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Fresh challenge against SC Special Determination on Expropriation Bill

■ Nihal Sri Ameresekere charges determination violates Article 123 (3) of the Constitution pertaining to Urgent Bills

■ Application seeks to illustrate judicial bias and disqualification

■ Says President had a keen interest in the Urgent Bill

By DHARISHA BASTIANS

PUBLIC interest litigator Nihal Sri Ameresekere filed a landmark application in the Supreme Court yesterday seeking to have the Court's determination pertaining to the Government's controversial Expropriation Act reviewed and re-examined

and declared null and void and having no force in law.

The Under Performing and Under Utilised Assets Act, which allows the Government to expropriate private enterprises arbitrarily, was passed into law on 11 November 2011, after it was submitted to the Supreme Court for a special determi-

nation as an Urgent Bill on 20 October 2011.

The Petitioner prays the court to clarify whether the determination made by a three Judge Supreme Court bench on 24 October 2011 on the constitutionality of the Under Performing and Under Utilised Assets Act has violated the 'deeming'



Nihal Sri Ameresekere
provision of Article 123 (3) of the Constitution referring to Urgent Bills, whether it is constitutionally null

and void and of no force in law and if it has been made under circumstances of perceived judicial bias and disqualification.

Ameresekere has cited the Attorney General and Speaker of Parliament Chamal Rajapaksa as respondents in the case.

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Fresh challenge...

The Petitioner argues that a Special Determination on an Urgent Bill submitted under Article 122 of the Constitution is governed by Article 123 (3) of the Constitution which states: "If the Supreme Court entertains a doubt it shall be deemed to have been determined that the Bill or such provision of the Bill is inconsistent with the Constitution."

"Thereby the Supreme Court stands debarred from determining otherwise, the Supreme Court had no jurisdiction to make any determination ultra-vires the deeming provision of Article 123 (3) of the Constitution and if so made, such determination as in this instance is constitutionally ab-initio null and void and of no force or avail in law," the Petitioner's application states.

The petitioner says Article 123 (3) is an inbuilt safeguard and check enshrined within the Constitution regarding Urgent Bills. "It is constitutionally mandated that no doubt, whatsoever, can be entertained by the Supreme Court on an Urgent Bill," the Petitioner's application states.

The application cites several clauses of the Supreme Court's determination on the Underperforming and Under Utilised Assets bill which reveals that several doubts and/or questions had been entertained by the Supreme Court.

In his application the Petitioner states that the case is a catastrophic situation warranting an extraordinary, precedent-setting remedy to both rectify the current Constitutional violation pertaining to the Expropriation Act and stop such legislation under the guise of an Urgent Bill from being attempted to be enacted in the future.

Citing the five Judge bench ruling on the Jeyaraj Fernandopulle Vs. Premachandra De Silva and Others case in Supreme Court, Ameresekere argues that the Supreme Court has inherent powers to correct decisions made per incuriam or 'through lack of care'.

"A decision will be regarded as given per incuriam if it was in ignorance of some inconsistent statute or binding decision... an order made on wrong facts given to the prejudice of a party will be set aside by way of remedying the injustice caused," the ruling cited in the application states.

In the application the Petitioner also cites several illustrations of perceived judicial bias and disqualification as also warranting the rescinding or vacating of the Court's special determination on the Expropriation Act.

Specifically the Petitioner refers to the three Judges making the determination, Chief Justice Shirani Bandaranayake, Justice P.A. Ratnayake and Justice Chandra Ekanayake. The Application refers to the appointment of Pradeep Kariyawasam, husband of the Chief Justice, as Chairman of a State bank, the appointment of Tissa Ekanayake, husband of Justice Chandra Ekanayake, as Parliamentary Ombudsman, and illustrates that President Mahinda Rajapaksa as the Minister of Finance was a keenly interested party in the matter of the Urgent Bill to Expropriate Under Performing and Under Utilised Assets.

"Circumstances and relationships could or may have subsequently changed but what is of relevance are the circumstances and relationships which subsisted prior to and at the relevant time the impugned Special determination was made," the petitioner says.

In his application, Ameresekere also makes reference to the fact that the Expropriation Act was ad hominem legislation inconsistent with the Constitution because it unilaterally targeted selection of specifically named parties without any transparent survey for identification and devoid any criteria of transparent evaluation.

"The arbitrarily and unilaterally targeted parties have been denied natural justice and access to the judiciary in terms of Article 105 of the Constitution," the application states.

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Fresh...

"The aforesaid Special Determination of 24.10.2011 well and truly glaringly reveals that several doubts and/or questions had in fact been entertained by the Supreme Court, as per 'excerpts' from the said Special Determination of 24.10.2011 given below with Page and Line references: (Emphasis added)

Page 3 Line 2 and 3 - "However it had been identified that there are Underutilised Assets and Underperforming Enterprises" - There was no evidential proof and data before the Supreme Court for them to have been so identified - thus would this not give rise to an inherent doubt?

Page 4 Lines 1 and 2 - "It is clearly seen that the said Bill deals with Under-utilised Assets as well as Underperforming Enterprises" - This is a mere statement without any evidential proof thereof - thus would this not give rise to an inherent doubt?

Page 5 Lines 2 and 3 - "A question arose as to whether such classification would make the said provisions inconsistent with Article 12(1) of the Constitution" - a clear instance of a doubt having been entertained

Page 7 Line 10 - "It is evident that there is a clear rational nexus" - There was no evidential proof and data for such inference - thus would this not give rise to an inherent doubt?

Page 7 Lines 16 & 17 - "Even if there had been any inconsistency, the restriction placed in by the Provisions of the Bill would be permitted in terms of Article 15(7)" - a clear instance of a doubt having been entertained

Page 8 Lines 8 & 9 - "contains provisions in meeting the just requirements of the general welfare of a democratic society, the restriction, if any envisaged" - There was no evidential proof and data for such justification, and furthermore a clear instance of a doubt having been entertained, with the word 'restriction, if any'?

Page 8 Line 21 - "Question that arises therefrom is" - entertainment that there was a question i.e. a doubt, as given in the Citation

Page 9 Line 12 - "referred to the test which drew attention" - inherent in such dicta that

there was a test, by implication a doubt had been entertained which had to be subject to a test

Page 10 Line 16 - "It is apparent" - This demonstrates that there had been no certainty but a mere appearance, which by implication is an admission of the entertainment of an inherent uncertainty / doubt

Page 11 Line 6 - "It is apparent" - This demonstrates that there had been no certainty but a mere appearance, which by implication is an admission of the entertainment of an inherent uncertainty / doubt

Page 13 Lines 22 & 23 - "It is also to be noted that the vesting would take place for a public purpose" - There is no specification of the 'public purpose' without any uncertainty, and by implication would this not give rise to an uncertainty / doubt, whereas Article 157 of the Constitution stipulates only 'national security' and not 'public purpose'?"

"In the face of the foregoing doubts which had been entertained by the Supreme Court, the aforesaid 'Urgent Bill' and/or the provisions thereof ipso facto was deemed to have been determined and stood and stands to be inconsistent with the Constitution in terms of the mandatorily deeming provision of Article 123(3) of the Constitution, with the Supreme Court having been debarred and/or estopped from having determining otherwise, without having any jurisdiction to have done so.

"Nevertheless, notwithstanding such estoppel, the Supreme Court assisted by a Deputy Solicitor General had instead proceeded to answer such doubts and/or questions, which had been entertained by the Supreme Court, without any jurisdiction to have done so in terms of Article 123(3) of the Constitution; whilst the very entertainment of a doubt renders the very provisions of the 'Urgent Bill' or the entirety of the 'Urgent Bill' upon which such doubts had been entertained, ipso facto, to have been determined to be inconsistent with the Constitution, as per the constitutionally mandatorily deeming provision in Article 123(3) of the Constitution."

Fresh challenge in SC against expropriation law



Enterprises and Underutilized Assets' was inconsistent with the constitution, and although the Supreme Court had determined on October 24, 2011 that the said piece of legislature was not unconstitutional paving the way for the urgent bill to be passed in Parliament, the Supreme Court had raised several doubts on the bill, which according to the Constitution could be challenged.

Ameresekere detailing the manner in which the Supreme Court opinion was sought and later passed in Parliament said "the citizens of the country were 'shut out' and denied their constitutional rights by such procedure."

Citing Article 123(3) of the Constitution, Ameresekere said the bill could be deemed null and void if the Supreme Court entertained any doubts regarding the said bill.

Referring to the Supreme Court determination issued on October 24, 2011 Ameresekere quoted several doubts raised by the Supreme Court with reference to the expropriation bill:

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Public interest activist Nihal Sri Ameresekere yesterday (18) filed an application in the Supreme Court seeking to declare null and void the expropriation law enacted by Parliament last year.

In his petition, Ameresekere argued that the bill titled 'An Act to provide for the vesting in the Government identified Underperforming



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Nihal Sri in a new fight

Files fresh petition against Expropriation Act

Well known good governance activist and public-spirited accountant, Nihal Sri Ameresekere, made a fresh application last morning to the Supreme Court, seeking to have the 'Revival of the Underperforming Enterprises and Underutilized Assets or the infamous Expropriation Bill declared ab-initio null and void and of no force or avail in law'.

Ameresekere made the application under Article 122(1) of the Constitution, seeking the exercise of the inherent powers of the Supreme Court, to have the Special Determination made by a three Judge Bench on 24 October 2011 on the Bill, under and in terms of Article 122, read with Article 123(3), of the Constitution, to be re-viewed and re-examined.

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Nihal...

The applicant sought a ruling from Court as to whether the said Special Determination 'has been made *per-incuriam*, without jurisdiction, *ultra-vires* the deeming provision in Article 123(3) of the Constitution, was / is constitutionally ab-initio null and void and of no force and avail in law, and has been made under circumstances of 'perceived judicial bias and disqualification' and if it be so, to declare the Special Determination of 24.10.2011 to be *ab-initio* a nullity.

The Attorney General along with Chamal Rajapaksa, MP and Speaker of Parliament were cited as Respondents.

Applicant averred that, had the Supreme Court entertained a doubt, on this instant 'Urgent Bill', then on the very entertainment of such doubt, constitutionally, it is deemed to have been determined that the instant 'Urgent Bill' or any provision thereof was *ipso facto* inconsistent with the Constitution.

Upon the entertainment of a doubt by the Supreme Court, Article 123(3) of the Constitution deems the 'Urgent Bill' or any provision thereof to have been determined to be inconsistent with the Constitution.