

**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".

In the matter of an application under Article 122(1) of the Constitution.

Present: Dr. Shirani A. Bandaranayake - Chief Justice
P.A. Ratnayake, PC - Judge of the Supreme Court
Chandra Ekanayake - Judge of the Supreme Court

**S.C. Special Determination
No. 02/2011**

Hon. The Attorney-General,
Attorney General's Department,
Colombo 12.

Counsel: Janak de Silva DSG with Nerin Pulle SSC for
Hon. The Attorney-General.

The Court assembled at 11.30 a.m. on 24th, October 2011.

A Bill bearing the title "An Act to provide for the vesting in the Government identified Underperforming Enterprises and Underutilized Assets" was referred to this Court by His Excellency the President, in terms of Article 122(1) b of the Constitution for a special determination as to whether the Bill or any Provision thereof is inconsistent with the Constitution. The Bill bears an endorsement of the Secretary to the Cabinet of Ministers that in the view of the Cabinet of Ministers it is urgent in the national interest.

The objective of the Bill is to vest in the State identified Underperforming Enterprises and Underutilized Assets in order to ensure their effective administration, management or their revival through alternate methods of utilization. This is carried out in the national interest and the intention is to utilize the said assets through restructuring and entering into management contracts.

The Government had been of the view that it is an inherent obligation on its part to ensure its People maximum benefits from the limited resources that are available by securing and protecting as effectively as possible the social order in which social, economic and political justice would prevail. Having the basic welfare of the people in the country in mind, the Government had divested land and granted extensive concessions to promote economic activities with the

objective of ensuring maximum benefits to the People. This has been carried out in the national interest. However it has been identified that there are Underutilized Assets and Underperforming Enterprises that would not permit to perform the said obligation on the part of the Government to ensure its People the maximum benefits from its limited resources that are available.

Accordingly the Bill in question would make provision for the vesting in the State, two types of assets known as Underutilized Assets or Underperforming Enterprises. This would be in conformity of the Directive Principles of State Policy, referred to in Article 27 and specifically in Article 27(2) b and 27(2) d of the Constitution. These two Articles refer to the following objectives of the State, based on the Directive Principles of State Policy.

"27(2) b - the promotion of the welfare of the People by securing and protecting as effectively as it may, a social order in which justice (social, economic and political) shall guide all the institutions of the national life.

27(2) d - the rapid development of the whole country by means of public and private economic activity and by laws prescribing such planning and controls as may be expedient for directing and co-ordinating such public and private economic activity towards social objectives and the public weal."

On an examination of the objectives of the Bill, it is clearly seen that the said Bill deals with Underutilized Assets as well as Underperforming Enterprises.

The Underutilized Assets deal with two categories of land.

The first category refers to State land alienated within a period of twenty years (20) prior to the date of the coming into operation of this Act, to a person for the purpose of generating employment, foreign exchange earnings or savings or economic activities beneficial to the public, but where such benefits have not accrued and therefore being prejudicial to the national economy and public interest.

The second category deals with land owned by a person who had been granted within a period of twenty years (20) prior to the date of coming into operation of this Act, either tax incentives under any tax related law, incentives under the Board of Investment law or Regulations framed there under or any Government Guarantees on the basis that the related operations proposed to be carried out by such person will result in generating employment, foreign exchange earnings or savings or economic activities benefited to the public, but where such benefits as aforesaid have not accrued and therefore being prejudicial to the national economy and public interest.

An Underperforming Enterprises on the other hand would mean a legal entity such as a company, institution or body established by or under any written law for the time being in force, in which the Government owns shares and where the Government has paid contingent liabilities of such Enterprise and is engaged in protracted litigation regarding such Enterprise, which is prejudicial to the national economy and public interest.

The above description shows that for the purpose of this Bill, Assets and Enterprises had been classified and a question arose as to whether such classification would make the said provisions inconsistent with Article 12(1) of the Constitution.

Article 12(1) of the Constitution, which refers to the right to equality, clearly states that all persons are equal before the law and are entitled to the equal protection of the law.

Equality, which is a concept based on the firm foundation of the Rule of Law, does not forbid reasonable classification. A classification, which is not arbitrary, could be regarded as valid and permissible and for this purpose it would be necessary for such classification to be founded upon reasonable differentia. As has been stated in the well known decision of **Ram Krishna Dalmia v Justice Tendolkar (AIR (1958) SC 538)** for a classification to be valid, there are two conditions that should be satisfied, which could be stipulated as follows:

1. that the classification must be founded on an intelligible differentia which distinguish persons or things that are grouped together from others who are left out of that group, and
2. that the differentia must bear a reasonable, or a rational relation to the objects and effects sought to be achieved by the Statute in question.

Considering the aforementioned conditions, it is abundantly clear as stated in **Budhan Chowdhary v State of Bihar (AIR (1955) SC 191)** what is

necessary is that there should be a nexus between the basis of classification and the object of the enactment that carries such classification.

In the context of the present Bill the classification is based on the differentiation made with regard to the type of land that would come into question. Such land is either State land which had been given with a particular objective to be achieved, which has not been realized or is private land and certain exemptions from tax and other incentives under written law has been given with an objective to be achieved, which had failed.

In **K. Thimmappa v Chairman, Central Board of Directors** (AIR (2001) SC 467) discussing the concept of classification in terms of the right to equality, the Indian Supreme Court had observed that,

"When a law is challenged to be discriminatory essentially on the ground that it denies equal treatment or protection, the question for determination by the Court is not whether it has resulted in inequality, but whether there is some difference which bears a just and reasonable relation to the object of legislation. Mere differentiation does not *per se* amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection of differentiation is unreasonable or arbitrary; that it does not rest on any rational basis having regard to the object which the legislature has in view."

In **Union of India v M.V. Valliappan** (AIR (1999) SC 2526, the Indian Supreme Court had specifically stated thus:

"It is settled law that differentiation is not always discriminatory. If there is a rational nexus on the basis of which differentiation has been made with the object sought to be achieved by particular provision, then such differentiation is not discriminatory and does not violate the principles of Article 14 of the Constitution."

Considering all the aforementioned it is evident that there is a clear rational nexus between the object sought to be achieved by the Bill in question and the differentiation it has made, and in such instance there cannot be a violation of the provisions contained in Article 12(1) of the Constitution.

Learned Deputy Solicitor General submitted that the classification specified in the Bill is permissible in terms of Article 12(1) of the Constitution. He further contended that 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) of the Constitution.

Article 15 of the Constitution refers to the restrictions on fundamental rights and Article 15 (7) specifically deals with such restrictions regarding the exercise and operation of fundamental rights which fall within Articles 12, 13(1), 13(2) and 14 of the Constitution. The said Article 15(7) of the Constitution is as follows:

"The exercise and operation of all the fundamental rights declared and recognized by Articles 12, 13(1), 13(2) and 14 shall be subject to such restrictions as

may be prescribed by law in the interests of national security, public order and the protection of public health or morality or for the purpose of securing due recognition and respect for the rights and freedoms of others or of meeting the **just requirements of the general welfare of a democratic society** "

. . . . (emphasis added).

Since the present Bill contains provisions in meeting the 'just requirements of the general welfare of a democratic society', the restrictions, if any, envisaged by the Bill could easily come within the provisions of the said Article 15(7) of the Constitution. However there is no necessity to go into the applicability of Article 15(7) as there is no inconsistency with Article 12(1) of the Constitution.

Learned Deputy Solicitor General stated that Underperforming Enterprises encompass situations where the Government is engaged in protracted litigation. It was submitted that having such litigation does not mean that judicial power would be exercised through the Bill, or there would be interference in the exercise of judicial power.

Learned Deputy Solicitor General drew our attention to the view expressed by **Sirimane, J** in **Tuckers Ltd v The Ceylon Mercantile Union** ((1970) 73 NLR 313) where it was stated that,

"The first question that arises therefore is whether in the provisions of the impugned Act . . . , there is a usurpation of judicial power by the legislature.

In dealing with this question one must bear in mind that a Court should be slow to strike down an Act of Parliament unless there is a clear encroachment on the judicial sphere.

In order to ascertain whether there has been such an encroachment one should I think look at the Act as a whole and not at a particular section isolated from other provisions of the Act. I am also of the view that in determining this question it is permissible to look at the object and the true purpose of the legislature in passing the Act."

Learned Deputy Solicitor General referred to the test which drew attention on the ability to enforce the decision, as at that time, judicial power was based on the enforcement of the rights and liabilities of the parties (**Senadheera v The Bribery Commissioner** ((1961) 63 NLR 313)). This test was later rejected in **Piyadasa v The Bribery Commissioner** ((1962) 64 NLR 385) and **Jailabdeen v Danina Umma** ((1962) 64 NLR 419) where it had been held that the power of enforcement was not essential to judicial power.

It was also submitted that in **Queen v Liyanage** ((1962) 64 NLR 313), **Jailabdeen v Danina Umma** (Supra) and **Piyadasa v The Bribery Commissioner** (Supra) that our Courts had followed the approach taken by Griffith CJ in **Huddart Parker and Co. v Moorehead** ((1909) 8 CLR 330) where the judicial power had been interpreted as follows:

" the words "judicial power" as used in Section 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide

controversies between its subjects or between itself and its subjects, whether the rights relate to life, liberty or property. "

This position changed in **Kariapper v. Wijesinghe** ((1967) 70 NLR 49), where referring to the Griffith CJ's observations, the Privy Council had been of the view that,

"It is unwise in the sphere of constitutional law to go beyond what is necessary for the determination of the case in hand and because the Board is of the opinion that the character of the Act is not that of an act of attainder or a bill of pains and penalties it is not necessary here to attribute a particular character to what has, as has already been seen, been described an "exercise of the judicial power of Parliament in a legislative form."

On the basis of the aforesaid it is apparent that the present Bill contains no provisions which would provide for the exercise of judicial power or the interference in the exercise of judicial power in relation to Underperforming Enterprises.

Learned Deputy Solicitor General submitted that the Bill deals with National Policy which is a matter within the Reserved List introduced by the Thirteenth Amendment to the Constitution.

The Thirteenth Amendment to the Constitution, which made provision for the establishment of Provincial Councils that were empowered to make statutes applicable to the Province, had clearly stipulated that such Councils would have

no power to make statutes on any matter set out in the Reserved List. Accordingly the legislative power with regard to the National Policy on all subjects and functions are vested with the Central Government.

Since the present Bill deals with National Policy, which is a matter within the Reserved List, the Parliament has the authority and, is competent to legislate.

On a consideration of the totality of the aforementioned, it is apparent that no provision of the Bill is inconsistent with any provisions of the Constitution.

Learned Deputy Solicitor General referred to several drafting errors in the Bill under consideration and accordingly such errors are referred to below under the relevant Clause.

Clause 1

This Clause refers to the short title of the Bill. Learned Deputy Solicitor General at the hearing submitted that the word **and** after the word Enterprises should be replaced with the word **or**.

Clause 2

This Clause deals with the vesting of underperforming or underutilized Assets in the Secretary to the Treasury for and on behalf of the Government of Sri Lanka. In SC (SD) No.3/2002, this Court had determined that if there are no provisions in a Bill to pay compensation where provision has been made for the purpose of requisition of movable property, such a provision would be inconsistent with Article 12(1) of the Constitution. The said Determination further stated that the Hon. The Attorney General had submitted that an appropriate provision would be included for the payment of compensation to persons whose property

is requisitioned and it was determined that with the suggested amendment, the said Bill would not be inconsistent with any provisions of the Constitution.

In the present Bill Clauses 4(2) and 4(3) states that 'prompt, adequate and effective' compensation is payable and in such instances the said Clause is not inconsistent with Article 12(1) of the Constitution.

Learned Deputy Solicitor General at the hearing submitted that the words **Government of Sri Lanka** in Clause 2(1) should be replaced with the word **State** as the preamble to the Bill states that the intention is to vest the Enterprises and Assets in the State.

Learned Deputy Solicitor General also submitted that the words **in writing** would have to be added at the end of Clause 2(3) to ensure that there is no ambiguity as to whether any authorization has been given.

Clause 3

Clause 3 deals with the appointment of a Competent Authority by the Cabinet of Ministers. This is for the purpose of controlling, administering and managing or ensuring the revival of Underperforming Enterprises or Underutilized Assets vested in the Secretary to the Treasury.

Learned Deputy Solicitor General submitted that the words **Section 3** in Clause 3(1) should be replaced with the words **Section 2(1)**, since the vesting takes place in terms of Clause 2(1) and not Clause 3.

The Competent Authority so appointed is subject to general or special directions of the Government issued from time to time.

Learned Deputy Solicitor General submitted that the word **Government** in Clause 3(3) should be replaced with the word **Cabinet** since the use of word Government in relation to giving special or general direction is ambiguous.

Learned Deputy Solicitor General also submitted that the words **in writing** should be inserted after the words **as may be issued** in Clause 3(3) to ensure that there is no ambiguity as to any such direction was given or not.

Learned Deputy Solicitor General also submitted that the words **identified** in Clause 3(4) be deleted as it is redundant. It was also submitted that the words **or Asset** in Clause 3(4) (a) be deleted in order to avoid any ambiguity.

Clause 4

In terms of this Clause, the shares held by all Shareholders (except for those already held by the Secretary to the Treasury) of any Underperforming Asset or Underutilized Enterprise are vested in the Secretary to the Treasury. The said Clause, as stated earlier, also provides for prompt, adequate and effective compensation for shares and assets that are vested.

Article 157 of the Constitution refers to International Treaties and Agents and such Treaties and Agents shall have the force of law in Sri Lanka and otherwise than in the interests of national security, no written law should be enacted or made and no executive or administrative action should be taken in contravention of the provisions of such Treaty or Agreement.

In the event if there are any Treaties or Agreements that had been passed by the Parliament, the Bill is not in contravention of such Treaties or Agreements as it provides for prompt, adequate and effective compensation. It is also to be noted that the vesting would take place for a public purpose.

Learned Deputy Solicitor General submitted that the Bill is introduced for the purpose of vesting in the State Underutilized Assets, which would include two classes of land, defined earlier. Since land is being vested in the State there cannot be any question with regard to any shares. Accordingly the word **or an Underutilized Asset** in Clause 4(1) should be deleted. Learned Deputy Solicitor General also submitted that the word **Government** in Clause 4(1) should be replaced with the word **State**.

Learned Deputy Solicitor General also submitted that the word **Section 2** in Clause 4(2)(a) be replaced with the words **Section 4**, since the shares of 'Underperforming Enterprises' get vested with the Secretary to the Treasury in terms of Clause 4(1) and not in terms of Clause 2(1).

Clause 6

This Clause deals with the determination of compensation by the Tribunal and appeals there from and provision has been made to make its Award within 6 months from the date of the receipt of the claim after such inquiry. The said Clause does not specify the time frame within which a claim for compensation should be made. Learned Deputy Solicitor General submitted that a time frame of 2 years from the date of vesting be given in making a claim.

Learned Deputy Solicitor General also submitted that although an aggrieved person has the right to appeal against an Award to the Court of Appeal on a question of law with the leave of the Court of Appeal that such an appeal should not be limited only to a question of law and therefore to delete the words **on a question of law**.

