

enter into the bond which would be considered necessary by the learned Additional District Judge, in terms of the provisions of the aforesaid Section 23 of the Judicature Act.

The costs of the inquiry before the District Court into the Defendant-Appellant's application for execution of the decree pending appeal, and also the costs of the appeal, against the Order of the District Court dated 9.2.89, to the Court of Appeal and to this Court shall be costs in the cause.

JAMEEL, J., – I agree.

AMERASINGHE, J., – I agree.

Appeal allowed.

Execution stayed.
