DRACONIAN FEATURES OF

RECOVERY OF LOANS BY BANKS (SPECIAL PROVISIONS) ACT NO. 4 OF 1990
&
SUPREME COURT DETERMINATION ON PROPOSED AMENDMENTS

Recovery of Loans by Banks (Special Provisions) Act No. 4 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 Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990, as amended by Recovery of Loans by Banks (Special Provisions) (Amendment) Act No. 24 of 1995, is amply borne out by the facts, that a Bank has the prerogative right to unilaterally pass a Resolution of its Board of Directors, thereby vesting the Bank with power and authority to enter upon any immovable property mortgaged to the Bank, and further vesting the Bank with power and authority to sell such property by public auction.

Such Resolution is passed behind the back of a Customer, without any intimation to or knowledge of the Customer, the Customer being notified only after the Resolution has been passed, as a *fait accompli*. This process is known as *parate-execution*.

In terms of the provisions of statute, where any such property is taken possession of, it is auctioned, in reality at a 'mock auction', whereat the Bank, itself, invariably purchases the property at a ridiculously nominal sum, in total disregard to the 'real market value' of such property, thereby making a mockery of the entire process, oppressive of the rights of the Customer, alienating the rights of an owner, who is not a borrower.

Thereafter, the Bank proceeds to sell such property, invariably intriguingly by means of 'private treaty', dubiously devoid of transparency and any competition, often providing the prospective buyer, with funds, as long-term loans, to finance such very purchase, whereas in such scenario, the original Customer could have been afforded a re-schedulement of the allegedly defaulted loan on similar terms.

Ironically, the statute also vests the right in the Banks to issue a certificate of sale, whereby any right, title and interest of the borrower to and in the property shall vest with the purchaser, whereas right, title and interest to and in the property, could be that of a third party owner, who had mortgaged the property for the borrowings of the Customer.

Furthermore, such a prospective buyer of such property from a Bank has a right to make an Application by way of summary procedure, in accordance with the provisions of the Civil Procedure Code, to obtain an Order from the District Court having jurisdiction, for delivery of possession of that property, upon the production of the certificate of sale issued by the Bank.

The foregoing action by a Bank would be in circumstances, when a Bank deems, that any sum of money due on any loan is in default by a Customer, whether on account of principal of any loan or of interest or of both.

Ironically, though both a 'lender and a borrower are equal parties to a civil transaction', by this statute, one party, namely the Bank, is bestowed with the right to be person making a claim, as a 'Claimant', of a allegedly defaulted debt, which could be very well be in dispute, and thereafter to unilaterally decide that it is in fact in default in a sum arbitrarily and unilaterally so decided upon, usurping the role of a 'Judge', and thereafter to take possession of and sell, exercising the role of an 'Executioner', whilst during the entire process, the Customer, without any right, is expected to be a mere helpless onlooker !

Ought not Banks have been first required to prove such a debt in a Court of law, prior to pursuing the right to recover property mortgaged in respect of an alleged debt, particularly through such procedure of *parate-execution* ?

The foregoing process is outside the judicial process established by the Constitution, by the exercise of the judicial power of the people, enshrined in the Constitution, as a component of the sovereignty of the People.

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. The provisions of the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990, as amended, have been resorted to by Banks, not only in respect of a debt arising from a single transaction or borrowing, but also where there have been a multiplicity of a series of revolving transactions, arising from the financing of commercial transactions, carried on by business enterprises, which financing have been so afforded by a Bank on the overall security of a mortgaged property.

Banks have resorted to the exploitation of the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990, as amended, to seek to recover a series of commercial revolving alleged debts, which invariably would be in dispute, consequent to various charges unilaterally made by Banks, and disputed accounting of the complexity of a multiplicity of a series of transactions.

Intriguingly, the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990, as amended, recognises only the Customer, who is the borrower, and not the owner of a property mortgaged, where the Customer and the owner are two different parties, and any excess above the alleged debts claimed, from the proceeds realised on the sale of such mortgaged property are required by the statute to be paid to the borrower, and not to the real owner, who is not even entitled to receive notice, and is kept totally in the dark, and would be blissfully unaware of the entire process affecting such owner's property !

Amendments proposed in July 2003 to this draconian Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 were dealt with by a 5-Member Bench of the Supreme Court in SC (SD) No. 22/2003, which was in respect of the "Recovery of Loans by Banks (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 Recovery of Loans by Banks (Special Provisions) Act No. 4 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 "Debt Recovery (Special Provisions) (Amendment) Bill" to amend the "Debt Recovery (Special Provisions) Act No. 2 of 1990".

The Supreme Court in its Determination 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"; and that through a process of *"parate execution",* the mortgagor is not only denied equality guaranteed under Article 12 (1) of the Constitution, but also denied access to justice, as provided in Article 105 (1) of the Constitution; and that "this amounts to a subversion of due process of law"
The Supreme Court in its Determination has *inter-alia* observed;

> "…….. This necessarily involves a finding by the Court that the debtor is in default or re-payment of money that had been lent or advanced upon the security of the mortgage."
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> "….. Article 4 of the Constitution which lays down the manner in which the sovereignty of the People shall be exercised and enjoyed, specifically provides in sub-paragraph (c) that the judicial power of the People shall be exercised by Parliament through Courts and institutions, created and established or recognized by the Constitution, or created and established by law. The essential concomitant of the exercise of judicial power is set out succinctly and effectively in Article 105(1) of the Constitution which reads as follows :
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> > "Subject to the provisions of the Constitution, the institutions for the administration of justice which protect, vindicate and enforce the rights of the People shall be –
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> > (a) the Supreme Court of the Republic of Sri Lanka,
> > (b) the Court of Appeal of the Republic of Sri Lanka,
> > (c) the High Court of the Republic of Sri Lanka and such other Courts of First Instance, tribunals or such institutions as Parliament may from to time ordain and establish."
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> "…….. This basically, is the Rule of Law, on which our Constitution is based. 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. 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. "
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> "…… 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."

"….. Thus the resulting effect is that, on the one hand the Bank could proceed to a seizure and sale of the property without the intervention of Court and on the other, the borrower or mortgagor cannot have recourse to even a regular action to dispute the course of action taken by the Bank."

"It is clear from the foregoing analysis, that we have to uphold the grounds urged by the Petitioner and the Intervenient Petitioners ……. Lenders and borrowers are both parties to a civil transaction. They belong to a single class of persons in the perspective of Article 12(1) of the Constitution which firmly provide that "all persons are equal before the law and are entitled to the equal protection of the law." There may be inherent strengths and weaknesses in the parties to a transaction or in any relationship. Whilst the law may by affirmative action seek to remedy such inherent inequality, the law certainly cannot strengthen the strong and weaken, the weak. Such a course of action is manifest in the amendment which not only denies to a mortgagor the equality guaranteed by Article 12(1) but also denies to him access to justice as provided in Article 105(1). This amounts to a subversion of the due process of law."

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*