

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

DFCC Bank,  
No. 73/5,  
Galle Road,  
Colombo 01.  
Petitioner

**SC/APPEAL/33/2019**

**SC/HCCA/LA/448/2018**

**WP/HCCA/COL/155/2017/LA**

**DC COLOMBO NO: DSP/241/14**

Vs.

Warnakulasuriya Chandima Prasad  
Rajitha Fernando,  
'Sarani Aquarium'  
No. 297,  
Kolinjadiya West,  
Wennappuwa.  
Respondent

AND BETWEEN

Warnakulasuriya Chandima Prasad  
Rajitha Fernando,  
'Sarani Aquarium'  
No. 297, Kolinjadiya West,  
Wennappuwa.  
Respondent-Petitioner

Vs.

DFCC Bank,  
No. 73/5, Galle Road,  
Colombo 01.  
Petitioner-Respondent

AND NOW BETWEEN

DFCC Bank,  
No. 73/5, Galle Road,  
Colombo 01.  
Petitioner-Respondent-Appellant

Vs.

Warnakulasuriya Chandima Prasad  
Rajitha Fernando,  
'Sarani Aquarium'  
No. 297, Kolinjadiya West,  
Wennappuwa.  
Respondent-Petitioner-Respondent

Before: Hon. Chief Justice Jayantha Jayasuriya, P.C.  
Hon. Justice Achala Wengappuli  
Hon. Justice Mahinda Samayawardhena

Counsel: Nigel Hatch, P.C. with Siroshni Illangage for the Petitioner-  
Respondent-Appellant.  
L.P.A. Chithrangani for the Respondent-Petitioner-  
Respondent.

Argued on: 09.02.2023

Written Submissions:

By the Petitioner-Respondent-Appellant on 12.03.2019 and  
10.04.2023

By the Respondent-Petitioner-Respondent on 24.04.2019  
and 10.03.2023

Decided on: 26.02.2024

**Samayawardhena J.**

The short matter to be decided on this appeal is whether a right of appeal lies against an order made under section 16 of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990. Section 16 provides for the delivery of possession of the property. In the impugned order dated 19.11.2018, the High Court of Civil Appeal of Colombo, for the first time, determined that a right of appeal lies against such an order. Hence this appeal by the appellant bank.

In *Sunpac Engineers (Private) Limited v. DFCC Bank and Others* (SC/APPEAL/11/2021, SC Minutes of 13.11.2023) a Seven Judge Bench of this Court held that the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990, is a special Act passed by Parliament aiming at revitalising the country's economy by facilitating speedy recovery of debts by non-judicial sales and the Act applies to any property mortgaged to the bank as security for any loan in respect of which default has been made irrespective of whether the mortgagor is the borrower or a third party. There is no need to highlight that this is a special Act and is a departure from the established law and procedure because it is expressly stated in the Act itself. Where there are provisions in a special Act which are inconsistent with the general law and procedure, the general law and procedure must yield to the provisions of the special Act.

I must state at the outset that if the view of the High Court of Civil Appeal is to be accepted, the purpose of the legislation and the intention of the legislature will seriously suffer. The mortgagor against whom an order for delivery of possession is made, will resort to ordinary appellate procedure jeopardizing the early finality of the litigation.

Section 16 of the Recovery of Loans by Banks (Special Provisions) Act reads as follows:

*16(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.*

*(2) Every application under subsection (1) shall be made and shall be disposed of, by way summary procedure, in accordance with the provisions of Chapter XXIV of the Civil Procedure code; and on all documents filed the purpose of each such application and on all proceedings held thereupon, stamp duties and other charges shall be payable at the respective rates payable under any written law for the time being in force on applications for, and proceedings connected with, or incidental to, the execution of a decree of a District Court for the delivery of possession of any immovable property of the same value as the property to which such application relates.*

*(3) Where any immovable property sold in pursuance of the preceding provisions of this Act in the occupancy of the borrower or some person on his behalf or of some person claiming under a title created by the borrower subsequently to the mortgage of the*

*property to the bank the District Court shall order delivery to be made by putting the purchaser or any person whom he may appoint to receive possession on his behalf, in possession of the property.*

*(4) Where any immovable property sold in pursuance of the preceding provisions of this Act is in the occupancy of tenant or other person entitle to occupy the same, the District Court shall order delivery to be made by affixing a notice that the sale has been taken place, in the Sinhala, Tamil and English languages, in some conspicuous place on the property, and proclaiming to the occupant by beat of tom-tom or any other customary mode or in such manner as the court may direct, at some convenient place, that the interest of the borrower has been transferred to the purchaser. The cost of such proclamation shall be fixed by the court and shall in every case be prepaid by the purchaser.*

*(5) Every order under subsection (3) or subsection (4) shall be deemed, as the case may be, to be an order for delivery of possession made under section 287 or section 288 of the Civil procedure Code, and may be enforced in like manner as an order so made, the borrower and the purchaser being deemed, for the purpose of the application of any provisions of that Code, to be the judgment-debtor and judgment-creditor, respectively.*

Under section 16(1), the Court is not expected to have a full trial or full inquiry and make an order on the merits of the substantive case, if any. The Court makes a perfunctory order for delivery of possession upon production of the certificate of sale. The intervention of the Court is sought at this stage primarily to prevent the breach of peace in the execution of a non-judicial order.

The main contention of the respondent is that section 23 of the Judicature Act, No. 2 of 1978 as amended by Act No. 37 of 1979 provides for the right of appeal against any order or judgment of the District Court. Hence, a right of appeal is available against orders made under section 16 of the Recovery of Loans by Banks (Special Provisions) Act as well. This is not a novel argument taken up for the first time in this appeal.

*23. 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 judgment, 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 judgment, 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 judgment of the Court of Appeal upon the appeal.*

It is trite law that section 23 of the Judicature Act provides for a right of appeal only in respect of judgments and orders of the District Court made in the exercise of its ordinary civil jurisdiction and has no application when the Court exercises special jurisdiction unless the specific statute conferring such special jurisdiction expressly provides for an appeal. The right of appeal is a creature of a statute. It is not an inherent right. Without a statutory provision explicitly creating such a right the aggrieved party is not entitled to file an appeal. It cannot be assumed, implied, or inferred. If there is no right of appeal, there is no room for leave to appeal because, when leave is granted, it transforms into an appeal. Nevertheless, revision remains unaffected.

In the leading Supreme Court case of *Bakmeewewa, Authorised Officer of People's Bank v. Konarage Raja* [1989] 1 Sri LR 231 at 237-238, Justice G.P.S. de Silva (as His Lordship then was) made this abundantly clear in the following terms.

*Section 23 of the present Judicature Act is similar to the provisions contained in section 73 of the repealed Courts Ordinance. Section 23 occurs in Chapter IV of the Judicature Act which spells out the civil jurisdiction of the District Courts. In my opinion section 23 of the Judicature Act provides for a right of appeal in respect of judgments or orders 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 as in the instant case. As already stated, the jurisdiction exercised by the District Court in terms of sections 72(7) and 72(8) of the Act is the jurisdiction of a Court of execution in respect of an extra judicial order. It is basically not different from the jurisdiction exercised by the Magistrate's Court in proceedings for the recovery of taxes in default under the Income Tax Ordinance. It is settled law that there is no right of appeal from an order made by a Magistrate's Court in such proceedings – vide Commissioner of Income Tax vs. De Vos (35 NLR 349) and De Silva vs. Commissioner of Income Tax (53 NLR 280, 282). The fact that there is no right of appeal does not mean that an aggrieved party is left without a remedy, for revision is available.*

In *Martin v. Wijewardena* [1989] 2 Sri LR 409 at 419, the Supreme Court made a similar pronouncement in the invocation of the appellate jurisdiction of the Court of Appeal under Article 138 of the Constitution. Similar to section 23 of the Judicature Act, Article 138 of the Constitution should also be understood subject to limitations.

Article 138(1) of the Constitution reads as follows:

*The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by the High Court, in the exercise of its appellate or original jurisdiction or by any Court of First Instance, tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and restitutio in integrum, of all causes, suits, actions, prosecutions, matters and things of which such High Court, Court of First Instance, tribunal or other institution may have taken cognizance:*

Justice Jameel with the agreement of Chief Justice Ranasinghe and Justice Amarasinghe stated at page 419:

*In the light of these authoritative statements it is not possible to accept the contention that there is implied in Article 138 an unfettered "RIGHT OF APPEAL" to the Court of Appeal. Nor, is it possible to accept the contention that this alleged "RIGHT OF APPEAL" under this Article 138 is only fettered to the extent provided for in the Constitution or other Law. An Appeal is a Statutory Right and must be expressly created and granted by statute. It cannot be implied. Article 138 is only an enabling Article and it confers the jurisdiction to hear and determine appeals to the Court of Appeal. The right to avail of or take advantage of that jurisdiction is governed by the several statutory provisions in various Legislative Enactments. That is to say, for appeals from the regular courts, in the Judicature Act, and the Procedural Laws pertaining to those courts. For the various Tribunals and other Quasi-Judicial Bodies, in the respective statutes that created them. For these reasons the question formulated by the Court of Appeal is answered in the Negative. Section 18 of the Agrarian Services Act, No. 58 of 1979 does not provide for nor does it create a Right of Appeal in a tenant*



*cultivator, who is aggrieved by the Order of the Commissioner to pay up his arrears to the Landlord before a stipulated date. Further, Article 138 of the Constitution does not confer on such a tenant cultivator a Right of Appeal.*

*Martin v. Wijewardena* has consistently been followed in later decisions. *Vide Gamhewa v. Maggie Nona* [1989] 2 Sri LR 250, *Gunaratne v. Thambinayagam* [1993] 2 Sri LR 355, *Malegoda v. Joachim* [1997] 1 Sri LR 88, *Bandara v. People's Bank* [2002] 3 Sri LR 25, *The People's Bank v. Camillus Perera* [2003] 2 Sri LR 358.

In *Jayawardena v. Sampath Bank* [2005] 2 Sri LR 83 at 84-85, Justice Amaratunga applied the above principles of law in the invocation of jurisdiction of the District Court under section 16 of the Recovery of Loans by Banks (Special Provisions) Act.

*The Act No. 4 of 1990 had been passed in order to permit the Banks defined in it to resort to parate execution to recover the loans granted by those Banks. The Act does not contain a provision bringing in the provisions of the Civil Procedure Code to cater to situations not covered by the provisions of the Act. Section 16 enables a purchaser to apply to the District Court to obtain an order for the delivery of possession. That is the only instance under the Act where recourse to ordinary courts is permissible. Section 16 or any other provision of Act No. 4 of 1990 do not provide that an appeal, direct or with leave, is available against an order made under Section 16. A right of appeal must, be specifically provided for. Such a right cannot be implied. Martin vs. Wijewardana [1989] 2 Sri LR 409. In the absence of a specific right of appeal given by Act No. 4 of 1990 and in the absence of any provision in Act No. 4 of 1990 incorporating the provisions of the Civil Procedure Code, there is no right to make an application for leave to appeal.*

Dismissing the application for leave to appeal, in *Dassanayake v. Sampath Bank* [2002] 3 Sri LR 268, Justice Nanayakkara at 269-270 stated:

*The question at issue is whether the petitioner is entitled to come by way of leave to appeal seeking redress, which he has prayed for in his petition against an order made by the District Judge under section 16 of the Recovery of Loans by banks (Special Provisions) Act, No. 4 of 1990.*

*A careful analysis of the provisions of the said Act makes it evident that the jurisdiction exercised by the District Court under the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990, is in the nature of special jurisdiction created by the Act.*

*As far as section 16(1) of the said Act is concerned, it provides for expeditious mode of recovery of the property, which has already been vested in the purchaser by an issuance of certificate of sale in terms of the provisions of the said Act. The right of appeal is a statutory right; unless it is expressly created and provided by the Statute, it cannot be implied or inferred.*

Quoting with approval the above dicta, in *Raj Motha v. Hatton National Bank* (CA/APPEAL/495/2001, CA Minutes of 30.09.2004) Justice Imam stated:

*The Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 which is a special law does not provide for a right of appeal to any forum.*

In *Jayasundera v. Hatton National Bank* (CA/1479/2004, CA Minutes of 05.08.2005), Justice Somawansa stated:

*[Under section 16 of Act No. 4 of 1990] the District Court is vested with special jurisdiction to deliver vacant possession of property referred to in the certificate of sale. Once a certificate of sale is issued by the board of directors of the licensed commercial bank the procedure in entertaining the disposing of such application is by way of summary procedure as set out in the Civil Procedure Code. Thus it is seen that only certain sections of the Civil Procedure Code which deals with the execution of the decree are applicable in respect of execution of such order. In the circumstances with reference to section 16 of the Act No. 4 of 1990 the District Court is vested with special jurisdiction to execute an extra judicial act done by the board of directors of a bank which is not a function of the District Court in exercising its ordinary civil jurisdiction of a District Court. Unfortunately for the respondent-petitioner provisions of section 16 or any other connected section in the aforesaid special law do not create a right of appeal to any person aggrieved by the order of the learned District Judge.*

The question whether appeal is available against an order of the District Court made under section 16 of the Recovery of Loans by Banks (Special Provisions) Act was authoritatively answered in the negative by the Supreme Court in *Hatton National Bank v. Thejasiri Gunethilake* [2016] 1 Sri LR 276. In that case Justice Anil Gooneratne with the agreement of Chief Justice Dep and Justice Abeyratne held at 284-285:

*G.P.S. de Silva J. (a former Chief Justice) in Bakmeewewa, Authorised Officer of People's Bank Vs. Konarage Raja [1989] 1 Sri LR 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 [1989] 2 Sri LR 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 expedite debt recovery under a special jurisdiction exercised by the District Court.*

When the law was well-settled that (a) section 23 of the Judicature Act provides for a right of appeal only in respect of judgments and orders of the District Court made in the exercise of its ordinary civil jurisdiction and has no application in instances where the District Court exercises special jurisdiction unless a right of appeal is expressly provided for in the Act; (b) the District Court exercises special jurisdiction in making orders for delivery of possession under section 16 of the Recovery of Loans by Banks (Special Provisions) Act; (c) the summary procedure is adopted in this process solely for the purpose of executing an extra judicial order; and (d) the Act does not provide for a right of appeal against an order made by the District Court in terms of section 16 of the Act, there is absolutely no justification in accordance with the doctrine of *stare decisis* for the High Court to give a different interpretation to the statutory provisions and come to a conclusion that is opposite to the well-settled law which stands to reason.

As held by a Five Judge Bench of this Court in *Indrani Mallika v. Siriwardena* (SC/APPEAL/160/2016, SC Minutes of 02.12.2022) *stare decisis* is an abbreviation of the Latin phrase *stare decisis et non quieta movere* (to stand by precedent and not to disturb settled points). This

doctrine is not a rule of statute but a concomitant of judicial comity. The main object of *stare decisis* is to ensure the uniformity, consistency, certainty and predictability of the law. Let the law be stable rather than perfect is the rationale of this doctrine.

As Timothy Endicott, Hafsteinn Dan Kristjánsson and Sebastian Lewis state in the recent book titled *Philosophical Foundations of Precedent* (Oxford University Press, 2023) at page 2:

*The unity that legal systems tend to impose on themselves offers a crucial initial step in a justification of following precedent in law. The legal unification of judicial agency may involve a hierarchy, and may allow dissenting judgments, but it secures finality and a non-contradictory form of ordering. In that unification of agency, judges tend not to be free to disregard what other judges have done. The judges who serve on a court tend to act as representatives of a single, institutional agency. That tendency generates expectations that the court will act consistently, and a sense of responsibility on the part of judges to do so. The decision of the court is seen as an action of the same agency that reached a decision yesterday, or years ago. Adherence to precedent not only makes the system look unified; it tends to make the system look timeless, conferring the stability, reliability, and consistency that are crucial elements in the rule of law.*

Nevertheless, there are exceptions to this doctrine. One such exception is the previous decision being given *per incuriam*. A decision *per incuriam* is one given in ignorance or forgetfulness of the law laid down in a statute or binding precedent, which, if considered, would have resulted in a different decision. It is important to bear in mind that a decision will not be regarded as *per incuriam* merely because a subsequent Court believes that the law had been misinterpreted in the previous decision. For the

previous decision to be regarded as *per incuriam*, the fault must derive from ignorance of statutory law or binding authority.

In the instant appeal, the High Court does not state that superior Courts have decided that there is no right of appeal against the orders of section 16 of the Recovery of Loans by Banks (Special Provisions) Act, in ignorance of relevant statutory provisions or binding precedent but rather on the basis that the statutory provisions have not been correctly interpreted and applied. Although the High Court does not use the term *per incuriam*, it has decided the appeal on that basis. I do not think that in the previous decisions, the statutory provisions have been misinterpreted. They have been correctly interpreted in line with the purpose of the Act and the intention of the legislature. Even if the said statutory provisions have not been correctly interpreted by the Superior Courts, High Court could not have come to a different conclusion as the judgments of the Superior Courts bind the lower courts in accordance with the doctrine of *stare decisis*. The High Court of Civil Appeal has exceeded its jurisdiction.

The High Court states that section 16 of the Act does not lay down a “special procedure” but provides for the application of “summary procedure” and therefore there is a right of appeal to the dissatisfied party. Firstly, the High Court may have conflated “special jurisdiction” alluded to by Justice G.P.S. de Silva in *Bakmeewewa* with “special procedure”. Secondly, the Superior Courts, particularly Justice Somawansa in *Jayasundera v. Hatton National Bank* and Justice Anil Gooneratne in *Hatton National Bank v. Thejasiri Gunethilake* held that the entire chapter XXIV of the Civil Procedure Code on summary procedure is inapplicable and the limited function of the District Court in this instance is to act as a court of execution in respect of an extra judicial order made by the Board of Directors of the bank.

This Court granted leave to appeal to the appellant bank on the following questions of law:

*14(a). Has the High Court erred in law in disregarding and/or failing to apply the fundamental legal principle that no right of appeal lies unless expressly conferred by statute which said legal principle has been followed in Sri Lanka for almost a century?*

*14(b). Has the High Court erred in law in disregarding and/or failing to follow and apply the case law decided by the Court of Appeal that no right of appeal has been conferred against an Order made under Section 16 of the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 (as amended)?*

*14(c). Has the High Court erred in law in failing to judicially consider and/or misdirected itself in law in applying the case law cited by the Petitioner which have held that the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 (as amended) is a special law and does not provide for a right of appeal?*

*14(d). Has the High Court erred in law in failing to take cognizance of the legislative intention of Parliament which provided for a right of appeal in the Debt Recovery (Special Provisions) Act No. 2 of 1990 (as amended) but did not provide for a right of appeal in the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 (as amended) which establishes that there is no right of appeal under Act No. 4 of 1990?*

*14(e). Has the High Court erred in law in disregarding and/or failing to follow the principle of stare decisis where the High Court of the Western Province Holden in Colombo (exercising appellate jurisdiction) is bound by the decisions of the Court of Appeal and Supreme Court?*



*14(f). Has the High Court erred in law in analyzing the case law and drawing a distinction between special and ordinary jurisdiction exercised by the District Court and holding that no right of appeal exists from an Order made by the District Court exercising special jurisdiction unless expressly conferred by statute and in doing so completely disregarding the case law cited which specifically held that the District Court exercises special jurisdiction under the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 (as amended) which does not confer a right of appeal?*

The respondent raised the following question of law:

*Has the legislature introduced the principle that prohibitions must not be presumed under section 23 of the Judicature Act with regard to the right of appeal?*

The appellant's questions of law are answered in the affirmative. The respondent's question of law is answered in the following manner: "Section 23 of the Judicature Act is applicable when the District Court pronounces judgments and orders in the exercise of its ordinary civil jurisdiction and not in instances where it exercises special jurisdiction."

The impugned order of the High Court of Civil Appeal is set aside. The preliminary objection raised by learned President's Counsel for the appellant bank that, the application for leave to appeal filed against the order of the District Court made under section 16 of the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 is misconceived in law, is upheld. There is no right of appeal against an order of the District Court made under section 16 of the aforesaid Act. The application for leave to appeal shall stand dismissed. The appellant is entitled to costs in all three courts.

As agreed, the parties in the connected case No. SC/APPEAL/34/2019 will abide by this judgment.

Judge of the Supreme Court

Jayantha Jayasuriya, P.C., C.J.

I agree.

Chief Justice

Achala Wengappuli, J.

I agree.

Judge of the Supreme Court