

1953

Present : Gratiaen J. and Weerasooriya J.

WAHARAKA SOBITHA UNNANSE *et al.*, Appellants,  
and AMUNUGAMA PIYARATANA UNNANSE *et al.*,  
Respondents

*S. C. 329—Application for revision in D. C. Kandy, 2,154L*

*Appeal—Stay of execution pending appeal—Quantum of security that should be furnished by judgment debtor—Civil Procedure Code, s. 761.*

Where application is made under section 761 of the Civil Procedure Code for stay of execution of a decree pending an appeal, the security ordered to be furnished by the judgment-debtor should not be unduly excessive. The amount of security should be such as would reasonably safeguard the interests of the judgment-creditor in the event of the judgment appealed from being eventually affirmed in appeal.

<sup>1</sup> *S. A. Law Reports, Cape Province Division (1938), p. 90.*

<sup>2</sup> *(1949) 51 N. L. R. 209.*

**A**PPPLICATION to revise an order of the District Court, Kandy.

*N. E. Weerasooria, Q.C.*, with *W. D. Gunasekera*, for the 1st and 2nd defendants petitioners.

*E. B. Wikramanayake, Q.C.*, with *H. W. Jayewardene*, for the plaintiffs respondents.

*Cur. adv. vult.*

September 16, 1953. GRATIAEN J.—

The parties to this application, and to the action in the Court below, are Buddhist priests. On 29th June, 1953, the learned Judge entered judgment in favour of the 1st and 2nd respondents against the petitioners and the 3rd, 4th and 5th respondents, declaring the property in dispute (consisting of houses and lands situated partly within the Municipality of Kandy) to be comprised in a charitable trust of which the 1st and 2nd respondents were entitled to receive the income and profits. The decree also directed the judgment debtors to be ejected from the property and to pay to the 1st and 2nd respondents damages at the rate of Rs. 2,000 per annum from the year 1945 until the property is restored to them.

The property was valued by the 1st and 2nd respondents in their plaint at Rs. 30,000, and has admittedly been continuously in the possession of the judgment debtors since the year 1932.

On 6th July 1953, the petitioners filed an appeal to this Court, which is still pending, against the judgment and decree passed against them and the 3rd, 4th and 5th respondents. In the meantime they had filed an application on 29th June—i.e., on the date on which judgment was pronounced against them—under section 761 of the Civil Procedure Code for a stay of execution of the decree (which had not yet been formally drawn up and signed under section 188) pending the determination of their proposed appeal. A few hours later, the decree having been duly passed, the 1st and 2nd respondents initiated execution proceedings against the judgment debtors.

On 7th July, 1953, after the petition of appeal had been filed, the learned District Judge proceeded to inquire into both applications under Chapter 59 of the Code—that is to say, the application of the judgment debtors for stay of execution pending the hearing of the appeal, and the counter-application of the judgment creditors for execution notwithstanding the pendency of the appeal.

With regard to the application of the judgment debtors, the Court granted a stay of execution provided that, on or before the 21st July, 1953, they furnished security (a) in a sum of Rs. 50,000 by the hypothecation of immovable property, and (b) in a sum of Rs. 15,000 in cash. He further directed that, in default of due compliance by the judgment debtors with these conditions, the execution of the decree should proceed unconditionally.

The petitioners complain that the terms imposed on them in regard to their application for stay of execution are unduly oppressive and that, as the security ordered bears “no relation to the facts of the case”, the decision of the learned Judge is tantamount to a summary refusal of their application.

The provisions of proviso (c) to section 761 make it clear that the amount of security which a Judge may in his discretion fix as a condition of a stay of execution pending appeal should be such as would reasonably safeguard the interests of the judgment creditor in the event of the judgment appealed from being eventually affirmed by this Court. If one considers the effect of the learned Judge’s order from this point of view, it seems to me that the security ordered to be furnished by the judgment debtors is manifestly excessive.

The decree under appeal directs the judgment debtors (a) to hand over immovable property which the judgment creditors themselves have valued at Rs. 30,000 and the annual rental value of which has been assessed by the Court at Rs. 2,000, (b) to pay damages which had, at the date of the decree, amounted to approximately Rs. 16,000 and (c) to pay continuing damages, until restoration of the property, at the rate of Rs. 2,000 per annum. There is no evidence of any substantial risk that the condition of the property will deteriorate pending the appeal, and I find it difficult to discover any cogent reason for ordering the judgment debtors to furnish, in addition to a sum equivalent to the damages already accrued, security in a sum of Rs. 50,000. In my opinion, the ends of justice would be met by substituting for the learned Judge’s order an order that execution be stayed pending the hearing of the appeal on condition, that the petitioners and/or the 3rd, 4th and 5th respondents

- (a) hypothecate with the Secretary of the District Court of Kandy on or before the 31st October, 1953, a sum of Rs. 15,000 in cash as security for the due performance of such decree or order as may ultimately be binding upon them in these proceedings, and
- (b) also hypothecate with the Secretary of the District Court on or before the 30th April, 1954, a further sum of Rs. 5,000 as security as aforesaid. (The purpose of this part of the order is to safeguard the interests of the judgment creditors in respect of accruing damages payable in terms of the judgment under appeal.)

In the event of the security ordered as aforesaid not being furnished on or before the due dates, I would direct that the application of the 1st and 2nd respondents for execution of the decree under appeal be granted upon the condition that they hypothecate with the Secretary of the District Court of Kandy a sum of Rs. 20,000 as security in terms of section 763 of the Civil Procedure Code.

I would make no order as to the costs of this application or of the inquiry in the Court below.