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

AND ALSO

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

S.C. Special Determination No. 23/2003

M. Rohan Wijesena, Attorney at Law, Legal
Officer of Lawyers for Human Rights and
Development,
233/1, Cotta Road,
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TO: THEIR LORDSHIPS THE CHIEF JUSTICE AND OTHER JUDGES OF THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

WHEREAS when the above-mentioned two Applications came up for hearing before Your Lordships' Court yesterday i.e., 26.8.2003, I, as the Intervenient-Petitioner, as kindly permitted by Your Lordships' Court made Oral Submissions on my Applications dated 22.8.2003 on my 2 Applications, respectively made in the above 2 matters.

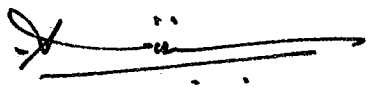
AND WHEREAS in making such Oral Submissions, I had to curtail and restrict my Submissions and not prolong the time of Your Lordships' Court, since it was already late in the day, when I commenced making Submissions.

AND WHEREAS in such circumstance, I very respectfully seek the permission of Your Lordships' Court to supplement my said Oral Submissions, with a brief Submission in writing in the form of short Notes in respect of items, which had to be left out due to the constrain of time.

AND THEREFORE I tender herewith a brief Submission in writing in the form of short Notes, **jointly in respect of both Applications Nos. 22/2003 and 23/2003,** and very respectfully MOVE that Your Lordships' Court be pleased to accept the same.

A copy of this Motion, together with a copy of the brief Submission in writing, has been delivered to the Hon. Attorney-General.

Colombo, 27th day of August 2003



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SUBMISSIONS IN WRITING IN THE FORM OF NOTES, JOINTLY IN RESPECT OF BOTH APPLICATIONS NOS. 22/2003 AND 23/2003, SUPPLEMENTAL TO THE ORAL SUBMISSIONS

Re Act No. 4 of 1990 [Application 22/2003]

1. "Ousting" Court Jurisdiction

Section 13 of the New Bill, amending Section 18 of the Principal Act, pertaining to the "Re-sale by the lending institutions", seeks to substitute Section 16(3), with Section 15 (3) of the Principal Act. **Section 16(3) required a District Court Order**, whereas Section 15(3) excludes such District Court Order.

2. "Upset Price"

"Upset Price" referred to in Section 11 of the Principal Act, was not defined therein, and **left to the Board of the Bank to decide**. This was the price at which the Bank could purchase the property. The New Bill at Section 16 defines the "Upset Price" as the "sum due on any loan, together with interest, expenses and costs incurred by the bank ……". **Ought it not be at Market Price ?** How could a property worth Rs. 100 Mn. on which a Loan balance Rs. 10 Mn. be purchased by a Bank for Rs. 10 Mn. only ? There have been instances where Banks have bought property at nominal values and re-sold them by private treaty, that too, giving loans to the buyer, having refused to re-schedule the original owner's balance loan !

3. Unfair power to Bank

The Bank is the interested/affected **Claimant, Judge and the Executioner ! Intervention by Court ought not be excluded**

Re Act No. 2 of 1990 [Application 23/2003]

1. **Re - Act No. 10 of 1996 subsequently enacted**

Prior to the enactment of the above Act, even after the enactment of Act No. 2 of 1990, Banks instituted MR Actions for recovery of facilities extended to businesses. All pending MR Actions were transferred to the Commercial High Court, when it was established in 1996. Some Banks correctly still institute actions in the High Court.

2. **Inadequacy of Time**

Section 4 (3) of the Principal Act stipulates that the Defendant shall appear and show cause on an early date, having regard to the distance from the Defendant's residence to Court [this also further reveals that this Act was meant for a loan obtained from a Bank and not commercial transactions with Banks]. Section 3 (3) of Amendment Act No. 9 of 1994 stipulates **that no further time shall be given to the Defendant by Court thereafter** for appearing and showing cause against the *Decree Nisi*

3. **Post-dated Cheques**

Section 6 of the New Bill seeks to replace Section 25, which relates to Offences in respect of **returned cheques**. The criminality "cheating" should be considered in the context of the prevalent commercial practice.

Companies distribute goods to its Dealers accepting "post dated cheques" giving credit of 30 days/ 60days/ 90 days for the Dealer to sell the goods and pay. The Cheque though dated bearing the same date as the Invoice, is banked as per the "credit arrangement with the Dealer", after the stipulated number of days. The Company in accepting such Cheque is aware that the Dealer did not have funds in the Account, but expected to sell the goods and make payment. This is also a marketing tool. Subsequently, there may arise disputes in relation to quality rejects / defective goods / bulk discounts, etc. according to practices in trade.

Hence for a "returned Cheque" to be a criminal offence, ought it not be deposited **promptly**, at least within 3 days, and **not within a period of 6 months,** as provided at Section 25(2) (a) of Section 6 of the New Bill ?

Also, such Companies distributing goods, discounts such Cheques with their Bankers, under Facilities named "Cheque Discounting Facility"/"Post Dated Cheque Facility". This would be unknown to the Drawer of the Cheque i.e. the Dealer referred to above. In such circumstance, would such Drawer be guilty of a criminal offence in a civil transaction ?

Banks also sometimes, keep as security/co-lateral "undated Cheques" from parties to whom bank facilities are extended, knowing very well, that there are no funds in the Accounts for such Cheques, the very Bank Account in some instances, being with such Bank, itself.

The above practices in the trade are quite distinct to a person making a prompt payment with a Cheque, holding out that he has money in the Account, which, no doubt, would be cheating. Hence,Section 25 should take cognisance of the foregoing.

3. Unequal Humiliation

Section 5 of the Principal Act, as replaced by Section 4 of Amendment Act 9 of 1994 [also sought to be amended by Section 4 of the New Bill] is to cause humiliation to a Debtor, being reported to his Employer or a Provincial Councillor/Municipal Councillor/ Urban Councillor/Pradeshiya Sabha Member, to the Head. **Significantly, it does not include Members of Parliament !** Discrimination and unequal treatment !

General

1. Banks are not "Sacrosanct"

- *Examples*

1. Collettes in the 1960's – [I assisted in the investigation]. A reputed State Bank and a reputed Foreign Bank were involved. Bank Statements and Bank Confirmations were forged for a period of over 8 to 10 years. Funds misappropriated Rs. 1.9 Mn in the 1960's !

2. Treasury had paid out an estimated sum of Rs. 1,800 Mn. in the 1980's, where Garment Exporters had claimed Export Rebates on "fictitious exports" on fraudulent Airway Bills and certain Banks in collusion with such Exporters claiming Export Rebates from the Treasury, without verifying the receipt of the export proceeds. I had this re-confirmed by former Dep. Secretary to the Treasury, Mr. K. Shanmugalingam, before I came to Court yesterday.

3. A wife signs a joint Personal Guarantee with the husband for an Overdraft Facility for a Company for Rs. 7.5 Mn. The husband is induced/advised by the Bank to buy Non-voting Shares of the Bank, itself, at Rs. 80/-, extending Overdraft of Rs. 10.5 Mn. Subsequently, these Shares sold in the market for around Rs. 12/- to 15/- incurring a loss. Wife judgment debtor in a DR Action, whereas this act by the Bank was not lawful, i.e. to finance/induce the purchase of its own Shares.

4. Guarantor/s whose names were on a Joint and Several Guarantee Bond and who had not placed their signatures thereon, whilst some others had signed, are now judgment Debtors in a DR Action for Rs. 115 Mn.!

5. Section 22 of Act No. 2 of 1990 expressly excludes the recovery of any penalty for delay or default of payment. However, Banks have acted otherwise.

6. A branch of a foreign Bank, acting in collusion with its Customer, has dishonoured accepted Bills of Exchange amounting to US $ 287,000/-. I have reported to the Director Bank Supervision, who is now inquiring. **There is no right of DR Action against the Bank.**

7. The Kotagala transaction packaged by the Merchant Bank and the Thawakkal transaction handled by Vanik Incorporation, were found to be unlawful by law enforcement authorities.

2. Other Institutions

To my knowledge, institution such as IFC, ADB, CDC do not have such DR Action or Parate rights. PSIDC [Private Sector Infrastructure Development Company Ltd.], a wholly owned government Company, which I was instrumental in promoting and establishing in association with the World Bank, for "government to government" funds to be channelled on long-term [20-30 year terms] to private sector projects for economic infra-structure development, have no such rights. Recently, a loan of US $ 25 Mn. was given to the SAGT Port Project on a Mortgage.

3. International Development

The intervention by Your Lordships' Court in the recent Pramuka Bank Case, to give a "window of opportunity" to examine, whether the Bank could be restructured / revived, prior to winding-up, is in line with the procedure formally in place under Chapter 11 in the United States, where all Creditors "are stayed" for consideration of reorganisation, under the supervision of Court, where possible, prior to winding up, since there are many stake holders, such as employees, suppliers, customers.

Under the present DR Action, a winding-up is precipitated and companies are before Lawyers and Courts, whereas ought they not be given a "window of opportunity", as in the Pramuka Case, to consider options for restructuring, ofcourse supervised by Court.

Consider, when Bus Companies are privatised, what the consequence would be, if the Bus Services have to be stopped due to a DR Action, **denying the commuter public transport** ! *[United Airlines has been under Chapter 11]*

4. Central Bank

In the context of the Central Bank Statistics adduced and submissions made at the Hearing by the State Counsel, it is imperative, that I adduce the following before Your Lordships' Court:

1. Annexed are copies of relevant Pages of the Hansard of 8.12.2000, together with the Questions and Answers tabled in Parliament in respect of Central Bank advances made to Finance Companies totalling to Rs. 2,723 Mn., of which Rs. 1,742 Mn. had been to Mercantile Credit Ltd. Of this amount, Rs. 68.2 Mn. had been recovered, of which Rs. 0.54 Mn. from Mercantile Credit Ltd. Therefore, the balance capital outstanding from Mercantile Credit Ltd., would be Rs. 1,741 Mn. The State Counsel pointed out that DR Action right had been given to Finance Companies in the Principal Act . Nevertheless, these monies stand un-recovered.

2. The above funds had been advanced by the Central Bank for the Medium and Long-Term Fund. The Central Bank at that time used to extend re-finance to Banks to re-schedule and re-structure financially sick industries from this Fund. The Central Bank stopped this practice, I believe, consequent to the above Finance Companies fiasco, on IMF / World Bank stipulations.

3. Recently, in a State Bank, where Action is pending in Court, in relation to alleged debts in the region of Rs. 3,000 Mn., an Arbitrator has been caused to be appointed.

4. Recovery of Debts by Banks is not the only issue, but proper risk evaluation in commercial banking transactions. A 5% Bad Debt provisioning is considered an acceptable norm in baking financing to develop business. The costs of Bank operations and the consequent cost of capital to businesses are relevant factors, Banks having profited from the business sector. One of the more important issues is borne out from the recently published accounts of two Banks, i.e. Share Capital in comparison to the Public Deposits.

		As at 30.6.2003 **"A"** Bank.	As at 30.6.2003 **"B"** Bank
		Rs. Mn.	Rs. Mn.
Share Capital	- Voting	550	435
	- Non-Voting	165	*(Subsequently Issued)*
Share Capital & Reserves		6,529	3,971
Public Deposits		93,642	57,008
Total Liabilities		122,145	87,198

5. In the context of concerns of the origin of the Principal Acts, which had been determined by a way of reference by the President. [where determination had to be made within 24 hours, not exceeding 3 days], I communicated by phone and e-mail with Attorney-at-Law, Mr. Chula Bandara, present Ambassador to Poland, who communicated to me, that it was Late Mr. N.U. Jayawardena, who had mooted these 2 Statutes, in the context of the plight Mercantile Credit Ltd., had got into at that time, and that Sampath Bank Ltd., of which he was then Chairman, had also intervened in the determination to support these 2 Statutes, with Mr. Chula Bandara, then Manager Legal, Sampath Bank also appearing in Court.

On 27th day of August 2003

Intervenient-Petitioner