

**KANTHILATHA AND ANOTHER
VS
WIMALARATNE AND OTHERS**

COURT OF APPEAL
AMARATUNGA, J AND
BALAPATABENDI J.,
C.A. PHC NO. 7/2002
H.C. COLOMBO REV. 178/01
M. C. GANGODAWILA 16523
JULY 15 AND AUGUST 01, 2002

Constitution, Articles, 154 P(3)(b) and 154P(6) – Civil Procedure Code, section 736 – Court of Appeal (Procedure for Appeals from High Courts) Rules 1988 – Appeal from order or judgment to higher court – Does the filing of an appeal ipso facto stay the operation of the order of the lower court ? – Primay Courts Procedure Act, section 66(1).

Held :

- (i) The effect of a right of appeal is the limitation of the jurisdiction of one court and the extension of the jurisdiction of another ; on that right being exercised the case should be maintained in status quo till the appellate court has dealt with it and given its decision.
- (ii) The filing of an appeal in the exercise of a right of appeal conferred by law, *ipso facto* operates to suspend the jurisdiction of the original court to execute the order appealed against.

APPLICATION in revision from the order of the Magistrate's Court of Gangodawila issuing writ.

Cases referred to :

1. *Abeywardena vs. Ajith de Silva* - (1998) 1 Sri LR 134 (DB)
2. *Edward vs. de Silva* - 46 NLR 342 at 343
3. *Attorney General vs. Sillem* 11 English Reports 1208

Viraj Premasinghe for petitioners.

D. W. Abeykoon, P.C., with *Upali Ponnampereuma* for respondents.

Cur.adv. vult

August 15, 2002

GAMINI AMARATUNGA, J.

The petitioners in this revision application were the 2nd and 5th respondents in M. C. Gangodawila case No. 16523, a proceeding initiated under section 66(1)(a) of the Primary Courts Procedure Act, No. 44 of 1979 in respect of a dispute affecting land. The respondents to this revision application were the other rival contending party respondents to the said land dispute which related to a roadway.

It was the contention of the present respondents that the 1st petitioner who was the 2nd party respondent to the Primary Court proceedings demolished a part of the rear boundary wall of her premises and constructed a gate to enable her tenant, the 2nd petitioner (who was the 5th respondent

to the Primary Court proceedings) to gain access to a roadway which exclusively belonged to the respondents. It was contended by the respondents that this newly created access interfered with their peaceful use of the roadway exclusively belonging to them. The learned Magistrate, having considered the material placed before him by the parties held that the 1st petitioner (the 2nd party respondent in the proceedings before the Primary Court) or her agents have no right to use the said roadway. He has further directed that the opening she has made by demolishing a part of her boundary wall should be closed by re-building the boundary wall as it existed before.

The present petitioners then filed a revision application in the High Court of Colombo against the order of the learned Magistrate. After hearing the revision application the learned High Court Judge by his order dated 4.06.2001 has held that the present respondents have a right to use the roadway which was the subject matter of the dispute and that the present petitioners should not obstruct or interfere with the exercise of their right. He has also affirmed the order of the learned Magistrate directing the present petitioner to re-erect the boundary wall in the same way as it existed before. Accordingly the learned High Court Judge has dismissed the revision application with costs.

The petitioners in their application to this Court (paragraph 11) have stated that against the order of the High Court Judge they have preferred an appeal to this Court. In proof thereof they have filed document P4, a certified copy of the journal entry dated 21.06.2001 contained in the High Court record No. HCRA 178/2000. It is to be mentioned here that P4 is not a copy of the petition of appeal filed by the petitioners against the order of the High Court Judge.

The petitioners' petition to this Court describes the events that took place after the High Court dismissed the revision application. The respondents to the present application, who were the successful party in the Magistrate's Court and in the High Court have applied to the Magistrate's Court to execute the order of that Court dated 2000.10.18 as approved by the High Court by its order dated 4.6.2001. When the present petitioners were noticed to appear in the Magistrate's Court in connection with execution proceedings, they have informed Court that they have filed an

appeal to this Court against the order of the High Court and accordingly have moved to have execution stayed till the appeal is disposed of by this Court. The learned Magistrate has thereafter directed the petitioners to support their application to stay execution until the appeal is decided. The journal entry in the Magistrate's Court record relating to 18.1.2002, which has been produced marked P3D by the petitioners states that a letter for appeal has been produced.

This entry does not indicate what was the letter produced before the Magistrate. On that date the learned Magistrate has made the following order. "The 2nd party has not taken any step in the Court of Appeal against the order sought to be executed. Execute the order of the High Court pending the receipt of an order from the Court of Appeal."

The petitioners now seek an order staying further proceedings in MC Gangodawila case No. 16523 until the final determination of their appeal to this Court. They have already obtained a stay order staying the operation of the learned Magistrate's order dated 18.1.2002 until the final determination of this application.

The order of the High Court has been made in the exercise of the revisionary jurisdiction vested in it by Article 154 P(3)(b) of the Constitution. In terms of Article 154P(6) a party dissatisfied by a final order or a judgment of the High Court in the exercise of its revisionary jurisdiction under Article 154 P(3)(b) has, subject to the provisions of the Constitution and any law, a right of appeal to the Court of Appeal against such order. See *Abeywardana vs. Ajith de Silva*⁽¹⁾. The petition of appeal, filed by the petitioners in the High Court on 20.6.2001, now forms a part of the record of this Court in CA(PHC)163/2001, the Court of Appeal number assigned to their appeal.

When a party, in the exercise of a right of appeal conferred by law prefers an appeal against any order or a judgment to a higher court, the resulting position with regard to the execution of the order appealed against has been explained by Soertsz ACJ, in *Edward vs. De Silva*⁽²⁾ at 343 in the following words. "The ordinary rule is that once an appeal is taken from the judgment or decree of an inferior Court, the jurisdiction of that Court in respect of that case is suspended except, of course, in regard to matters to be done and directions to be given for the perfecting of the appeal and

its transmission to the Court of Appeal. As Lord Westbury, Lord Chancellor (1864) observed in *Attorney General vs. Sillem*⁽³⁾ 'the effect of a right of appeal is the limitation of the jurisdiction of one Court and the extension of the jurisdiction of another'. It follows as a corollary that on that right being exercised the case should be maintained in status quo till the appellate court has dealt with it and given its decision."

There may be statutory exceptions to this general rule, such as section 763 of the Civil Procedure Code, which permits execution pending appeal. However, even in such situations there are safeguards provided to protect the interests of the appellant. In the absence of any exception, the general rule, as explained by Soertsz ACJ, applies. This general rule is daily given effect to in the Magistrate's Court and High Courts when appeals are preferred against orders and judgments of such courts given in the exercise of their original jurisdiction. However, a substantial number of revision applications filed in this Court in the recent past indicate that the question of staying execution pending appeal has very often come up especially in relation to orders made in proceedings, initiated in terms of section 66(1) of the Primary Courts Procedure Act, No. 44 of 1979. In terms of the provisions of that Act, there is no right of appeal against an order made in proceedings commenced under section 66(1). However, more often than not, the party against whom an order is made in such proceedings files a revision application in the High Court invoking its revisionary jurisdiction under Article 154 P (3)(b) of the Constitution.

As stated above, a party dissatisfied with the order made by the High Court in the revision application has a right of appeal to this Court against such order. In terms of the Court of Appeal (Procedure for Appeals from the High Courts) Rules of 1988, such appeal has to be filed in the High Court within 14 days from the order appealed against. Once an appeal is filed, the High Court has to forward its record together with the petition of appeal to the Court of Appeal. In the meantime, as has happened in this case, the party who is successful in the High Court may make an application to the original Court, supported by a certified copy of the order of the High Court, to execute the order of the High Court. Several revision application which have come up before this Court indicate that in such situations, some original court judges have taken the view that in the absence of a direction from the Court of Appeal directing the stay of execution pending

appeal, the order appealed against is executable. With respect, this is an erroneous view. It appears that the learned Magistrate in this case has fallen into the same error when order was made to execute the order of the High Court pending the receipt of an order from the Court of Appeal. There is no provision or a necessity for issuing a direction to stay execution. The filing of an appeal *ipso facto* operates to suspend the jurisdiction of the original court to execute the order appealed against.

There is a practical difficulty faced by the original courts when an application to execute the order of the High Court is made. The appeal is filed in the High Court and it is then transmitted to the Court of Appeal. There is no provision to officially intimate to the original court that an appeal has been filed. In such situations it is the duty of the party resisting execution on the basis of the pending appeal to furnish proof by way of a certified copy of the petition of appeal to satisfy the original court that an appeal has been made. When such proof is tendered the original court should stay its hand until the appeal is finally disposed of.

In this case the petitioners have filed an appeal against the order of the High Court and now the appeal is before this Court. In view of what has been stated in this judgment there is no necessity to issue an order staying all proceedings in MC Gangodawila. That court has no jurisdiction to execute the order of the High Court until the petitioners' appeal is heard and disposed of by this Court. However, since the petitioners have prayed for it, I formally set aside the order of the learned Magistrate dated 18.1.2002 and issue an order staying all proceedings in M.C. Gangodawila case No. 16523 until the final determination of appeal No. CA(PHC) 163/2001. In the circumstances of this case I make no order for costs.

BALAPATABENDI, J. - I agree,

Though, there is no necessity to issue an order staying proceedings, order of Magistrate formally set aside ; stay order issued.