

**JAYAWARDENA AND OTHERS
VS
SAMPATH BANK**

COURT OF APPEAL
AMARATUNGA J
WIMALACHANDRA J
CALA APPL.416/2003
D.C.COLOMBO 6468/SPL
OCTOBER 22, 2004
NOVEMBER 1, 2004

Recovery of Loans by Banks (Special Provisions) Act 4 of 1990 - Section 15, 15(2), 16(1) - Civil Procedure Code - cap. 24-Parate Execution - Bank purchasing property - application to District Court to obtain possession under Summary Procedure - Decree Nisi made absolute - is it a Interlocutory Order ?

On the Preliminary Objections raised :

Held :

- i) Section 16 of the Recovery of Loans by Banks Act does not provide that an appeal direct or with leave is available against an order under Section 16 - Order to obtain delivery of possession of the property purchased at the auction.
- ii) A right of appeal must be specifically provided for. In the absence of a specific right of appeal and in the absence of any provision in the Act incorporating the provisions of the civil procedure code, there is no right to make an application for Leave to Appeal.

Quarere

Since Section 16 by reference incorporates Cap. 24 of the civil procedure code - Does a Direct appeal lie?

APPLICATION for Leave to Appeal from an Order of the District Court of Colombo.

Case Referred to :

1. *Martin vs Wijewardena - 1989 - 2 Sri LR 409*

Ikram Mohamed P.C., with Thisath Wijegunawardena and M.C.M. Muneer for Petitioner.

Palitha Kumarasinghe with H. Wijegunawardena for the Respondent

cur. adv. vult.

July 11, 2005

Gamini Amaratunga J.

This is an application for leave to appeal against an order made by the District Court of Colombo under section 16 of the Recovery of Loans By Banks (Special Provisions) Act No. 4 of 1990. The 1st and 2nd petitioners mortgaged to the respondent Bank, premises No. 87, belonging to the 1st petitioner, as security for a loan obtained by the 3rd petitioner company. When the 3rd petitioner company defaulted to pay the loan, the Board of Directors of the respondent Bank adopted a resolution under and in terms of Act No. 4 of 1990 to sell the mortgaged property by public auction.

At the auction the respondent Bank itself purchased the property. Thereafter in terms of section 15 of Act No. 4 of 1990, a certificate of sale was signed by the Board of Directors of the respondent Bank. In terms of section 15(2) such certificate is conclusive proof with respect to the sale of the property. Thereafter the respondent Bank, under section 16(1) of Act No. 4 of 1990 made an application to the District Court of Colombo to obtain an order for the delivery of possession of the property purchased by it at the auction. This application was made by way of summary procedure under Chapter 24 of the Civil Procedure Code.

The learned District Judge having considered the application issued a decree nisi. After it was served on the petitioners, they appeared and raised certain legal objections and the learned judge having considered the submissions, made the decree nisi absolute. The petitioners now seek leave to appeal.

The learned counsel for the respondent Bank raised a preliminary objection to the effect that there is no right to make a leave to appeal application against an order made under section 16 of Act No. 4 of 1990. 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*⁽¹⁾. 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. Accordingly I uphold the preliminary objection.

One may argue that since section 16 of Act No. 4 of 1990, by reference incorporates chapter 24 of the Civil Procedure Code, a right of appeal is available against an order absolute entered under that chapter. An order absolute entered under section 387 of the Code is a final order. In that event the proper remedy is not an application for leave to appeal but a direct appeal.

For those reasons I hold that the petitioners' leave to appeal application is misconceived in law. I therefore dismiss the application with costs in a sum of Rs. 10000.

WIMALACHANDRA J. — I agree.

Preliminary objection upheld. Application dismissed.