

CHAN LUM

v.

RAYMOND STODDART

[HIGH COURT, 1994 (Pathik J), 11 November]

Civil Jurisdiction

Practice (Civil)-stay of order for possession pending appeal-principles applicable.

On an application for a stay of execution of an order for possession pending appeal to the Court of Appeal the High Court reviewed the principles applicable to such applications.

Cases cited:

- Chirgwin v Russell and Another* (1910) 27 TLR 21
Kanji Jogia & Ors v Bhagwandas Hargovind & Ors 12 FLR 180
Khairul Nisha v Ba Meat Company (Action No. 114/88 West. Div)
Linotype-Hell Finance Ltd v Baker [1992] 4 All ER 887
Ram Lakhan v Brahmanand Raghwanand (FCA 51/78)
The Annot Lyle (1886) 11 P.D. 116
Wilson v Church (No. 2) (1879) 12 Ch. D.454

Application for stay pending appeal.

A. Rana for the Plaintiffs
S. Parshotam for the Defendants

Pathik J:

This is defendants' application by Summons for an order that execution and all further proceedings on the Order of this Court, namely Order for vacant possession of the property occupied by the defendants, dated 30 September 1994 be stayed pending the hearing of appeal therefrom of which defendants have given notice by Notice of Appeal dated 24 October 1994.

The Grounds of Appeal as stated in the said Notice of Appeal are as follows:-

1. That the learned trial judge erred in law in allowing as evidence the Affidavit of Fung Chu Leong sworn on 26 July 1994 and filed in the High Court proceedings on behalf of the Respondents.
2. That the learned trial judge erred in law and in fact in not considering the special circumstances of the

case when the Appellants had produced sufficient evidence to show why they should not give up vacant possession of the land in the time allowed by the Honourable Judge.”

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Both counsel made oral submissions before me.

In relation to the first ground of appeal Mr. Parshotam for the defendants submits that the affidavit in support of the application sworn by the attorney under a Power of Attorney on behalf of one of the two registered proprietors (the first Plaintiff) is a defect which is fatal to the Plaintiffs' case. He says that to be proper the affidavit should have stated "means of knowledge" and "authority to make" on behalf of both the registered proprietors.

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On the second ground of appeal he said that he is not pursuing it before me but will do so before the Appeal Court.

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Mr. Parshotam further submitted that if stay is not granted the appeal will be nugatory. He urged the Court to look at the balance of convenience. The Plaintiffs, he says, have nothing to lose for they will still receive the rent which the defendants are prepared to deposit in Court. He admits though that there is an agreement to sell the property.

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Mr. Rana for Plaintiffs in opposing the application said that the Applicants are trying to 'buy time'; the second defendant's affidavit stated that they want till December to vacate the property. He says that the application is not bona fide, as in June they wanted time till December to vacate and they are still there after judgment given on 30 September 1994. He further says that the refusal will not render the appeal nugatory as they can always claim compensation for any loss suffered by them. He says that the Plaintiffs' hardship should also be considered as the property has been sold; there is no evidence that the defendants will suffer any hardship.

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I will now consider the issue before me.

It is entirely a discretionary matter for the court whether to grant a stay or not. There are, however, two important matters which a Court would consider. Firstly the Court does not "make a practice of depriving a successful litigant of the fruits of his litigation, ... pending an appeal" (The Annot Lyle (1886) 11 P.D. at p.116, C.A.). Secondly, that "when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal if successful, is not nugatory" (Wilson v Church (NO.2) (1879) 12 Ch.D. at pp.458, 459 C.A.).

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On 'stay' in Halsbury's Laws of England Vol. 17 4th Ed. at page 455 it is stated:

"The Court has an absolute and unfettered discretion as to

A the granting or refusing of a stay, and as to the terms upon which it will grant it, and will, as a rule, only grant a stay if there are special circumstances, which must be deposed to in affidavit unless the application is made at the hearing ...”

Here I find that there are no special circumstances based on what the defendants have submitted.

B Further on ‘staying proceedings’ it is stated in Wilson (supra) at p.454:

C “Where an unsuccessful party is exercising an unrestricted right of appeal, it is the duty of the Court in ordinary cases to make such order for staying proceedings under the judgment appealed from as will prevent the appeal, if successful, from being nugatory. But the Court will not interfere if the appeal appears not to be bona fide, or there are other sufficient exceptional circumstances ...” (underlining mine).

Since Mr. Parshotam raised certain matters in relation to his first ground of appeal I would make some observation on them without in any way wanting to tread in the province of the appellate court.

D Mr. Parshotam relies heavily on his first ground of appeal. After having considered the points raised by counsel for the defendants and having found that there were no merits in them an order was made under section 169 procedure. The Court was well aware that that there was only one Affidavit and which was sworn on behalf of one of the proprietors who was the husband of the second proprietor. The fact of the second plaintiff being the wife of the first plaintiff is clear from the evidence before the Court. It was also perfectly clear from the annexure to the affidavit in support of the summons that notice to quit was given by the solicitors for the Plaintiffs acting on behalf of both the Plaintiffs. It was subsequently that an application for possession was made. There is nothing to indicate that the other registered proprietor (second plaintiff) had any objection to the application. To quote the words of Fiji Court of Appeal “However, it appears that no injustice has resulted because it was clear that possession of premises on the said land occupied by appellant as a tenant was sought” (Ram Lakhan v Brahmanand Raghwanand Civ. App 51/78 FCA cyclostyled judgment - p. 2) Similarly, here no injustice has been done to the defendants as they were fully aware that the notice to quit was on behalf of both the registered proprietors. Mr. Parshotam referred to the following statement from Ram Lakhan (supra) of which the Court is well aware and had borne it fully in mind in determining the issue before it:

“Proceedings under section 169, although of a summary nature, are special proceedings and care should be taken to ensure that all the relevant requirements have been satisfied before an order for possession is made.”

While still on this aspect of the matter it is stated in the headnote to Kanji Jogia & Ors v Bhagwandas Hargovind & Ors (12 FLR p.180) that “a notice to quit given by only two of the three lessors was ineffective to determine the lease”. There Hammett P.J. said that “there is no evidence that they had any authority or that the first and second Plaintiffs had any authority to give any notice of termination on behalf of the third lessor”. But here both the proprietors who are ‘joint tenants’ gave notice, hence the most essential requirement in s.169 proceedings has been fulfilled. In s.169 it is provided that the “last registered proprietor of the land” may summon for possession. Hence the fact that here the affidavit did not state that the deponent swore on behalf of the second Plaintiff did not in the circumstances either cause injustice to the defendants or that it was fatal as going to the root of the matter as far as law is concerned.

Mr. Parshotam submitted that the deponent should have stated his means of knowledge and also the fact that he is authorized to make the affidavit and he referred to Chirgwin v Russell and Another (1910)27 TLR which dealt with summons under Order 14. But there Vaughan Williams L J held that Lush J was “quite right in declining to stay execution” as the defendant had “admitted all that was suggested in the affidavit filed on behalf of the plaintiff”. Similarly, here the defendants are admitting that they are tenants of both the Plaintiffs. If anyone should worry it is the wife (the second Plaintiff) if the first Plaintiff was not authorized to cause an affidavit to be sworn only on his behalf.

On stay of execution pending appeal in Linotype - Hell Finance Ltd v Baker [1992] 4 All ER 887 C.A. it was held:

“When an unsuccessful defendant seeks a stay of execution pending an appeal to the Court of Appeal, it is a legitimate ground for granting the application that the defendant is able to satisfy the court that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success.”

I am not satisfied with either of these grounds in this case to enable me to exercise my discretion in the defendants’ favour. The giving up of vacant possession is bound to cause some inconvenience but what hardship the defendants will suffer I cannot see, and in any case it is not such as will entitle them to remain in possession. After all, the defendants had ample time to vacate. As stated in my judgment I am not satisfied that even in December the defendants’ house will be ready for occupation by them as there is no satisfactory evidence before the Court in that regard. Therefore in the situation of the defendants the refusal of the application will not amount to their financial ruination or that it will render the outcome of a successful appeal nugatory. In a similar situation Dyke J in Khairul Nisha d/o Changa Mia and Mohammed

A Alim Khan & Mohammed Aqib Khan v Ba Meat Company (Action No. 114/88 West. Div. cyclostyled judgment page 2) while refusing the application said that "if the defendant's appeal is successful the plaintiff will obviously have to give possession back to the defendant, or compensate him". I agree with Dyke J's view in this regard.

B To conclude, in the circumstances of this case I do not find that there are any special circumstances to enable me to grant a stay and the grounds on which the defendants rely in this application are insufficient in my view for the purposes of this application. Therefore in the exercise of my discretion I refuse the order sought, namely stay of execution pending appeal, with costs against the defendants which are to be taxed unless agreed upon.

C *(Application dismissed.)*

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