

‘EXCLUSIVE JURISDICTION’

UNDER & IN TERMS OF

THE HIGH COURT OF THE PROVINCES (SPECIAL PROVISIONS) ACT NO. 10 OF 1996

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DEBT RECOVERY (SPECIAL PROVISIONS) ACT NO. 2 OF 1990

The High Court of the Provinces (Special Provisions) Act No. 10 of 1996 came into operation on 8th May 1996.

Section 2 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 stipulates that a High Court established under and in terms of the said Act shall have exclusive jurisdiction to hear and determine all actions, applications and proceedings specified in the First Schedule to the said Act – viz:

“2 (1) Every High Court established by Article 154P of the Constitution for a Province shall, with effect from such date as the Minister may, by Order published in the *Gazette* appoint, in respect of such High Court have exclusive jurisdiction and shall have cognisance of and full power to hear and determine, in the manner provided for by written law, all actions, applications and proceedings specified in the First Schedule to this Act, ”

“2 (2) Where an Order is made under sub-section (1) in respect of a High Court established by Article 154P of the Constitution, the jurisdiction exercisable by such High Court under that sub-section shall –

- (a) if such High Court is the High Court established for the Western Province, be exercised by that High Court sitting in Colombo and in any other place within the Western Province, as may be designated by the Minister, by Order published in the *Gazette*, with the concurrence of the Chief Justice;

By *Gazette Extra-ordinary* No. 943/12 of 1.10.1996, the Minister of Justice & Constitutional Affairs made Order that the High Court established for the Western Province, shall have exclusive jurisdiction in respect of all actions, proceedings and applications set out in the First Schedule to the High Court of the Provinces (Special Provisions) Act No. 10 of 1996.

The First Schedule to the High Court of the Provinces (Special Provisions) Act No. 10 of 1996, *inter-alia*, stipulates –

“All actions where the cause of action has arisen out of commercial transactions (including causes of actions relating to banking, export or import of merchandise,) other than actions instituted under the Debt Recovery (Special Provisions) Act No. 2 of 1990”

Debt Recovery (Special Provisions) Act No. 2 of 1990 defines “Debt” to mean –

“a sum of money which is ascertained or capable of being ascertained at the time of the institution of the action, and which is in default, whether the same being secured or not, or owed by any person or persons, jointly or severally or as principal borrower or guarantor or in any other capacity, and alleged by a lending institution to have arisen from a transaction in the course of banking, lending,

financial or other allied business activity of that institution, but does not include a sum of money owed under a promise or agreement which is not in writing”

The cogent question in issue is, as to whether, a multiplicity of a series of alleged loans and/or advances, arising out of a multiplicity of a series of revolving commercial transactions, could be construed or constructed in a sum total, to fall within the meaning of the definition of a “debt”, and within the scope of the Debt Recovery (Special Provisions) Act No. 2 of 1990 ? In the context of the totality of the provisions of the said statute, would not a “debt” appear to pertain to ‘a transaction’, i.e. *one single transaction* ?

In taking cognisance of the scheme and meaning set out in the Debt Recovery (Special Provisions) Act No. 2 of 1990, in its entirety, is it not evident, that it refers to a transaction of money lending i.e. where a loan has been given to a borrower, and that it does not contemplate a multiplicity of a series of commercial and/or banking transactions of a revolving nature, which would constitute ‘commercial transactions relating to banking, and/or the export or import of merchandise’ ? Otherwise, what would such transactions constitute, if not ‘commercial transactions relating to banking, and/or the export or import of merchandise’ ?

Would not, causes of action arising out of ‘commercial transactions relating to banking, and/or the export or import of merchandise’ fall within the ‘exclusive jurisdiction’ of the specified High Court, in terms of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 ?

Therefore, could causes of action arising out of ‘commercial transactions relating to banking, and/or the export or import of merchandise’ be construed and/or constructed, in a sum total, to be a “debt” as defined coming within the meaning and scope of the Debt Recovery (Special Provisions) Act No. 2 of 1990 ?

Would the mere ‘labelling’ and filing of an action in respect of allegedly defaulted claims arising out of ‘commercial transactions relating to banking, and/or the export or import of merchandise’, by itself, make such an action, as an action rightfully and lawfully coming under the ambit and scope and within the meaning of the Debt Recovery (Special Provisions) Act No. 2 of 1990 ? Thereby, could the ‘exclusive jurisdiction’ vested in the High Court by the *latter* statute, the High Court of the Provinces (Special Provisions) Act No.10 of 1996, be permitted to *be circumvented* ?

Could an action, for claims arising out of ‘commercial transactions relating to banking, and/or the export or import of merchandise’ rightfully and lawfully come under the ambit and scope and within the meaning of an action under the Debt Recovery (Special Provisions) Act No. 2 of 1990, when in fact and law, claims arising out of ‘commercial transactions relating to banking, and/or the export or import of merchandise’, comes within the ambit and scope, as defined in the First Schedule to the High Court of the Provinces (Special Provisions) Act No. 10 of 1996, with exclusive jurisdiction vested in a High Court by the said Act ?

Is this not a pertinent issue that needs to be addressed, to prevent the arbitrarily and/or unreasonable resort by Banks to the draconian provisions of the Debt Recovery (Special Provisions) Act No. 2 of 1990, which has now been impugned by the Supreme Court to be ‘harsh, oppressive and unconscionable’, and violative of the ‘equal protection before the law’, a fundamental right guaranteed in the Constitution, with the Supreme Court having further observed that ‘lenders and borrowers are both parties to a civil transaction’, and that ‘law certainly cannot strengthen the strong, and weaken, the weak’ ?

The cogent issue is, as to whether, in the case of causes of action arising out of ‘commercial transactions relating to banking, and/or the export or import of merchandise’, a Bank has an ‘option or choice’ to institute an action, either under the Debt Recovery (Special Provisions) Act No. 2 of 1990 or as a regular action under the High Court of the Provinces (Special Provisions)

Act No. 10 of 1996, which vests the said High Court with 'exclusive jurisdiction', and which is also the *latter* Act ?

Would not the answer to the above simply have to be 'No', whereas otherwise, how could there be any meaning to the 'exclusivity' of jurisdiction under and in terms of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 for causes of action arising out of 'commercial transactions relating to banking, and/or the export or import of merchandise', as defined in the First Schedule to the said Act ?

The Supreme Court at the Hearing into the proposed amendments to the Debt Recovery (Special Provisions) Act No. 2 of 1990, as amended, and Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990, observed that the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 is the *latter* Act, and therefore ought to take precedence over the previous Acts. Furthermore, ought not the dicta and the reasoning in the SC (SD) Determinations Nos. 22/2003 and 23/2003, respectively pertaining, 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, be taken into cognisance, in this regard ? *How could such Supreme Court dicta be disregarded ?*

Ought not Banks, in the first instance, be required to prove debts arising out 'commercial transactions relating to banking and/or the export or import of merchandise', in terms of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996, prior to pursuing the right to recover property mortgaged in respect of only proven debts, particularly with the draconian provisions of the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990, which stand impugned by the Supreme Court, as not only violative of the fundamental right enshrined in Article 12 (1) the Constitution, but also violative of access to justice in terms of Article 105 of the Constitution, amounting to 'a sub-version of the due process of law' ?

Even prior to the enactment of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996, and even after the Debt Recovery (Special Provisions) Act No. 2 of 1990 and Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990, had been enacted, Banks have instituted separate regular 'MR (*Money Recovery*) Actions' in respect of a multiplicity of a series of banking transactions and/or revolving loans, such as Trust Receipt Loans, Pledge Loans, Overdrafts, etc, affording both parties to such civil transaction to 'equal protection before the law and access to justice' in terms of the Constitution.

In a case, involving a multiplicity of a series of import and/or export transactions and/or loans, and/or advances, and repayments made against certain loans and/or advances, with set-off against other loans and/or advances, with disputed interests and charges unilaterally and arbitrarily made by Banks, and with the attendant complexity of accounting reconciliations, ought not any dispute arising from such complexity, with a multitude of facts, be reasonably adjudicated upon, after evidence and the adduce of proof, particularly in the context of disputes, affording both the Bank and the Customer, the 'equal protection before the law', with the Supreme Court having observed that 'both are parties to a civil transaction', and that the 'law certainly cannot strengthen the strong, and weaken, the weak' ?

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- *Appeared in person, at the Supreme Court Hearing, to bring out the draconian provisions of the Debt Recovery (Special Provisions) Act No. 2 of 1990 and Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990*