

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

“DEBT RECOVERY (SPECIAL PROVISIONS) (AMENDMENT) BILL

In the matter of an Application under
Article 121(1) of the Constitution

S.C(SD) NO. 23/2003

M. Rohana Wijesena
(Petitioner)

Manel Rajkumar
Kulandan Palaniandy
Nihal Sri Ameresekere
(Intervient-Petitioners)

Hon. Attorney-General
(Respondent)

BEFORE : Sarath N.Silva - Chief Justice
P. Edussuriya - Judge of the Supreme Court
Hector S. Yapa - Judge of the Supreme Court
J.A.N.de Silva - Judge of the Supreme Court
T.B. Weerasuriya - Judge of the Supreme Court

COUNSEL : K. Tiranagama with M.J.A. Hassan, Ms. H. Ratnayake and
Piyasena Dissanayake for the Petitioner.

U. Egalahewa, State Counsel for Attorney-General

M.A.Sumanthiran with Miss P. Bandaranayake for the
Intervient Petitioner.

Nihal Ameresekere Intervient-Petitioner (in person)

Court assembled at 10.30 a.m on 26.8.2003

A Bill titled “Debt Recovery (Special Provisions) (Amendment)” was published in the Government Gazette of 4.7.2003 and was placed on the Order Paper of Parliament. The Petitioner abovenamed invoked the jurisdiction of this Court to determine the question whether the Bill is inconsistent with the

provisions of the Constitution. The other Petitioners have intervened in these proceedings after the original Petitioner validly invoked the jurisdiction of this Court in terms of Article 121(1) of the Constitution.

We have heard submissions of learned Senior State Counsel representing the Hon. Attorney-General, Counsel for the Petitioner and the Interventient Petitioner and the Interventient Petitioner who appeared in person (Mr. Ameresekere).

The Bill seeks to amend the Debt Recovery (Special Provisions) Act No.2 of 1990. Counsel for the Petitioner and the Interventient Petitioner and Mr. Ameresekere submitted that the Bill is inconsistent with Article 12(1) of the Constitution.

The hearing of that matter was taken up together with SC(SD) No. 22/2003 where a similar issue was raised with regard to an inconsistency with Article 12(1) of the Constitution. Counsel and Mr. Ameresekere dealt with both bills together in the respective submissions made by them. The reasoning set out fully SC(SD) 22/2003 will apply with equal force in relation to this matter in respect of the alleged inconsistency with Article 12(1) of the Constitution.

The Debt Recovery (Special Provisions) Act No.2 of 1990 as amended by Act No. 9 of 1994 lays down a special procedure that could be availed of by a lending institution when it institutes an action to recover any debt, due to such institution. The provisions in these Acts in effect constitute amendments to the Civil Procedure Code. The Code lays down two procedures for the recovery of money lent or advanced. The first is the ordinarily applicable regular procedure and the second is the special summary procedure on liquid claims. In an action where the procedure is regular, as stated in the illustration to Section 7, the Defendant is called upon to formally state his answer to the case which is alleged against him before any question of fact is entertained by the Court, or its discretion thereon is in any degree exercised. Where the summary procedure on liquid claims as provided in Sections 703 to 711 is

availed of and summons issue in Form No. 19 of the first schedule, the Defendant cannot appear or defend the action unless he obtains leave from the Court in the manner that is especially provided. Section 703 provides that the summary procedure on liquid claims could be availed of only where the debt arises upon a bill of exchange, promissory note, or cheque or instrument or contract in writing for a liquidated amount of money or on a guarantee in which the claim against the principal debtor arises from such a document. It is of interest to note that in the Civil Procedure Code, enacted in 1889 at a time when there was no guarantee to every person of the equal protection of the law, a distinction is made between the regular procedure and the stricter summary procedure, not on the basis of the identity of the creditor but on the basis of a neutral circumstance namely the availability of evidence in the form of a written commitment to repay the debt.

On the other hand the Debt Recovery (Special Provisions) Act no.2 of 1990 passed at a time when there was a constitutional guarantee to every person of the equal protection of the law, makes a distinction on the basis of the identity of the lender. When such a distinction is made between two parties who have entered into a transaction, placing one party in a more advantageous position and submitting the other to a more stringent procedure, the question arises as to an inconsistency with Article 12(1) of the Constitution. Article 12(1) requires that all persons be equal before the law and entitled to the equal protection of the law. The matters stated in S.D(SC) 22/2003 regarding the application of the equality provision in relation to any law that provides for a special procedure which is seen as harsh, oppressive and unconscionable would apply in relation to this matter as well. The Petitioners concede that this Court has no jurisdiction to examine the constitutionality of the law that has been enacted by Parliament. However, they rely on two particular matters in the Bill that impact on certain limitations that are included in the law that is presently applicable, to minimize its strictness in relation to debtors.

These two matters are as follows :

(i) Clause 2 of the Bill which amends section 2 of Act No. 2 of 1990. The present section 2(2) provides that no action shall be instituted in terms of the special procedure where the sum alleged to be in default is less than Rs. 150,000/-. In the original Act the amount of Rs. 150,000/- was fixed in relation to the principal sum lent or advanced. By the amendment in 1994 the limitation was imposed in relation to the total sum ~~of~~ default which would include the principal and interest. The Bill under consideration reduces this limit to Rs. 50,000/-. The Petitioner contended that since 1990 the value of the Rupee decreased considerably due to inflation and others factors. They argue that if at all, the threshold amount should be increased and not reduced. If the limit is reduced to Rs. 50,000/- it would cover almost any transaction with a lending institution and a wider category of debtors, including those persons who are economically weak would come within the purview of the more stringent special procedure.

(ii) Section 2(i) of the original Act empowers a lending institution to have recourse to the special procedure to recover a debt due to such institution. The term "debt" is defined in Section 30 as amended by Act No. 9 of 1994. In terms of this definition a debt would include any sum of money which is due to a lending institution arising from a transaction had in the course of its business. It is significant that the definition has a clear reservation that a debt "does not include a sum of money owed under a promise or agreement which is not in writing."

In view of this reservation the special procedure could be resorted to only in instances where there is a written promise or agreement on the basis of which the sum due is claimed. This is broadly similar to the provision in the summary procedure on liquid claims. The amendment in clause 8 of the Bill, repeals the definition of the term "debt" in section 30. The substituted definition excludes the words referred to above which limit its applicability to money owed under a promise or agreement which is in writing. The resulting position is that the Court would not have any written evidence of the commitment on the part of the debtor when it issues decree nisi in the first instance.

We are inclined to agree with the submission of the Petitioners that the two amendments referred to above would extend the application of the special procedure which is more stringent from the point of the debtor, to a wider

category of persons and to any transaction had with the lending institutions, even in the absence of a written promise or agreement to pay.

We are further of the view that there ^{is} no rational basis to extend the provisions of the Act that is presently in force in the manner referred to in (i) and (ii) above.

Accordingly we make a determination in terms of Article 123⁽²⁾(b) of the Constitution that the Bill bearing the title "Debt Recovery (Special Provisions) (Amendment)" is inconsistent with Article 12(1) of the Constitution and has to be passed by the special majority required under Article 84(2) of the Constitution.

We have further considered in terms of Article 123(2)(c) whether an amendment could be made to the Bill by which the inconsistency would cease. Accordingly, we make the determination that if clauses 2(1) and 8(1) (in which objectionable provisions referred to above are contained) are deleted, the Bill would cease to be inconsistent with the Constitution.

Sgd.

Sarath N. Silva

Chief Justice

Sgd.

P. Edussuriya

Judge of the Supreme Court

Sgd.

Hector S. Yapa

Judge of the Supreme Court

Sgd.

J.A.N.de Silva

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