VYAPURI

vs.

ABUTHAHIR

COURT OF APPEAL
SOMAWANSA, J(P/CA) AND
WIMALACHANDRA, J.
CA 390/2004 (REV.)
D. C. KANDY 2437/RE

Civil Procedure Code, section 639, 753(2), 763(1), 763 and 763(2) - Judicature Act, section 23 - Writ pending appeal - Dismissed on a technical ground - Second application for writ pending appeal - Dismissed not on merits - Inquiry under section 763 - Burden is on whom - Can the judgement creditor make a second application for writ?

On the eighth day of writ pending inquiry the case was kept down when it was first called as both parties indicated to court that they are ready. However, when it was called for the second time, the plaintiff petitioner moved for a date stating that he is not ready for inquiry. The District Judge dismissed the plaintiff petitioner's application for writ on the basis that the petitioner has misled court by stating that he was ready for inquiry, when in fact he had not been ready.

After the dismissal the plaintiff filed another application, and the court dismissed the application on the basis that, the conduct of the petitioner in the earlier application showed a lackadaisical approach.

HELD:

(i) It is settled law that a court cannot dismiss an applicaiton without going into the merits unless either party has agreed to a dismissal in the event of non-compliance with an undertaking.

(ii) Section 763 of the Civil Procedure Code and section 23 of the Judicature Act place the burden of satisfying court as to why writ should be stayed fairly and squarely on the respondent.

(iii) Once an application is made for the issue of a writ pending appeal, and the respondent judgment/debtor is present in court there is no burden on the part of the plaintiff petitioner to prove anything. He can be silent - the court would have to call upon the judgment debtor respondent to show cause or satisfy court why writ should be stayed. The District Judge has no power to dismiss an application on the basis the plaintiff-petitioner is not ready for trial or that he had moved for a postponement on numerous of occasions - for the burden is on the respondent.

(iv) There is no express bar in the Code preventing a judgment creditor from making a second application for writ pending appeal, if the first application is dismissed on technical grounds and not on merit.

HELD FURTHER :

(v) The object of the power of revision is the due administration of justice; the court will not hesitate to use its revisionery powers to give relief where a miscarriage of justice has occurred and indeed the facts of this case cry aloud for intervention of this court to prevent what otherwise would be a miscarriage of justice.

APPLICATION for leave to appeal and revision from order of the District Court of Kandy.

Cases Referred to :

1. *Don Piyasena v. Mayawathie Jayasuriya* (1986) 1 Sri LR 6
2. *Grindlays Bank v. Mackinnon Mackenzie & Co. (Ceylon) Ltd.* (1990) 1 Sri LR 19
3. *Esquire (Garments) Industries Ltd. v. Bank of India* (1993) 1 Sri LR 130
4. *Mamnoor v. Mohamed* 23 NLR 493
5. *Mariam Bee v. Seyed Mohamed* 68 NLR at 38
6. *Somawathie v. Madawala* (1983) 2 Sri LR 15 at 30, 31

Reza Muzni for plaintiff respondent.
Rohan Sahabandu with *Gamini Hettiarachchi* for defendent - respondent.

January 01, 2006

ANDREW SOMAWANSA, J. (P/CA)

This is a revisionary application seeking to revise and set aside order of the learned District Judge of Kandy dated 28.05.2002 and 14.10.2003 rejecting the two applications of the plaintiff-petitioner (hereinafter called the petitioner) for execution of decree pending appeal without going into the merits of the applications. Petitioner also prayed for an order for this case to be sent back to the learned District Judge with directions to hod an inquiry and adjudicate on the merits of the application dated 28.06.2002.

After the pleadings weres completed and when the matter was taken up for argument both counsel agreed to resolve the matter by way of written submissions and both parties have tendered their written submissions.

The relevant facts are pending the appeal lodged by the defendent-respondent (hereinafter called the respondent) the petitioner applied to have the decree executed pending appeal. The respondent filed his objections to the aforesaid applicationand the matter was fixed for inquiry and as the counsel for the petitioner Mr. S. Mahenthiran, PC was not well a postponement was sought. Thereafter this matter had been postponed 7 times at the instance of the petitioner in view of the ill health of his counsel and on the 8th occasion on 28.05.2002 the learned District Judge inquired

from parties if they were ready and the petitioner informed Court that he was ready and the matter was kept down to be taken up later. When it was taken up for the second time an attorney-at-law had appeared on behalf of the petitioner and sought a postponement on the basis that the petitioner was not ready for inquiry. The learned District Judge then by his order dated 28.05.2002 dismissed the petitioner's application for writ pending appeal on the basis that the petitioner has misled Court by stating that he was ready for inquiry when in fact he had not been ready. This is the order that the petitioner is canvassing in the leave to appeal application bearing No. 405/2003.

After the dismissal of his application for execution of writ pending appeal the petitioner filed another replication seeking the same relief to which the respondent objected to and also took up a preliminary objection to the maintainability of this second application for writ pending appeal on the basis that the second application cannot be maintained in view of the previous order dated 14.10.2003. Again the parties agreed to tender written submissions and at the conclusion of the inquiry the learned District Judge by his order dated 14.10.2003 dismissed the application of the petitioner for execution of writ on the basis that the conduct of the petitioner in the earlier application shows the lackadaisical approach of the petitioner. The petitioner thereafter filed the instant revision application seeking to revise and set aside the aforesaid two orders.

When an application is made to have the writ executed pending appeal the relevant provisions that would be applicable is Section 763(2) of the Civil Procedure Code which reads as follows.

"The Court may order execution to be stayed upon such terms and conditions as it may deem fit, where -

(a) the judgement-debtor satisfies the court that substantial loss may result to the judgement-debtor unless an order for stay of execution is made, and

(b) security is given by the judgement-debtor for the performance of such decree or order as may ultimately be binding upon him"

Section 23 of the Judicature Act reads as follows :

" 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 judgement, decree, or order from 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 judgement, 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 judgement of the Court of Appeal upon the appeal."

Therefore in such a situation the Court is empowered to make an order staying the execution of the decree pending the disposal of the appeal where -

(a) the judgement-debtor satisfies Court that substantial loss may result to him unless execution is stayed and security is given by the judgement-debtor.

(b) there is a substantial question of law to be decided in appeal.

In the case of *Don Piyasena* vs. *Mayawathie Jayasuriya* [1] it was held :

"The provisions of section 23 of the Judicature Act and section 763(2) of the Civil Procedure Code make it clear that unless there is proof of substantial loss that may otherwise result, execution of decree will not be stayed merely on the grount that an appeal has been filed."

Again, in *Grindlays Bank* vs. *Mackinnon Mackenzie & Co. Ceylon Ltd.* [2] it was held :

"If the judgement-debtor desires stay of execution pending appeal he should establish substantial loss. The usual course is to stay proceedings pending an appeal when execution would cause irreparable injury. Mere inconvenience and annoyance is not enough. The damage must be substantial and the defendant must prove it."

In Esquire (Garments) Industries Ltd.,, vs. Bank of India [3] it was held :

"When an application for execution of a decree pending appeal is made in the exercise of rights conferred under section 763(1) of the Civil Procedure Code the District Judge may make any of the following orders :-

(a) Order execution or stay it, if he sees fit to order a stay, subject however, to the appellant furnishing a bond to abide the judgement of the Court of Appeal upon the appeal (Section 29 Judicature Act.)

(b) Order execution and if sufficient cause is shown by the appellant require security to be given for the restitution of the property which may be taken in execution of the payment of the value of such property and for the due performance of the decree or order of the Court of Appeal (Section 763(1) of the (C. P. C.)

(c) Order stay of execution upon such conditions as it may deem fit, where -

(i) the judgement-debtor satisfies the court that substantial loss may result to him unless an order for stay of execution is made;

(ii) the judgement-debtor gives security for the due performance of the decree or order as may be ultimately binding on him (Section 763(2) of the C. P. C.)

Thus it could be seen that it is settled law that on an inquiry under Section 763 the burden is entirely on the judgement-debtor to satisfy the Court as to whether he has met the aforesaid requirements. The plaintiff judgement-creditor need not even actively participate. The only limited matter the Court is called upon to adjudicate here is whether the judgement-debtor has satisfied the Court that substantial loss may be caused to him and /or that there is a substaintial question of law to be argued in appeal, in which event the Court has the discretion to stay execution of decree until the conclusion of the appeal.

The learned District Judge on 28.05.2002, without calling upon the defendent to show cause why the writ should be stayed pending the conclusion of the appeal, dismissed the plaintiff's application merely on the basis that the plaintiff had informed the Court that he was ready and thereafter when the matter was taken up for the second time counsel had appeared and moved for a postponement and also on the basis that the plaintiff had not been ready for inquiry.

The question that arises for determination in these proceedings is whether the learned District Judge could dismiss the application without going into the merits of the application when there was no burden cast on the plaintiff. It is settled law that a Court cannot dismiss an application without going into the merits unless either party has agreed to a dismissal in the event of non-compliance with an undertaking.

In *Mamnoor* vs. *Mohamed*[4] De Sampayo J. observed that the governing principle was that for " a judge to dismiss an action without hearing it, he should act under some specific power given to him by the code."

As stated above in the instant action the learned District Judge had dismissed the petitioner's application for writ pending appeal on the basis that the petitioner had misled the court by stating that he was ready for inquiry when in actual fact he had not been ready. I am unable to come across any rule of law or procedure prescribed by law giving a discretion to the District Judge to dismiss an application on such a ground as aforesaid. My considered view is that the aforesaid application for a postponement does not warrant the dismissal of the petitioner's application whether it is the 8th day of inquiry even though all the previous postponements were at the instance of the petitioner or the petitioner stating that he is ready and thereafter moving for a postponement. If the Court had made order earlier that the day on which the petitioner moved for a postponement was the final date for inquiry and no further postponements would be given, it could be argued that the order dismissing the application on the final date of inquiry was correct. In the instant action no such order was made making the 8th date of inquiry as the final date of inquiry. In the circumstances, when the petitioner requested for a postponement of the inquiry, the learned District Judge should have inquired from the respondent whether he consented to such a postponement or not and if the respondent objected

to a postponement Court should have refused the postponement and proceeded with the inquiry. Instead the learned District Judge dismissed the the application of the petitioner without calling upon the respondent to show cause why the writ should be stayed. Moreso, in accordance with the principle laid down in the aforesaid decision the burden was with the respondent and not with the petitioner. It is clear that the learned District Judge had erred by considering whether the petitioner would suffer prejudice by not obtaining possession. It must be said that such a consideration is alien to the provisions of Section 763 of the Civil Procedure Code and Section 23 of the Judicature Act places the burden of satisfying Court as to why writ should be stayed fairly and squarely on the respondent. Hence once the application for issue of writ pending appeal is made and the respondent is present in Court there is no burden on the part of the petitioner to prove anything. He can be silent. However the Court would still have to call upon the respondent to show cause or satisfy Court that writ should be stayed pending the determination of the appeal. The District Judge has no power to dismiss an application on the basis that the petitioner is not ready or that he had moved for a postponement on a number of occasions for the burden is with the respondent.

For the foregoing reasons, it is very clear that the learned District Judge erred when he made order on 28.05.2002 dismissing the application of the petitioner for execution of writ pending appeal. The order is erroneous and cannot be permitted to stand. Accordingly, I would grant leave to appeal against the impugned order dated 28.05.2002 and set aside the same and direct the learned District Judge to hold an inquiry in respect of the petitioner's application for writ pending appeal.

In view of my finding with regard to the leave to appeal application bearing No. CALA 405/2003 I do not think it necessary for me to consider the revision application bearing No. CALA Revision 390/2004 for the order canvassed in the revision application dated 14.10.2003 flows from the earlier order dated 28.05.2002 when the first order is set aside and the learned District Judge is directed to hold and inquiry into the petitioner's application for writ pending appeal, the second order dated 14.10.2003 dismissing the second application for a writ pending appeal becomes redudant.

Counsel for the respondent has taken several objections to the maintainability of the application for revision of the order dated 14.10.2003. He submits that as the impungned order is an interlocutory order the petitioner should have come by way of leave to appeal which is the statutory right granted to him, that in any event there is a delay of 4 months in making this application, that the petitioner has glossed over his own conduct as to how any why the first application was refused, that the petitioner should have been more vigilant and moved Court in terms of Section 639 to have the first order vacated and should have sought an order to continue with the application, that the dismissal of the first application is a bar to making a second application. The aforesaid submissions are without any merit for the order of the learned District Judge dated 14.10.2003 is solely based on the conduct of the petitioner with reference to the first order and like in the first order did not to into the merits of the application and did not follow the procedure laid down in Section 763(2). The order appears to be perverse and not in accordance with the provisions as prescribed by Section 763(2) but arbitrary. There is no express bar in the Civil Procedure Code preventing a judgment creditor from making a second application for writ pending appeal if the first application had been dismissed on a techinical ground and not on its merits. There are exceptional circumstances which warrant this Court to intervene and revise the order of the learned District Judge. In the circumstances objection taken by the repondent to the application of petitioner for revision of the impunged order appears to be without any merit. For on a consideration of the proceedings in the original Court, it is clear that there has been a miscarriage of justice. The object of the power of revision as stated by Sansoni, CJ in *Mariam Beebee* vs. *Seyed Mohamed* [15] "Is the due administration of Justice" and in the words of Soza, J in *Somawathie* vs. *Madawala* [6] at 30 and 31

" The Court will not hesitate to use its revisionary powers to give relief where a miscarriage of justice has occurred ..... and indeed the facts of this case cry aloud for intervention of this Court to prevent what otherwise would be a miscarriage of justice"

I would say the aforesaid observations of Sansoni, CJ and Soza, J. are equally applicable to the instant application for revision.

For the foregoing reasons, I would set aside both the aforesaid orders dated 28.05.2002 and 14.10.2003 and send the case back tothe District

Court of Kandy directing the learned District Judge to hold an inquiry and adjudicate on the merits of the application for writ pending appeal dated 28.06.2002. The petitioner will be entitled to costs of these proceedings in both applications viz: the leave to appeal application as well as the revision application fixed at Rs. 15,000/-.

WIMALACHANDRA, J. - I agree

Application allowed.
District Judge directed to hold inquiry and adjudicate on the merits.