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

***A Bill titled - "An Act to provide for the vesting in the Government identified Underperforming Enterprises and Underutilized Assets" (Printed on Bill as – "Revival of Underperforming Enterprises and Underutilized Assets")***

***In the matter of an Application under Article 122(1) of the Constitution***

**SC Special Determination No. 02/2011**

AND NOW

***In the matter of an Application to the Supreme Court seeking the exercise of its inherent powers to have the Determination made on the above titled Bill by a 3-Member Bench of the Supreme Court sitting on 24.10.2011 under and in terms of Article 122, read with Article 123, of the Constitution of the Republic of Sri Lanka, to be re-examined and determined upon on the constitutionality of the provisions of the said Bill by a fuller Bench of the Supreme Court, as a matter of general and public importance, in terms of Article 118, read with Article 132 of the Constitution***

Nihal Sri Ameresekere
167/4, Sri Vipulasena Mawatha
Colombo 10.

PETITIONER

Vs.

1. Hon. Attorney General
   Attorneys General's Department,
   Colombo 12.

2. Hon. Chamal Rajapaksa, M.P.
   Speaker of Parliament of Sri Lanka
   Parliament of Sri Lanka
   Sri Jayawardenepura
   Kotte.

RESPONDENTS

**TO: HER LADYSHIP THE CHIEF JUSTICE AND THEIR LORDSHIPS & LADYSHIPS THE OTHER HONOURABLE JUDGES OF THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA**

On this 17th day of November 2011

The **Petition** of the **Petitioner** above-named, appearing in person, states as follows:

1. a) The Petitioner is a citizen of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to as the "**country**") and is presenting this Petition on his behalf and for and on behalf of the general public, in the national and public interest, in upholding and defending the Constitution of the country and the Rule of Law, the very basis of the Constitution, wherein it is enshrined that the sovereignty is in the people, and is *inalienable*

*A true photostat copy of the National Identity Card of the Petitioner is annexed marked **"Z1",** pleaded as part and parcel hereof.*

b) Notwithstanding that a 7-Judge Bench of Your Ladyships' Court had determined in October 2002 that no body established under the Constitution had any '*unfettered powers'*, the Cabinet of Ministers, having acted arbitrarily, had referred the aforementioned Bill, *purportedly* as an 'Urgent Bill', under and in terms of Article 122 (1) of the Constitution, and consequently, Your Ladyships' Court sitting on 24.10.2011 had made a Determination, assisted only by a Deputy Solicitor General, representing the Attorney General.

c) Such procedure is solely for an urgent *exception* and not the rule, and hence such *intriguingly* questionable and hasty procedure, had been caused to be adopted, thereby intentionally keeping the people, whose sovereignty is *inalienable*, in the dark, and thereby precluding the people from being heard by Your Ladyships' Court, in making the aforesaid Determination, *ironically* exercising the judicial power of the people, and of *none other*.

d) Even under the aforesaid procedure, the Petitioner had a right to be heard. *Hence this Application*.

e) Even thereafter, the aforesaid Determination of Your Ladyships' Court had been tabled by the Hon. Speaker in the Parliament of Sri Lanka only on 8.11.2011, the day before the Bill was debated in Parliament.

*True copies of the aforesaid Determination of 24.10.2011 tabled on 8.11.2011 in Parliament and the Bill are annexed respectively marked **"Z2(a)"** and **"Z2(b)",** pleaded as part and parcel hereof.*

f) The Petitioner received copies of the aforesaid two Documents only on 9.11.2011, and as advised, promptly on 14.11.2011 filed Fundamental Rights Application No. 534/2011 in Your Ladyships' Court. The averments contained in the Petition, together with the documents marked therewith, in the said Fundamental Rights Application No. 534/2011 are reiterated **to be read and construed as part and parcel of this Petition, <u>and are not re-produced to avoid repetition</u>**.

*True copies of the aforesaid Petition dated 14.11.2011 in the Fundamental Rights Application No. 534/2011, the Petition dated 8.11.2011 for re-arrangement and compromise of HDL (Hotel Developers (Lanka) PLC) in HC (Civil) W.P. Case No. 52/2011/CO, and the Petition dated 17.11.2006 to Wind-up HDL in D.C. Colombo Case No. 217/CO, are annexed respectively marked **"Z3(a)", "Z3(b)" and "Z3(c)",** pleaded as part and parcel hereof (The Petitions have been marked without the Documents attached thereto, to avoid making the record voluminous, and should Your Ladyships' Court so require, copies of Documents would be tendered).*

2. a) The Petitioner within the stipulated period of 7 days challenged, under and in terms of Article 121 of the Constitution, the Inland Revenue (Special Provisions) (Amendment) Bill gazetted on 11.7.2003, and a 3 Judge Bench of Your Ladyships' Court in SC (SD) Nos. 20 & 21/2003 made the Determination on 7.8.2003, that ***none of the provisions of the Bill were inconsistent with any provisions of the Constitution***.

b) Subsequently, the Petitioner made an Application for a re-examination and determination by a Fuller Bench of Your Ladyships' Court, and the said Application was referred to Their Lordships the 3 Judges, who delivered the aforesaid Determination, who had minuted the view that '***no useful purpose would be served in a further hearing***'.

c) Consequently, the Petitioner having persuaded the then President to refer the same under Article 129 of the Constitution for an Opinion of Your Ladyships' Court, *whereat the Petitioner appearing in person made extensive submissions*, the foregoing Determination by the 3 Judge Bench, *that none of the provisions of the Bill were inconsistent with the Constitution* **was completely overturned,** with a 5 Judge Bench of Your Ladyships' Court, presided by then Chief Justice Sarath N. Silva, and comprising Your Ladyship, Chief Justice Shirani A Bandaranayake, and Their Lordships Justices H.S. Yapa, J.A. de Silva and Nihal Jayasinghe, pronouncing the provisions of the said Bill, *inter-alia*, to be

- ***inimical to the rule of law, and***

- ***to have violated the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, and***

- ***that amnesties had been granted to those who had contravened laws and thereby defrauded public revenue causing extensive loss to the State..***

d) On the wave of public opinion on the foregoing, the People's Alliance having won the General Election of April 2004, promptly presented a Bill to repeal the obnoxious features of the foregoing perverse law. A 3 Judge Bench of Your Ladyships' Court in SC (SD) No. 26 of 2004 endorsed the aforesaid castigations made by the 5 Judge Bench.

*True copies of the Opinion dated 17.3.2004 in SC Reference No. 1/2004 pronounced by the 5 Judge Bench of Your Ladyships Court, Determination dated 7.8.2003 in SC (SD) Nos. 20 & 21/2003 by a 3 Judge Bench of Your Ladyships' Court, and Determination dated 23.8.2004 in SC (SD) No. 26 of 2004 by 3 Judge Bench of Your Ladyships' Court are annexed marked* ***"Z4(a)", "Z4(b)"*** *and* ***"Z4(c)",*** *pleaded as part and parcel hereof*

3 a) In terms of the Constitution, more particularly Articles 79, 82 (1) and 82 (3), it is the *onus* of the Hon. Speaker to ensure that Bills presented to Parliament are in conformity with the constitutional mandates, procedures, limitations and prohibitions, and are within the scope of the *'limited legislative power'* conferred by the People on Parliament *to be exercised in trust on their behalf, without the alienation of their sovereignty, which is inalienable* (Article 3, read with Article 4 (a)), prior to Bills being placed on the Order Paper of Parliament, and/or proceeded with and/or certified.

b) Article 77 (1) of the Constitution stipulates that –

> "It is the duty of the Attorney-General to examine every Bill for any contravention of the requirements of paragraphs (1) and (2) of Article 82 and for any provision which cannot be validly passed except by the special majority prescribed by the Constitution; …"

4. The Petitioner reliably understands that, the Hon. Speaker has not yet endorsed his Certificate on the aforesaid Bill **Z2(b),** in terms of Article 79 of the Constitution certifying that it had been "*duly passed by Parliament*", and thus the re-examination of the above Determination **Z2(a)** *vis-à-vis* the Bill **Z2(b)** and the **invocation of the jurisdiction of Your Ladyships' Court therefor is, in any event not *ousted* under Article 80 (3) of the Constitution** – *viz*:

> **"**80(3) Where a Bill becomes law upon the certificate of the President or the Speaker, as the case may be, being endorsed thereon, no court or tribunal shall inquire into, pronounce upon or in any manner call in question the validity of such Act on any ground whatsoever"

5. The Petitioner very respectfully draws the attention of Your Ladyships' Court to the following, among other grounds, to be urged at the Hearing (*reference to the Bill is **Z2(b)***):

   a) The facts pertaining to Hotel Developers Lanka PLC (HDL) in Schedule 1 of the Bill had not been correctly disclosed to Your Ladyships' Court, whilst material facts had been suppressed, in seeking a Determination by the Attorney General, who had appeared to represent the State in a Winding-up Application of HDL viz **Z3(c)** .

   b) Thereby, the Attorney General has misled Your Ladyships' Court to state in the Determination that the Bill contains no provisions for the exercise of the judicial power or interference in exercise of judicial power in relation to 'underperforming enterprise' (HDL), whilst in actual fact judicial power was being exercised, which however was being stultified by the Attorney General.

   c) Your Ladyships' Court citing of an Indian Judgment has correctly stated, that the classification must be on *intelligible differentia* for specified groups. Admittedly there has not been any *intelligible differentia*, whatsoever, placed before Your Ladyships' Court by the Attorney General**. <u>What had been placed is a mere list of names and not</u>** *intelligible differentia* for specified groups.

   d) The Schedules to the Bill are ***ad hominem*** and had been selected without due process, procedure and/or criteria. The Privy Council in Liyanage v. Queen (*PC Appeal No. 23 of 1965*) held such to be ***ultra-vires*** **and invalid**. *This was even before the guarantee of equality before the law and equal protection before the law being enshrined in the 1978 Constitution.*

   e) Your Ladyships' Court in SC (FR) 158/2007 and 209/2007 annulled two perverse privatisations taking cognisance of the submissions made by the Petitioner, **<u>having heard the affected parties</u>**; *and subsequently even raising the question, as to whether all relevant documents had adduced before Your Ladyships' Court* ?

   f) The exception in Article 122 of the Constitution cannot be abused, as a general norm to *alienate* the sovereignty of the people, which is *inalienable*, since no body established under the Constitution has *unfettered* power - *vide* 'dicta' of a 7-Judge Bench of Your Ladyships' Court

   g) The Directive Principles of State Policy and the Fundamental Duties in Articles 27 and 28 must be taken in its entirety and not in isolation. For instance attention is drawn to the following:

      Articles 27( 2) - The State is pledged to establish in Sri Lanka a democratic socialist society, the objectives of which include-

      (a) the full realization of the fundamental rights and freedoms of all persons;

(f) the establishment of a just social order in which the means of production, distribution and exchange are not concentrated and centralised in the State, State agencies or in the hands of a privileged few, but are dispersed among, and owned by, all the People of Sri Lanka;

Article 27 (4) The State shall strengthen and broaden the democratic structure of government and the democratic rights of the People by decentralising the administration and by affording all possible opportunities to the People to participate at every level in national life and in government.

Article 27 (6) The State shall ensure equality of opportunity to citizens, so that no citizen shall suffer any disability on the ground of race, religion, language, caste, sex, political opinion or occupation.

h) In SC (FR) 209/2007 Your Ladyships' Court citing the relevant constitutional provisions therein exhaustively spelt out and adjudicated that Land was a matter, which came within the powers of a Provincial Council and was governed by the stipulations in Article 154 of the Constitution. Hence, the question arises, as to whether a Bill could be presented containing provisions infringing upon Article 154 of the Constitution and tantamounting to contravention thereof ?

i) The Bill is **harsh, oppressive and unconscionable law**, *prescribing a procedure other than the ordinary procedure,* **which ought have been struck down -** *vide* 'dicta' of a 5-Judge Bench of Your Ladyships' Court *viz* – **Z3(b)**

j) The Bill denies the right to access to the judiciary in terms of Article 105 of the Constitution

k) i ) Article 157 of the Constitution stipulates that – '*otherwise than in the interest* of national security **- no written law shall be enacted or made and no executive or administrative action shall be taken**, **in contravention of the provisions of treaty or agreement**'**.**

ii) HDL has foreign Japanese investors known to the Attorney General. **There is an Investment Promotion & Protection Agreement between Sri Lanka and Japan signed on 1.3.1982 and ratified on 7.7.1982, having been approved by the Cabinet of Ministers on 21.10.1991 and presented to the Parliament of Sri Lanka on 9.9.1982 by the Foreign Minister -** *vide* Hansard Column 853 of 9.9.1982

*True copy of the aforesaid Investment Promotion & Protection Agreement between Sri Lanka and Japan is annexed marked* ***"Z5",*** *pleaded as part and parcel hereof.*

l) Therefore, the impugned Bill tantamounts to the suspension and/or amendment of the Constitution of the country and could not be passed by simple majority of Parliament or otherwise.

m) The Bill has been passed by a simple majority of Parliament ***solely*** on the premise of the Determination **made *per-incuriam*** by Your Ladyships' Court, based on the 'representations' made to Your Ladyships' Court by the Attorney General, *with the people having been precluded from being heard.*

n) **The Bill is not yet law, and exceptional circumstances would warrant exceptional remedies to defend and uphold the Constitution and to enforce the Rule of Law, the very basis of the Constitution , which is under oath to be upheld and defended**.

o) **Your Ladyships' Court is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the Rule of Law meaningful and effective** - *vide* **'**dicta' of a 7-Judge Bench of Your Ladyships' Court

6. In the premises the Petitioner very respectfully states that;

a) he has good, sufficient and valid right , reasons and grounds to invoke the jurisdiction of Your Ladyships' Court seeking to have the Determination **("Z2(a)") made *per-incuriam*** re-examined, reviewed and determined upon by a Fuller Bench of Your Ladyships' Court. (*The Petitioner respectfully reserve the right to tender any further requisite documents to Your Ladyships' Court as may be necessary*)

b) this matter is of utmost general and public importance warranting re-examination and a determination by a Fuller Bench of Your Ladyships' Court, which is vested with the exclusive jurisdiction in respect of constitutional matters in terms of Article 118 of the Constitution.

c) in so urging Your Ladyships' Court, the Petitioner cites the *dicta* by Bhagawati J in *State of Rajasthan v Union of India, AIR 1977 SC 1361, 1413;*

> **"…. So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. In deed, it would be its constitutional obligation to do so …. No one howsoever highly placed and no authority howsoever lofty can claim that it shall be the sole judge of the extent of its power under the Constitution or whether its action is within the confines of such power laid down by the Constitution. This Court is the ultimate interpreter of the Constitution …. It is for this Court to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the Rule of Law …."**

d) Your Ladyships' Court in S.C. FR No. 431/2001 has held thus;

> **"It is now firmly established that all powers and discretions conferred upon public authorities and functionaries are held upon trust for the public, to be used reasonably, in good faith, and upon lawful and relevant grounds of public interest; that they are not unfettered, absolute or unreviewable; and that the legality and propriety of their exercise must be judged by reference to the purposes for which they were conferred"**

and held that – 'Your Ladyships' Court **did have jurisdiction** to consider whether a Proclamation and the Referendum Proposal was in conformity with the Constitution ….' *(Emphasis added)*

e) In SC Appeals 33 & 34 of 1992 Your Ladyships' Court, *inter-alia*, ***succinctly*** pointed out – *viz* (CLR *(Comm) 1992 @ 636*)

> "it could not entirely be a matter of indifference to the Government ....."

The foregoing well and truly demonstrated the true independence of the judiciary, *as a separate organ of the State*, and its right to state that - '***the Government can do no wrong'***

f) On assumption of Office, former Chief Justice J.A.N. De Silva, in his *Ceremonial Address*, though not a Buddhist, *adverted* to the following *Dhammapada*.

"Not by passing arbitrary judgments does a man become just; a wise man is he who investigates both right and wrong"

"He who does not judge others arbitrarily, but passes judgment impartially according to the truth, that sagacious man is a guardian of law and is called just"

7. The Affidavit of the Petitioner in support of the foregoing averments is annexed hereto.

**WHEREFORE** the Petitioner respectfully prays that Your Ladyships' Court be pleased to:

a) Constitute a Fuller Bench of Your Ladyships' Court to hear and determine upon this Application

b) Set aside the Determination **Z2(a)** made by a 3 Member Bench of Your Ladyships' Court and have the said Bill **Z2(b)** reviewed, re-examined and determined by a Fuller Bench, and forward such Determination to the Hon. Speaker of Parliament

c) determine that one or more of the provisions of the Bill **Z2(b)** is / are inconsistent with the provisions of the Constitution and requires / require a special majority in Parliament to become law,

d) determine that one or more of the provisions Bill **Z2(b)** is / are inconsistent with the provisions of the Constitution and requires / require a special majority in Parliament and Approval by the People at a Referendum to become law,

e) determine that one or more of the provisions of the Bill **Z2(b)** could not be legitimately passed by Parliament to become law in view of the specific prohibitions / bars contained in the Constitution,

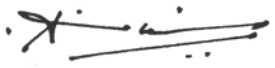
f) determine that one or more of the provisions of the impugned Bill **Z2(b)** is / are obnoxious, arbitrary, harsh, oppressive and unconscionable law, and ought be struck down

g) determine that one or more of the provisions of the Bill **Z2(b)** in effect amends / amend provisions of the Constitution and therefore, the said Bill **Z2(b)** could not have been placed on the Order Paper of Parliament, without having adhered to the specific constitutional procedures therefor,

h) determine that one or more of the provisions of the Bill **Z2(b)**, in effect amends / amend provisions of the Constitution, without having adhered to the specific constitutional procedures therefor, and therefor that the Hon. Speaker ought not proceed with the Bill **Z2(b)**,

i) make just and equitable interim orders as to Your Ladyships' Court shall seem meet in the given circumstances, to prevent a miscarriage of justice and a violation of the Constitution, which is under Oath to be upheld and defended.

j) grant such other and further reliefs as Your Ladyships' Court shall seem meet



Petitioner