DRACONIAN FEATURES OF

DEBT RECOVERY (SPECIAL PROVISIONS) ACT NO. 2 OF 1990
&
SUPREME COURT DETERMINATION ON PROPOSED AMENDMENTS

Debt Recovery (Special Provisions) Act No. 2 of 1990 had been hastily enacted, as mooted by some persons, with an urgent reference to the Supreme Court, without normal publication in the Gazette, thereby having denied a wide spectrum of citizens of the country to have exercised their constitutional right, to have challenged the constitutionality of such proposed law. Such surreptitious haste on such a matter of public interest, raises the question, as to why ?

The draconian nature of the provisions of the Debt Recovery (Special Provisions) Act No. 2 of 1990, as amended by Debt Recovery (Special Provisions) (Amendment) Act No. 9 of 1994, is amply borne out by the fact, that when an *Order Nisi* is taken out on an *ex-parte* Application made by a Bank, behind the back of a Customer, without any intimation to or any knowledge of the Customer, then such Customer is prevented by the provisions of this statute from alienating and/or disposing of any movable or immovable property, upon service of such an *Order Nisi*.

In terms of the provisions of this statute, where any such property is alienated or disposed of, then such alienation or disposal shall have no force or effect in law, and shall be open to seizure, in whomsoever hand such movable or immovable property is in. Violation of such statutory prohibition attracts criminal prosecution, with fines or imprisonment.

In the strict application of the statutory provisions, an ongoing business or a commercial enterprise would have to 'put-up shutters' instantly, and stop the sale of any of its products, upon the service of the *Decree Nisi*, which had been obtained *ex-parte,* with no notice to the Customer; jeopardising also the Customer's banking relationships with its other Banks, thereby precipitating a complete crisis !

Such draconian consequences do not arise, even when a Winding-up Application is made to Court and the Court appoints a Liquidator. Hence, how could the Debt Recovery (Special Provisions) Act No. 2 of 1990, as amended, have imposed such draconian provision, even when a Winding-up Order is made by Court, that too, after due inquiry, the law providing for due and proper administration of on going business operations and for the disposal thereof ?

Debt Recovery (Special Provisions) Act No. 2 of 1990, as amended, appears to have taken into reckoning a debt arising from a single transaction or borrowing, but not a multiplicity of a series of revolving transactions, arising from the financing by Banks of commercial transactions carried on by business enterprises. However, Banks have resorted to the exploitation of the Debt Recovery (Special Provisions) Act No. 2 of 1990, as amended, to seek to recover a series of alleged debts arising from a multiplicity of revolving commercial transactions, which alleged debts invariably would be in dispute, consequent to various charges unilaterally and arbitrarily made by the Banks, and disputed accounting of the complexity of a multiplicity of a series of transactions.

Intriguingly, the Debt Recovery (Special Provisions) Act No. 2 of 1990, as amended, stipulates that the Defendant shall appear and show cause on an early date, having regard to the distance of the Defendant's residence to Court, which in itself reveals the 'medieval nature' of such statute, which specifically also provides that no further time shall be given to a Defendant by Court thereafter for appearing and showing cause against the *Decree Nisi*. Would this not thereby alienate the independence of the judiciary to act justly and reasonably ?

In an instance of a multiplicity of a series of complex commercial transactions, arising from a banking relationship, it would be an impossibility to prepare a correct and comprehensive response, to enable due and proper adjudication by Court, to obtain Leave of Court to file Answer and defend. There cannot be a presumption that the Bank is always sanctimoniously right, whilst the Bank is, in itself, an interested and affected, profit oriented commercial party to the transaction.

Amendments proposed in July 2003 to this draconian Debt Recovery (Special Provisions) Act No. 2 of 1990 were dealt with by a 5-Member Bench of the Supreme Court in SC (SD) No. 23/2003, which was in respect of the "Debt Recovery (Special Provisions) (Amendment) Bill" gazetted and issued on 7th July 2003.The Supreme Court Determination made on 26th August 2003 was announced in Parliament on 23rd September 2003.

The above Bill to further amend the Debt Recovery (Special Provisions) Act No. 2 of 1990, as amended, was taken up for Hearing by a 5-Member Bench of the Supreme Court, together with another Bill that had been proposed at that very time, the "Recovery of Loans by Banks (Special Provisions) (Amendment) Bill" to amend the "Recovery of Loans by Bank (Special Provisions) Act No. 4 of 1990".

The main reasoning and dicta of the Supreme Court is contained in SC (SD) Determination No. 22/2003 in respect of the "Recovery of Loans by Banks (Special Provisions) (Amendment) Bill", pertaining to Recovery of Loans by Bank (Special Provisions) Act No. 4 of 1990 (*parate executions*), and the dicta in the Determination SC (SD) No. 23/2003 in respect of the "Debt Recovery (Special Provisions) (Amendment) Bill", pertaining to Debt Recovery (Special Provisions) Act No. 2 of 1990, as amended, *(DR Actions),* specifically stated that;

> "The reasoning set out fully in 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 Supreme Court in its Determination in SC (SD) 22/2003 deemed such process to be 'harsh, oppressive and unconscionable'; and upheld that 'lenders and borrowers are both parties to a civil transaction', and that "all persons are equal before the law and are entitled to the equal protection of the law" and that "the law certainly cannot strengthen the strong and weaken, the weak".

In SC (SD) No. 22/2003, the Supreme Court dicta, *inter-alia*, included the following:

> "The making of a decision as to a right as against another person and the enforcement of that decision against such person are the two stages of the administration of justice in a Civil matter. These two stages are provided for in Part I of the Civil Procedure Code, extending from Sections 6 to 372."
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> "……H.M. Seervai in his book titled "Constitutional Law of India" has examined the dicta in several judgments of the Indian Supreme Court and stated the conclusion to be drawn from them is as follows :
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> > "The principle therefore is that the Court will strike down harsh, oppressive or unconscionable law prescribing a procedure other than the ordinary procedure" – 4th Edition – Vol. I, page 532. "

> "…… They contend that the amendments in the Bill seek to strengthen the harsh, oppressive and unconscionable provisions already contained in the Act No. 4 of 1990. From this stand point they contend that the provisions of the Bill should be held as being inconsistent with Article 12(1) and 105(1) of the Constitution."

Furthermore, in SC (SD) 23/2003 in respect of the Bill to amend "Debt Recovery Act No. 2 of 1990", the Supreme Court, *inter-alia,* further observed that:

> "Section 703 provides that the summary procedure on liquid claims could be availed of …. . It is of interest to note that in the Civil Procedure Code had been enacted in 1889 at a time when there was no guarantee to every person of the equal protection of the law and has further observe thus -.
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> "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 had 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 SD (SC) 22/2003 regarding the application of the equal protection in relation to 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 Supreme Court in its aforesaid two Determinations dealt only with the two Amending Bills challenged at the Hearing, but during the Hearing observed that, issues raised pertaining to the exclusive jurisdiction of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996, to hear and determine upon alleged claims arising out of commercial transactions, including banking, export or import of merchandise, ought be decided upon at a Hearing of a 'specific commercial case', since the same could not be entertained at the Hearing into the Determination on Parliamentary Bills.

The dicta of the two Determinations by a 5-Judge Bench of the Supreme Court in SC (SD) Nos. 22/2003 and 23/2003, respectively, pertaining to proposed amendments to the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 and the Debt Recovery (Special Provisions) Act No. 2 of 1990, have to be reckoned together and taken cognisance of, inasmuch as the dicta in SC (SD) No. 23/2003 specifically stated;

> "The reasoning set out fully in 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"

It is evident from the dicta of the two Supreme Court Determinations, that the 5-Judge Bench of the Supreme Court has impugned the provisions even of the principal enactments, namely the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 and the Debt Recovery (Special Provisions) Act No. 2 of 1990, *vis-à-vis*, the infringement of the fundamental right to equality enshrined in Article 12 (1) of the Constitution, *viz;*

> "12 (1) All persons are equal before the law and are entitled to the equal protection of the law."

The 5-Judge Bench of the Supreme Court had observed that 'lenders and borrowers are both parties to a civil transaction', and that the 'law certainly cannot strengthen the strong, and weaken, the weak', and that when a 'distinction is made between two such parties, who had 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'.

It is further evident that the 5-Judge Bench of the Supreme Court had deemed that the provisions of the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 and the Debt Recovery (Special Provisions) Act No. 2 of 1990 are 'harsh, oppressive and unconscionable' and that in such an instance, 'the principle is that the Court will strike down such procedure'.

In the instance of the provisions of the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990, the 5-Judge Bench of the Supreme Court had additionally deemed, that the provisions therein 'deny access to justice as provided in Article 105 (1) of the Constitution, and that this amounts to a subversion of due process of law'; observing that;

> "Therefore it would be inconsistent with the Rule of Law and the requirements of our Constitution as to the administration of justice to invest in any person the power to decide in respect of his rights as against another, and further to empower that person who so decides to enforce his unilateral decision by the sale of property of such other person".
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> "The making of a decision as to a right as against another person and the enforcement of that decision against such person are the two stages of the administration of justice in a Civil matter."

Since the dicta of the two Determinations by a 5-Judge Bench of the Supreme Court in SC (SD) Nos. 22/2003 and 23/2003, respectively, pertaining to proposed amendments to the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 and the Debt Recovery (Special Provisions) Act No. 2 of 1990, even impugned the provisions of the said principle enactments, would it not therefore warrant a re-examination of the draconian provisions, violative of the Constitution, in the said two statutes, and new statutes enacted heeding the dicta of the two Supreme Court Determinations ? Is this not the bounden duty cast upon the legislature and the relevant authorities, who are responsible for the mooting and formulation of such enactments ?

In addition, Chapter VI of the Constitution stipulates the Directive Principles of State Policy and Fundamental Duties. In a recent Judgment in SC (FR) Applications Nos. 10/2007 to 13/2007, the Supreme Court held that;

> "The limitation in Article 29 which states that the provisions of Chapter VI are not justiciable would not in my view be a bar against the use of these provisions to interpret other provisions of the Constitution. Article 27 of Chapter VI lays down that the 'Directive Principles of State Policy' contained therein shall guide "Parliament, the President and the Cabinet of Ministers in the enactment of laws and the government of Sri Lanka for the establishment of a just and free society." Hence the restriction added at the end in Article 29 should not detract from the noble aspirations and objectives contained in the Directive Principles of State Policy, lest they become as illusive as a mirage in the desert."

- A*ppeared in person, at the Supreme Court Hearing, to bring out the foregoing draconian provisions of the two statutes, violative also of the Constitution*