

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

*In the matter of an Application under Article  
121 of the Constitution to determine the  
Constitutionality of a Bill titled Recovery of  
Loans by Banks (Special Provisions)  
(Amendment) Bill*

S.C. Special Determination No. 22/2003

Kusumini Kirthi Kumari, Attorney at Law,  
Legal Officer of Lawyers for Human Rights  
and Development,  
233/1, Cotta Road,  
Colombo 8.

**Petitioner**

Vs.

The Honourable Attorney General  
Attorney General's Department  
Hultsdorp,  
Colombo 12.

**Respondent**

**AND NOW**

Nihal Sri Ameresekere  
167/4, Sri Vipulasena Mawatha  
Colombo 10.

**Intervenient-Petitioner**

**TO: THEIR LORDSHIPS THE CHIEF JUSTICE AND OTHER JUDGES OF THE SUPREME  
COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA**

On this 22<sup>nd</sup> day of August 2003

The Petition of the **Intervenient-Petitioner** above named states as follows:-

1. The Intervenient-Petitioner is,
  - a. a citizen of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to as "**Sri Lanka**");
  - b. is a Fellow Member of the Institute Chartered Accountants of Sri Lanka and the Chartered Institute of Management Accountants of UK; and

- c. is practising as a Consultant, having functioned as a Senior Consultant on World Bank and USAID funded economic infrastructure re-structuring projects of the Government of Sri Lanka, and as an Advisor to the Ministry of Finance.

*A true photostat copy of the National Identity Card of the Interventient-Petitioner is annexed hereto marked "PI" and pleaded as part and parcel hereof.*

2. a) This Application is made in terms of Rule 63 (2) (iii) of the Supreme Court Rules 1978, the Interventient-Petitioner being a person interested in the determination of the questions involved to be heard at these proceedings.
- b) The Interventient-Petitioner, in the course of his professional services as Business Consultant, has time and again been Consulted in respect of business transactions put in suit under and in terms of the principal Act, which is sought to be amended by the Bill referred to herein, and thus has a knowledge of the application effect and practical implications of the provisions of the said Act.
- c) The Interventient-Petitioner has therefore the necessary interest to intervene in these proceedings.
3. The Interventient-Petitioner states that the Bill titled Recovery of Loans by Banks (Special Provisions) (Amendment) Bill which was published by Gazette of 4<sup>th</sup> July 2003 issued on 7<sup>th</sup> July 2003 and presented to Parliament on 5<sup>th</sup> August 2003 and is a Bill to amend the Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990.
4. The Interventient-Petitioner respectfully states that several provisions of the said Bill are inconsistent with the provisions of the Constitution of Sri Lanka and violates the fundamental rights of the citizens of Sri Lanka of equality before the law and equal protection of the law.
5. The Interventient-Petitioner respectfully states that the proposed amendments, *inter-alia*, seek to include Finance Companies within the definition of a "bank" and enables them to benefit by the Special Provisions in the principal Act:
- a) Clauses 2, 3, 4, 5, 6, 7, 10, 11, 12, 13,(2) and (3) and 16(1) are discriminatory in that they benefit only the Finance Companies and Commercial Banks, jeopardising the rights of third parties who have not obtained any loans from any banks and depriving them of the equal protection of the law and is violative of Article 12(1) of the Constitution in that they grant special benefits to the Finance Companies and Commercial Banks as against persons dealing with them in total disregard of the rights of the public.
- b) Clauses 4, 11, 12 create a liability on a mortgagor in addition to the borrower and is arbitrary and violates the right to equal protection of law of any mortgagor, who has not borrowed any monies.

- c) Clause 10(2) of the Bill is intended to facilitate seizure and sale of financed vehicles and grants special concession to Finance Companies as against the borrower/mortgagor and would affect the interests of innocent third parties and will be discriminatory of borrowers as against Finance Companies and is, as such, violative of Article 12(1) of the Constitution.
6. The Bill seeks to make the provisions in the Recovery of Loans by Banks (Special Provisions) Act applicable to those to whom the Act was not applicable earlier, such as persons who have not obtained any loan from a commercial bank or finance Company but whose property has been mortgaged.
- a) Clause 2(c) and (d) of the Bill seeks to make the Bill applicable to persons "who have not mortgaged property to a bank (finance Company) as security for a loan granted by the Bank (Finance Company), not being the person to whom such loan is granted". The Interventient-Petitioner respectfully states that this would facilitate the fraudulent opportunity for unscrupulous persons to obtaining loans from Banks and Finance Companies by mortgaging property of unsuspecting third parties, which is contrary to public policy. It is submitted that the proposed Bill is inconsistent with the provisions of Articles 3 and 4(a) read with Article 27 of the Constitution.
- b) Clause 3(2) denies the borrower or the mortgagor the basic principles of natural justice, in violation of his fundamental rights guaranteed by Article 12(1) of the Constitution.
- c) In Clause 2, 3, 5, 6, 7, 10 and in every other Clause that refers to the word "mortgagor or mortgaged property" denotes a person other than the borrower, a person who has not received any benefit from the transaction. The Bill recognises a mortgagor on the same level as that of the actual borrower or in an even worse position, than the borrower, and this amounts to a violation of the principle of equal protection of the law and is therefore inconsistent with Article 12(1) of the Constitution.
- d) In the absence of any indication that the provisions of the Bill would apply prospectively it appears that the provisions in the Bill would and could be applied with retrospective effect. The Interventient-Petitioner respectfully states that this would result in the property of persons, who have not obtained any loan from a "bank" and who were not liable to be penalised earlier, being liable to be penalised by the property been auctioned without any default on their part, whereas such new conditions was not prevalent at the time such property was mortgage.

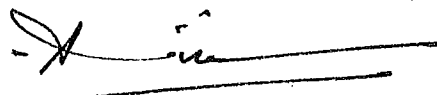
Such persons will be penalised even though there is no punishment or finding of guilt by a court of law. It is therefore respectfully submitted that this course of action provided for in the Bill violates Article 12(1) and 13(6) of the Constitution. Furthermore, provision 8A in Clause 7 may have retrospective effect and is therefore violative of Article 13(6) of the Constitution.

7. The Bill seeks to oust or curtail the jurisdiction of Courts.
  - a) Clause 3(2) grants arbitrary power to the Board of Directors of Finance Companies and Commercial Banks, dispossessing the Courts of any jurisdiction in determining the legality of their actions and is thus respectfully submitted as an interference in the judicial power of the People and is inconsistent with Articles 3 and 4(c) of the Constitution.
  - b) Clause 6(2), (3), (4) and (5) are subtle attempts to deny and deprive the public of their legal right to seek justice against illegalities and injustices committed by Finance Companies and are inconsistent with Articles 3 and 4(c) of the Constitution.
8. Clause 15 introduces a new Section 20A, which creates a special class of offence over and above the civil remedy for damages, simply because they are in respect of Banks or Finance Companies and is thus discriminatory and violative of Article 12(1) of the Constitution.
9. Thus the Interventient-Petitioner respectfully states that it is apparent that the Bill sought to be enacted only benefits the licensed commercial banks and Finance Companies enabling them to arbitrarily and unilaterally recover alleged loans to the loss and detriment of persons, who had not received any benefit from any transaction with such institution but whose property had been mortgaged to the bank by the borrower and without the transaction being examined or adjudicated upon.
10. The Interventient-Petitioner respectfully states that the provisions of the Bill violate the principle of equal protection of the law.
11. The Interventient-Petitioner respectfully states that the Bill titled Recovery of Loans by Banks (Special Provisions) (Amendment) Bill is discriminatory, unreasonable, unjust and prejudicial and is violative of the constitutional mandates.
12. The Interventient-Petitioner respectfully states that the Application of this Bill, amending the principal Act No. 2 of 1990 must be considered with the subsequent Act, namely the High Court of the Provinces (Special Provisions) Act No. 10 of 1996, more particularly the **“exclusive jurisdiction”** vested in the said High Court to adjudicate upon - **“All actions where the cause of actions has arisen out of commercial transactions (including causes of actions relating to banking, the export or import of merchandise) .....**” and the question, as to whether a “commercial bank or a licensed commercial bank” has an unqualified right of choice, in the context of the said **“exclusive jurisdiction”** vested in the said High Court.
13. The Interventient-Petitioner respectfully submits that Banks and Finance Companies are in the business of, *inter-alia*, banking and/or financing, marketing money, with advertising, promotion and propaganda, and they are not merely, as made out to be, “exclusive lending institutions”. If any privilege is afforded to Banks and Finance Companies for the recovery of such monies, then the same benefit ought logically to also devolve upon business houses and others, who in turn afford credit to other persons utilising such monies of Banks and Finance Companies

14. In the aforesaid circumstances the Interventient-Petitioner respectfully states that the said provisions in the Bill are inconsistent with the Constitution and need a special majority in Parliament and approval by the People at a Referendum to be enacted.
15. An affidavit of the Interventient-Petitioner is annexed hereto in support of the averments contained herein.

**WHEREFORE** the Interventient-Petitioner respectfully prays that Your Lordships' Court be pleased to :

- (a) grant permission for the Interventient-Petitioner to be heard at these proceedings in terms in terms of Rule 63 (2) (iii) of the Supreme Court Rules 1978;
- (b) declare that any one or more of the provisions of the Bill titled Recovery of Loans by Banks (Special Provisions) (Amendment) Bill is inconsistent with the Constitution;
- (c) make a determination that the Bill titled Recovery of Loans by Banks (Special Provisions) (Amendment) Bill can be passed as law only by a special majority in Parliament and approval by the People at a Referendum;
- (d) grant such further and other reliefs as to Your Lordships' Court shall seem meet



INTERVENIENT-PETITIONER