

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA**

S.C. Appeal No. 189/2012  
SC(HC)CALA Application No. 151/2012  
WP/HCCA/COL/17/2010(RA)  
D.C Colombo Case No. DSP/00147/08

In the matter of an Application in terms  
of Section 16(1) of the Recovery of  
Loans by Banks (Special Provisions) Act  
No. 04 of 1990 as amended.

Hatton National Bank PLC.  
No. 479, T.B. Jayah Mawatha,  
Colombo 10.

**PETITIONER**

Vs.

Hikkaduwa Gamage Thejasiri  
Gunethilake  
No. 309/55, Gorge E. De Silva Mawatha,  
Kandy.

**RESPONDENT**

**AND**

In the matter of an Appeal in terms of  
Section 753 of Civil Procedure Code read  
with Section 5 of the High Court of the  
Provinces (Special Provisions)  
(Amendment) Act No. 54 of 2006.

Hikkaduwa Gamage Thejasiri  
Gunethilake  
No. 309/55, Gorge E. De Silva Mawatha,  
Kandy.

**RESPONDENT-PETITIONER**

Vs.

Hatton National Bank PLC.  
No. 479, T.B. Jayah Mawatha,  
Colombo 10.

**PETITIONER-RESPONDENT**

**AND NOW**

In the matter of an Application for Leave to Appeal under Section 5C of the High Court of the Provinces (Special Provisions) (Amendment Act) No. 54 of 2006 read together with Article 127 of the Constitution.

Hatton National Bank PLC.  
No. 479, T.B. Jayah Mawatha,  
Colombo 10.

**PETITIONER-RESPONDENT-PETITIONER**

Vs.

Hikkaduwa Gamage Thejasiri  
Gunethilake  
No. 309/55, Gorge E. De Silva Mawatha,  
Kandy.

**RESPONDENT-PETITIONER-RESPONDENT**

**BEFORE:** Priyasath Dep P.C., J.,  
Upaly Abeyrathne J. &  
Anil Gooneratne J.

**COUNSEL:** Palitha Kumarasinghe P.C., with Priyantha Alagiyawanna  
for the Petitioner-Respondent-Petitioner

Sumedha Mahawanniarachchi with Champika Rodrigo  
For the Respondent-Petitioner-Respondent

**ARGUED ON:** 19.10.2016

**DECIDED ON:** 23.11.2016

**GOONERATNE J.**

This was an action filed in the District Court of Colombo by the Petitioner-Respondent-Petitioner (hereinafter referred to as Petitioner) against the Respondent-Petitioner-Respondent (hereinafter referred to as the Respondent) in terms of Section 16(1) of the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 as amended, praying for the delivery of possession of the property referred to in the schedule to the petition and eviction of the Respondent, his agents, employees and all those holding under the Respondent.

The said Section 16(1) reads thus:

Order for delivery of possession.

- (1) The purchaser of any immovable property sold in pursuance of the preceding provisions of this Act shall, upon application made to the District Court of Colombo or the District Court having jurisdiction over the place where that property is situate. And upon production of the certificate of sale issued in respect of that property under section 15, be, entitled to obtain an order for delivery of possession of the that property.

The above section has a significant bearing on a 'Certificate of Sale'. As Such, I would also refer to Section 15(1) & (2) of the said Act. Section (1) & (2) reads thus:

- (1) If the mortgage property is sold, the Board shall issue a certificate of sale and thereupon all the right, title and interest of the borrower to, and in, the property shall vest in the purchaser, and thereafter it shall not be competent for any person claiming through or under any disposition whatsoever of the right, title or interest of the borrower to, and in, the property made or registered subsequent to the date of the mortgage of the property to the Bank, in any court to move or invalidate the sale for any cause whatsoever, or to maintain any right title or interest to, or in, the property as against the purchaser.
- (2) A certificate signed by the Board under subsection (1) shall be conclusive proof with respect to the sale of any property that all the provisions of this Act relating to the sale of that property have been complied with.

It is important to consider the background facts at this point as presented by learned President's Counsel on behalf of the Petitioner Bank, and very many of such facts are not disputed by the opposing party.

The Respondent was a customer of the Petitioner Bank of the Katugastota branch and he maintained account bearing No. 30101. On the request of Respondent the Petitioner Bank granted the Respondent a term loan facility and an overdraft. In the usual way Respondent provided security for the said facilities by a mortgage and hypothecated the property described in the schedule to the petition (Mortgage Bonds No 2294 and 2655). The Respondent

defaulted repayments due on the above facilities. As such the Board of Directors as provided by the above Act under Section 4, passed a resolution to sell the property by public auction in order to recover monies due on the above Mortgage Bonds. Material furnished to this court indicates that the resolution was published in the Government Gazette (A-P 3 (a) to A-P 3(d)).

It is also urged that the Petitioner Banks resolution was duly communicated to the Respondent by letter of 14.08.2003. It is also pleaded that the Petitioner Bank fixed the auction on 03.10.2002 and published the date and place of auction by Gazette dated 12.09.2003. At the auction there were no bidders and the Petitioner Bank purchased the property and thereafter the Board of Directors of the Bank issued a certificate of sale (A-P4)

The Petitioner Bank as stated above instituted proceedings in the District Court of Colombo by petition dated 23.09.2008 (A) for delivery of possession of the property. Respondent filed objections on 17.07.2009 (B) to above and moved for dismissal of the petition of the Petitioner Bank. At the inquiry before the learned District Judge both parties agreed to dispose the matter by way of written submissions. Learned District Judge delivered the Order on 23.04.2010 ('E') and rejected the objections of the Respondent and District Judge by his Order, made Order 'nisi' absolute and issued the writ. However the Respondent filed a Notice of Appeal. Petitioner Bank moved the

District Court to issue the Writ of Execution. On 01.06.2010 District Court issued the Writ of Execution against the Respondent. Prior to issuing the Writ the Respondent filed a Revision Application (G) in the High Court on 31.05.2010 against the Order of the learned District Judge dated 23.04.2010 ('E').

The High Court of Colombo having initially issued a Stay Order, ('H') finally acting in revision set aside the Order of the learned District Judge dated 23.04.2010 ('E') by Judgment dated 16.03.2012 and directed the learned District Judge to re-issue notice of application for Writ, on the Respondent.

The Petitioner Bank being aggrieved and dissatisfied with the Judgment of the High Court dated 16.03.2012 filed a Leave to Appeal Application in the Supreme Court. This court granted Leave to Appeal on the following substantial questions of law.

1. Has the Provincial High Court of the Western Province erred in law setting aside the Order dated 23.04.2010 of the District Court of Colombo issuing writ and ordering the District Court to re-issue Notice of Writ of Execution, purporting to act under Section 347 of the Civil Procedure Code?
2. Has the Provincial High Court of the Western Province erred in law when it set aside the order dated 23.04.2010 issuing the writ of the District Court as the High Court acting in revision as the High Court has not given any valid reason to act in revision or to set aside the said Order?
3. Has the Provincial High Court of the Western Province erred in law in exercising revisionary jurisdiction in the circumstance of this case?

4. Can documents be tendered in an application filed in terms of the summary procedure of the Civil Procedure Code without a supporting affidavit or oral evidence?

At the very outset, prior to expressing my views as regards the case in hand, it would be convenient to very briefly and by a simple observation to discuss, “what is parate execution”? It is simply a right of the mortgagee to sell the mortgaged property without the intervention of courts. It is a sale by the creditor of the debtors property (whether movable or immovable) without intervention of courts. Today it is ‘perhaps’ described as an extra judicial sale arising from an extra Judicial Order. Statutory recognition for this type of sale seems to have been a gradual process and in earlier times courts have gone to the extent to observe it to be harsh and deplorable. However the legislature thought it fit to enact laws to facilitate and expedite debt recovery, as large sums of money due to Banks on loan facilities, remained unsettled. Eventually significant changes occurred in the 1990 era and several statutes were enacted to facilitate debt recovery. Just to mention a few i.e Debt Recovery (Special Provisions) Act No. 2 of 1990, Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990, Mortgage Amendment) Act No. 3 of 1990, Consumer Credit Act No. 7 of 1990. Trust Receipts (amendments) Act No. 13 of 1990 etc. Very many such statutes of this category empowered Banks and other institutions as

described in statutes to resort to parate execution and gives the power to non-judicial persons (Board of Directors of a Bank as the case may be) to take the decision to sell the mortgaged property to recover unsettled loans, having complied with the requirements of the statute.

The learned counsel for the Respondent however argued before us, that an auction sale did not take place and that there was no valid auction sale as contemplated by law. He also urged inter alia that notice of auction sale was sent only three days prior to the auction sale and contrary to the required provisions in law. It was also evident to this court that learned counsel for the Respondent did not wish to make any comments in support of the order of the High Court.

The learned President's Counsel for the Petitioner however demonstrated to this court the requirements laid down in Section 16(1) and Section 15 of the above law and maintained throughout the hearing and by his submissions supported the Order of the learned District Judge and also submitted that the High Court had misdirected itself in law and fact and made order contrary to law. Learned President's Counsel placed much emphasis inter alia in his submission to the conclusive nature of the certificate of sale as contemplated by Section 15 of the said Act. He also submitted to court that Section 15 of the said Act would not permit the borrower or any other person

claiming through the borrower to invalidate the sale for any cause whatsoever or maintain any right or interest to the property as against the purchaser.

Having perused the Judgment of the learned High Court Judge, I find that good part of the Judgment consists of a narration of the case of each other as referred to in their written submissions. The only point considered by the High Court was that Petitioner Bank had not given reasonable notice or due notice as required by Section 347 of the Civil Procedure Code, regarding notice of the application for writ (not contested by Respondent). High Court also observes that as submitted and stated by the Petitioner Bank, the Respondent has not challenged the order of the District Court on the question of Order issuing the writ. High Court rejects that position of the Petitioner Bank as above, and holds that due notice of application for writ of execution had not been given by the Petitioner Bank. Accordingly the High Court had set aside the Order of the learned District Judge dated 23.04.2010 which seems to have been confused as an Order issuing writ and directed the learned District Judge to re-issue notice of the application for writ to the Respondent.

There is no doubt that the learned District Judge made his Order, making the order nisi absolute on 23.04.2010. In the Revision Application before the High Court no relief was prayed for against execution of the writ. Material furnished to this court, Petitioner sought to execute the writ of execution on

17.05.2010 ('Y' F1). As such one year has not lapsed from the date of decree to the application of writ.

I do agree with the submissions of learned President's Counsel that in the absence of a right of appeal against the Order made under Section 16 of Act No. 4 of 1990, the Judgment creditor is entitled to execute the writ on the basis there is no appeal. It seems to me that the High Court erred in holding that the Petitioner made an application for writ of execution on 17.10.2010 whereas the application was in fact made on 17.05.2010. I also agree with the submissions of learned President's Counsel that the High Court failed to consider that Respondent challenged Order of the learned District Judge dated 23.04.2010 on the basis that the certificate of sale is invalid and Petitioner has not adduced evidence to show that an auction sale was held on 03.10.2003. High Court had erroneously misdirected itself on basic facts, that transpired in the District Court.

The learned District Judge has concentrated on the evidence led and referred to in his order (E) that the Respondent has defaulted in the repayment process of the loan granted to him. Order further states that the Petitioner Bank sold the property in dispute under a duly passed resolution by the Petitioner Bank and that the Bank becomes in terms of the certificate of sale (P4) the owner. It is concluded by the learned District Judge that the Respondent

failed to provide material as to why the said decree nisi should not be made 'absolute'.

In this Judgement I have discussed very briefly parate execution. Judicial authority described legislation enacted to expedite debt recovery as special legislation which conferred special jurisdiction. G.P.S de Silva J. (a former Chief Justice) in *Bakmeewewa, Authorised Officer of People's Bank Vs. Konarage Raja* 1989(1) SLR 231 held in a case under the Finance Act that the jurisdiction exercised by the District Court is a special jurisdiction. Case discussed therein is very similar to the case in hand and held further that Section 72(7) and 72(8) of the said law provide for a speedy mode of obtaining possession of premises, which have already vested in the Bank by virtue of the vesting order. He further held that an application made to the District Court and the provisions of Chapter 24 of the Civil Procedure Code are invoked solely for the purpose of executing an extra judicial order. To make it very clear a distinction has been made by G.P.S. de Silva J. and he observes that Section 23 of the Judicature Act provides for a right of appeal in respect of Judgment of the District Court made in the exercise of its ordinary, general, civil jurisdiction and has no application to the special jurisdiction conferred on the District Court.

In the above circumstances the Petitioner Bank is entitled to execute the writ notwithstanding the notice of appeal. Act No. 4 of 1990 has not provided for a right of appeal against an order made by the District Court in terms of Section 16 of the said Act. *Martin Vs. Wijewardena* 1982 (2) SLR 409 at 420 Jameel J. held “an appeal is a statutory right and must be expressly created and granted by statute. It cannot be implied. The law is clear and I would say it is trite law on the point as in Section 16(1) of the said Act. The method followed by the Petitioner Bank to regain possession of the land in dispute cannot be faulted in any respect.

Section 16(1) of the Act no doubt provides, upon production of the certificate of sale issued in respect of that property under Section 15, entitle the Petitioner Bank to obtain an order for delivery of possession of that property. Wording in Section 16(1) is almost similar to Section 72(7) of the Finance Act No. 16 of 1973. Both statutes require the production of the vesting order or the certificate of sale as the case may be. Both statutes in this way provides for delivery of possession of property and so enacted by the legislature to expedite such delivery of possession. Certificate of sale is conclusive proof in respect of that property and as regards its sale being duly complied with in terms of the Act. As such the certificate of sale cannot be challenged, if and when it is issued in terms of the said Act.

The law as contemplated in Act No. 4 of 1990, and as amended, need to be strictly interpreted. The words employed by the said statute cannot be given any extended meaning other than to achieve the purpose of the statute. As such as observed in this Judgment the intention of the legislature was to expediate debt recovery under a special jurisdiction exercised by the District Court.

As such the questions of law are answered as follows.

Question No. (1) & (2) yes.

- (3) High Court erred in law in exercising revisionary jurisdiction in the absence of exceptional circumstances, which should have been established by Respondent. In any event High Court was in a serious error.
- (4) It is elementary that where both Petitioner and Respondent are present. Proceedings commence in summary procedure by Respondent stating his objections to the petition. Further, Respondent is entitled to read his affidavit or other documentary evidence or with leave of court lead oral evidence. I note that no documentary evidence can be so read without express leave of court unless a copy of document is served on the Petitioner at least 48 hours before hearing (Section 384). Documents may not be introduced with written submissions. However the evidentiary value conferred on the certificate of sale as per Section 15 of Act No. 4 of 1990 cannot be contested as the certificate is conclusive. As such upon the production of the certificate of sale the Petitioner Bank is entitled for delivery of possession of the property in dispute.

This appeal is allowed. The Judgment of the High Court is set aside.

We affirm the Order of the District Court.

Appeal allowed, without costs.

JUDGE OF THE SUPREME COURT

Priyasath Dep P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

Upaly Abeyrathne J.

I agree.

JUDGE OF THE SUPREME COURT