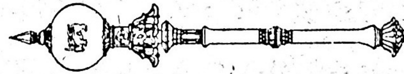

DECISIONS OF THE SUPREME COURT ON PARLIAMENTARY BILLS

1990

VOLUME VI

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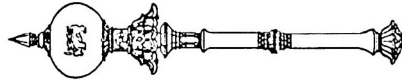

DECISIONS OF THE SUPREME COURT OF THE REPUBLIC OF SRI LANKA UNDER ARTICLES 120, 121 AND 122 OF THE CONSTITUTION OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA FOR THE YEAR 1990

VOLUME VI

(THE SECOND PARLIAMENT)

Published by the Bills Office of the Parliament Secretariat
November 2001

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PREFACE

It is over ten years since the Parliament Secretariat published the Decisions of the Supreme Court on Parliamentary Bills. The value of this publication became evident when numerous requests were made, among others, by the legal profession, academics, Government Departments and students, to continue publishing these decisions. In response to these requests the Parliament Secretariat took steps to compile the present volume, which contains sixteen decisions delivered by the Supreme Court in 1989.

The value of a publication of this kind can only be retained if the effort is a continuing one. It is a contribution to the growing body of Constitutional Law in this country. We hope, therefore, to continue publishing these judgements in future.

We acknowledge warmly the contributions made by the officers in the Parliamentary Bills Office in collecting the material, preparing indexes and proof reading. Our thanks are also due to the Government Printer for his co-operation in the technical arrangements. Lastly, we thank Hon. Speaker for giving us the encouragement to resume and continue this vital task.

DHAMMIKA KITULGODA
Secretary-General of Parliament

Parliament of Sri Lanka,
Sri Jayewardenepura Kotte.
03rd September 2001.

DEBT RECOVERY (SPECIAL PROVISIONS)

A

BILL

to provide for the Regulation of the Procedure relating to Debt Recovery by Lending Institutions and for matters connected therewith or incidental thereof.

THE DEBT RECOVERY (SPECIAL PROVISIONS) BILL

In the matter of a Reference under Article 122(1) (b)of the Constitution

S. C. Special Determination No.1/90
(PPA / Parl / 53)

Present :
H. A. G. de Silva, J.,
Bandaranayake, J.,
Fernando J.,
Dheeraratne, J., and
Goonewardene, A. J.

Counsel :
Shibly Aziz, P. C., Additional Solicitor-General, with P. L. D. Premaratne, D. S. G., K. C. Kamalasabayson, S. S.C., A. Kasturiaratchi, S. C., and F. N. Goonewardene, S.C., for the Attorney-General;

Dr. H. W. Jayewardene, Q. C., with L. C. Seneviratne, P. C., R. K. W. Goonesekera, Gamini Jayasinghe and Harsha Cabraal on behalf of the Bar Association of Sri Lanka;

R. K. W. Goonesekera on behalf of Sanath Jayatilleke;

Lakshman Kadirgamar, with R. K. Suresh Chandra, Chula Bandara, Thushantha Wijemanne, S. Ratnatunga and Miss Nanayakkara on behalf of the Sampath Bank;

R. Weerakoon in person.

The Court assembled for the hearing at 10.10 a.m. on 4th January 1990.

A Bill titled "An Act to provide for the Regulation of the procedure relating to Debt Recovery by Lending Institutions and for matters connected therewith or incidental thereto" ("The Debt Recovery (Special Provisions) Act, No. of 1989") was referred to this Court by His Excellency the President, in terms of Article 122 (1) (b) of the Constitution, for the special determination of this Court whether the Bill or any provision thereof is inconsistent with the Constitution. The Bill contains a certificate to the effect that in the view of the Cabinet of Ministers the Bill is urgent in the national interest.

Mr. Shibly Aziz, P. C., Additional Solicitor – General assisted this Court in this matter.

The Bar Association of Sri Lanka, Sanath Jayatilleke, Attorney-at-law, and R. Weerakoon, Attorney-at-law, had filed written objections to certain provisions of the Bill, and applied for and were granted permission to be heard in suport of their objections ; R. Weerakoon, Attorney-at-law, however, did not make oral submissions as the objection taken by him was dealt with by Counsel appearing for the Bar Association. The Sampath Bank had filed a petition in support of the Bill, and applied for and was granted permission to be heard.

The provisions of the Bill are intended to expedite and simplify the legal procedures for the recovery of debts by lending institutions.

Clause 30 of the Bill defines "lending institution" and "debt" :

"debt" means a sum of money which is ascertained or capable of being ascertained at the time of the institution of the action, whether the same be secured or not, or owed jointly or severally, but does not include a promise or agreement which is not in writing ;

"lending institution" means –

(a) a licensed Commercial Bank within the meaning of the Banking Act, No 30 of 1988 ;

(b) the State Mortgage and Investment Bank established by the State Mortgage and Investment Bank Act, No. 13 of 1975 ;

(c) the National Development Bank established by the National Development Bank of Sri Lanka Act, No 2 of 1979 ;

(d) the National Savings Bank established by the National Savings Bank Act, No 30 of 1971 ;

(e) the Development Finance Corporation of Ceylon established by the Development Finance Corporation of Ceylon Act (Chapter 165) ; and

(f) a Company registered under the Finance Companies Act, No 78 of 1988, to carry on finance business and having a minimum issued and paid up capital of not less than twenty five million rupees ;

The main contention on behalf of the Bar Association of Sri Lanka was that the definitions of "lending institution" and "debt", in clause 30 of the Bill, were discriminatory and therefore inconsistent with Article 12 of the Constitution. Firstly, it was contended that other provisions of the Bill conferred certain privileges and advantages on "lending institutions", by providing for a more convenient and expeditious procedure for the recovery of debts ; these privileges and advantages were not granted to all lending institutions, but only to certain institutions specified in the definition ; the basis of selection of such institutions was arbitrary and unreasonable ; accordingly, that provision of the Bill was in violation of Article 12. Secondly, it was submitted that the definition of "debt" was so wide as to include not only debts arising from transactions in the ordinary course of the banking, lending, financial or allied business activities of such lending institutions, but even debts wholly unrelated thereto ; thus "debt" would include a liability arising from a contract of tenancy or from an agreement to buy or sell immovable property. It was also contended in the written submissions filed that "debt" would even include a liability in delict, but it is implicit from the definition that it relates to liabilities arising from a written promise or agreement, and clause 4 (1) confirms that any such debt must arise from an "instrument, agreement or document", so that the definition would exclude delictual liabilities. The privilege and advantage of recovering debts unconnected with ordinary banking transactions (and allied transactions) was not granted to all lending institutions, but only to the selected institutions specified in the definition, so that (even if the definition of lending institution was, **per se**, not discriminatory) there was no rational basis for the conferment of that privilege only on the selected lending institutions ; accordingly, the definition of "debt" was in violation of Article 12.

The learned Additional Solicitor-General conceded that the definition of "debt" was too wide, and would be amended so as to restrict it to debts arising from transactions in the ordinary course of the banking, lending, financial or allied business activities of lending institutions; upon such amendment being made this part of clause 30 of the Bill would not be inconsistent with the Constitution or any provision thereof.

It needs to be emphasised that legal provisions for the expeditious recovery of debts-not **before** they fall due, but **after** default by the borrowers- by banking and financial institutions are not burdens or punitive measures imposed on borrowers. Expeditious debt recovery is, in the long-term, beneficial to borrowers in general for at least two reasons. Firstly, expeditious repayment or recovery of debts enhances the ability of lending institutions to lend to other borrowers. Secondly, the Law's delays in respect of debt recovery, howsoever and by whomsoever caused, tend to make lending institutions much more cautious and slow in lending: by refusing some applications, by requiring higher security from some borrowers, and by insisting on more stringent terms as to interest from other borrowers. Expeditious debt recovery will thus tend to make credit available more readily and on easier terms, and will maximise the flow of money into the economy. Undoubtedly, there is a legitimate national interest in expediting the recovery of debts by lending institutions engaged in the business of providing credit, and thereby stimulating the national economy and national development. The objections to the constitutionality of the Bill must be considered in that context.

The definition of "lending institutions" includes three categories of institutions. These institutions consist of (a) State Lending Institutions set up by special Acts of Parliament (the State Mortgage and Investment Bank, the National Development Bank, the National Savings Bank, the Development Finance Corporation of Ceylon) as well as State commercial banks set up by special Acts of Parliament (such as the Bank of Ceylon and the People's Bank), (b) all other licensed commercial banks within the meaning of the Banking Act, and (c) some, but not all, finance companies registered under the Finance Companies Act.

Had all lenders, or all lending institutions without exception, been given the privileges and advantages sought to be conferred by the Bill, the objection based on Article 12 would necessarily have failed; the desirability or prudence of such an enactment is, of course, quite another matter.

Had the Bill selected only the State lending institutions and State commercial banks for the conferment of certain special privileges and advantages, it could hardly have been contended that the basis of classification was arbitrary or unreasonable; the State provides, or channels, funds for the development of the national economy, with special emphasis on certain sectors of the economy, sometimes even providing special schemes for such sectors. State institutions, which are subject to the direction and/or control of the State, can properly be regarded as being instruments of national policy in relation to economic development, thus constituting a class; an examination of the statutes by which these institutions were set up reveals that all these institutions are "public corporations" within the meaning of Article 170 of the Constitution (and the Finance Act, No 38 of 1971). The conferment of sepcial privileges and advantages on that class, in order to expedite the recovery of debts, is reasonably related to the effective implementation of national policy in regard to the provision of credit.

The Bill seeks to confer privileges and advantages on another class as well, namely all commercial banks. While the identical considerations of national economic policy do not apply to commercial banks in general, since the same degree of State direction or control does

not exist, nevertheless the inclusion of this class as a whole, in the definition of "lending institution", is not arbitrary or unreasonable; commercial banks play an important role in making credit available, and the State exercises a measure of supervision and control over their activities-under the Monetary Law Act (Cap. 422) and the Banking Act, No 30 of 1988. The conferment of special privileges and advantages on these institutions thus connot be regarded as discriminatory.

It is the inclusion of certain finance companies which has given rise to considerable difficulty. The Bill does not disclose the basis on which it seeks to include finance companies with a minimum issued and paid up capital of not less than twenty five million rupees, and to exclude those with a smaller issued and paid up capital. The learned Additional Solicitor-General drew our attention to section 19 of the Banking Act, No 30 of 1988, which requires every licensed commercial bank at all times to maintain "an *Unimpaired* capital in an amount not less than twenty-five million rupees", and submitted that the requirement of "a minimum issued and paid up capital of not less than twenty five million rupees" in the case of finance companies was intended to put such companies on a par with licensed commercial banks; on that basis he submitted that it was legitimate to include such finance companies in the same class of "lending institutions" as commercial banks. A finance company is required by section 4(1) of the Finance Companies Act. No 78 of 1988, at all times to maintain "an *unimpaired* capital of not less than five million rupees", so that it would appear to be legally permissible for a finance company with an issued and paid up capital of twenty-five million rupees to have an unimpaired capital of a lesser amount. Particularly in view of the difference in terminology, we entertain a doubt as to whether this affords a rational basis of differentiation between finance companies, so as to include some, and exclude other, finance companies, and we entertain a doubt whether this provision is inconsistent with Article 12 of the Constitution, which guarantees to all persons –including bodies corporate– the right to equality before the law. In terms of Article 123(3) of the Constitution, paragraph (f) of the definition of "lending institution" contained in clause 30 of the Bill must therefore be deemed to have been determined to be inconsistent with Article 12 of the Constitution, and may only be passed by the special majority required under the provisions of paragraph (2) of Article 84 of the Constitution.

The majority of us are of the opinion that if the words "and having a minimum issued and paid up capital of not less than twenty five- million rupees" are deleted, paragraph (f) would cease to be inconsistent with Article 12 of the Constitution.

It was contended that the provisions of Part I of the Bill, particularly clauses 4(2), 8(2) and 12, were inconsistent with Article 12. Many of the provisions contained in Part I are similar to corresponding provisions in Chapter LIII of the Civil Procedure Code, providing for summary procedure on liquid claims. However, Part I requires the Court to enter a decree nisi in the first instance, upon the filing of the plaint, together with an affidavit to the effect that the sum claimed is justly due, as well as the instrument or document sued upon; in effect a burden is placed on the defendant to adduce evidence to disprove the plaintiff's claim, but not to the extent that the ultimate burden of proof is placed on the defendant. (The provisions of sections 384 to 391 (other than 389) of the Civil Procedure Code apply to the trial of the action.) These provisions would ensure an expeditious disposal of actions for the recovery of debts, although from the point of view of the defendant they may possibly be considered somewhat burdensome; they are not inconsistent with Article 12. The provisions of clause 14 appear at first sight to deprive a defendant who admits liability of the right to an order for payment by instalments; it may well be that, read with clause 21, the provision of section 194 of the Civil

Procedure Code are applicable. However, the fact that the judgment-debtor may not be entitled to the benefit of an order under section 194 is reasonably related to the legislative objective of ensuring expeditious recovery of debts.

The provisions of clause 16(3) impose a heavy burden on a person resisting the Fiscal at the stage of execution, although he claims the property, sought to be seized by the Fiscal, in his own right or under a person other than the judgment-debtor; he may be required to furnish security for the satisfaction of the entirety of the decreed amount, even if the property is worth much less. Such a provision, imposing burdens on a person who may be quite uninvolved in the dispute between plaintiff and defendant, is not reasonably related to or necessary for the attainment of the object of ensuring expeditious recovery of debts, and denies such persons of equality before the law and of the equal protection of the law. The provisions of clause 16(3), insofar as they mandatorily require the furnishing of security for the satisfaction of the full amount of the decree, is inconsistent with Article 12 of the Constitution, and may only be passed by the special majority required under the provisions of paragraph (2) of Article 84 of the Constitution. That provision would cease to be inconsistent if amended so as to give a discretion to the Court to require security to be furnished for the satisfaction of the decreed sum or such part thereof as the Court thinks fit.

The provisions of clauses 18, 19 and 20 may operate so as to deprive a defendant or a judgment-debtor of a right of appeal, unless he furnishes security for the satisfaction of the full amount of the decree; this requirement is imposed even in respect of a secured debt; it is also in addition to any security furnished at the stage of obtaining leave to appear and show cause. Such a provision is not reasonably related to or necessary for the attainment of the object of ensuring expeditious recovery of debts; it imposes a disability or disadvantage to which other appellants are not subject, and is inconsistent with Article 12 of the Constitution, and may only be passed by the special majority required under the provisions of paragraph (2) of Article 84 of the Constitution. That provision would cease to be inconsistent if amended so as to give a discretion to the Court to require security to be furnished for the satisfaction of the decreed sum or such part thereof as the Court thinks fit in all the circumstances.

It was strenuously contended by learned Queen 's Counsel on behalf of the Bar Association that, even if there was no inconsistency with Article 12, the provisions of the Bill which conferred privileges or advantages on "lending institutions" as defined, to which other lenders were not entitled in actions instituted under the Civil Procedure Code, were inconsistent with Articles 3 and 4 of the Constitution; he urged that judicial power cannot be divided or diluted in such a way that there would be different remedies or different procedures for different plaintiffs; that Articles 3 and 4 required not only that judicial power be exercised by Courts, and other duly constituted tribunals, but also that the manner of its exercise must be uniform. Article 14 of the International Covenant on Civil and Political Rights was relied on: all persons shall be equal before the courts and tribunals. He conceded, however, that it was permissible to set up special tribunals, such as Labour Tribunals, and to provide special procedures and remedies, such as for the recovery of State lands or Government quarters. Learned Counsel appearing for the Sampath Bank cited *Anthony Naide v Ceylon Tea Plantation Co,* 68 N. L. R. 558, and drew our attention to Article 105(2) of the Constitution. It is quite clear that Parliament may by ordinary law replace or abolish or amend the powers, duties, jurisdiction and procedure of courts and tribunals (other than the Supreme Court, and except such jurisdictions as are entrenched by the Constitution), and that this does not involve any unlawful interference with judicial power. The Bill is not inconsistent with Articles 3 or 4 of the Consistituion.

We therefore determine that -

The definition of "debt" in clause 30, is inconsistent with Article 12 of the Constitution, but upon being amended in the manner stated by the learned Additional Solicitor-General would cease to be inconsistent therewith.

Paragraph (f) of the definition of "lending institution" contained in clause 30 of the Bill is deemed to have been determined to be inconsistent with Article 12 of the Constitution, and may only be passed by the special majority required under the provisions of paragraph (2) of Article 84 of the Constitution; the majority of us are of the opinion that if the words" and having a minimum issued and paid up capital of not less than twenty- five million rupees" are deleted, paragraph (f) would cease to be inconsistent with Article 12 of the Constitution.

The provisions of clause 16(3), insofar as they mandatorily require the furnishing of security for the full amount of the decree, is inconsistent with Article 12 of the Constitution, and may only be passed by the special majority required under the provisions of paragraph (2) of Article 84 of the Constitution. That provision would cease to be inconsistent if amended so as to give a discretion to the Court to require security to be furnished for the satisfaction of the decreed sum or such part thereof as the Court thinks fit.

The provisions of clauses 18, 19 and 20 requiring a defendant or a judgment-debtor, seeking to appeal, to furnish security for the satisfaction of the full amount of the decree, is inconsistent with Article 12 of the Constitution, and may only be passed by the special majority required under the provisions of paragraph (2) of Article 84 of the Constitution. That provision would cease to be inconsistent if amended so as to give a discretion to the Court to require security to be furnished for the satisfaction of the decreed sum or such part thereof as the Court thinks fit in all the circumstances.

None of the other provisions of the Bill are inconsistent with the Constitution or any provision thereof.

H. A. G. de Silva
Judge of the Supreme Court.

G. R. T. D. Bandaranayake
Judge of the Supreme Court.

M. D. H. Fernando
Judge of the Supreme Court.

R. N. M. Dheeraratne
Judge of the Supreme Court.

S. B. Goonewardene
Acting Judge of the Supreme Court.

First Reading:
23.01.1990 (Hansard Vol. 62 No. 4 Col. 837)

Sponsor:
Prime Minister, Minister of Finance and Minister of Labour and Social Welfare

Decision of the Supreme Court conveyed to Parliament:
09.01.1990 (Hansard Vol. 62 No. 1 Cols. 3-8)

Second Reading:
23.01.1990; 24.01.1990; 26.01.1990; 29.01.1990
(Hansard Vol. 62 Nos. 4 - 5; 7-8 Cols. 846-868; 990-1096; 1295-1386; 1389-1483)

Committee Stage and Third Reading:
29.01.1990 (Hansard Vol. 62 No.8 Cols. 1484-1528)

Hon. Speaker's Certificate:
06.03.1990

Title: **Debt Recovery (Special Provisions) (Amendment) Act, No. 2 of 1990**

MORTGAGE (AMENDMENT)

A

BILL

to amend the Mortgage Act (Cap.89)

and

RECOVERY OF LOANS BY BANKS (SPECIAL PROVISIONS) (AMENDMENT)

A

BILL

to provide for the recovery of loans granted by Banks for the economic development of Sri Lanka; and for matters connected therewith or incidental thereto.

THE MORTGAGE (AMENDMENT) BILL
AND
THE RECOVERY OF LOANS BY BANKS (SPECIAL PROVISIONS) BILL

In the matter of a Reference under Article 122(1) *(b)* of the Constitution

S. C. Special Determination No. 2/90
(PPA/Parl. I/53)

S. C. Special Determination No. 3/90
(PPA/Parl. I/53)

Present :
H. A. G. de Silva, J.,
Bandaranayake, J.,
Fernando, J.,
Dheeraratne, J., and
Goonewardene, A. J.

Counsel :
Shibly Aziz, P. C., Additional Solicitor-General, with P. L D. Premaratne, D. S. G., K. C. K. Kamalasabayson, S. S. C., A. Kasturiaratchi, S. C., and F. N. Goonewardene, S. C., for the Attorney-General;

Dr. H. W. Jayawardene, Q. C., with L. C. Seneviratne, P. C., R. K.W. Goonesekara, Gamini Jayasinghe, Harsha Cabraal and Miss N. Rajapakse on behalf of the Bar Association of Sri Lanka;

R. K. W. Goonesekera with Gamini Jayasinghe on behalf of Sanath Jayatilleke;

Lakshman Kadirgamer with R. K. Suresh Chandra, Chula Bandara, Thusanthe Wijemanne, S. Ratnatuga and Miss T. Nanayakkara on behalf of the Sampath Bank;

R. D. C. de Silva, P. C., with Geoffrey Alagaratnam, R. Deviligoda and C. Liyanapatabendige for the Sri Lanka Banks Association

The Court assembled for the hearing at 10.20 a. m. on 8th January 1990.

A Bill titled "An Act to amend the Mortgage Act (Cap. 89)" ("The Mortgage (Amendment) Act, No. of 1989") was referred to this Court by His Excellency the President, in terms of Article 122 (1) (*b*) of the Constitution, for the special determination of this Court whether the Bill or any provision thereof is inconsistent with the Constitution. The Bill contains a certificate to the effect that in the view of the Cabinet of Ministers the Bill is urgent in the national interest.

A Bill titled "An Act to provide for the Recovery of Loans granted by Banks for the economic development of Sri Lanka; and for matters connected therewith or incidental thereto" ("The Recovery of Loans by Banks (Special Provisions) Act, No. of 1989") was referred to this Court by His Excellency the President, in terms of Article 122(1) (*b*) of the Constitution, for the special determination of this Court whether the Bill or any provision thereof is inconsistent with the Constitution. The Bill contains a certificate to the effect that in the view of the Cabinet of Ministers the Bill is urgent in the national interest.

Mr. P. L. D. Premaratne, Deputy Solicitor-General, and Mr. K. C. Kamalasabayson, Senior State Counsel, assisted this Court in these matters, which were considered together.

The Bar Association of Sri Lanka and Sanath Jayatilleke, applied for, and were granted, an opportunity to make submissions in support of their objections to the Bills. The Sampath Bank and the Sri Lanka Banks Association applied for, and were granted, an opportunity to make submissions in support of the Bills.

At the commencement, the learned Additional Solicitor-General informed the Court that there were certain typographical errors in the second Bill, which would be amended in due course; in clause 5 reference should be to section 7 (and not 4); in clause 6(1) and (2) reference should be to section 5 (and not 4); and in clause 6(1) the word "of" should be substituted for "or".

1. The principal question in issue is whether the conferment of the right of parate execution on the institutions mentioned in clause 22 of the second Bill was inconsistent with the Constitution. This necessitated a detailed examination of the history of parate execution as well as the ascertainment of the institutions presently enjoying that right.

PARATE EXECUTION: History

In 1943 the Mortgage Commission was appointed to inquire into the law relating to Mortgage, Credit Facilities and the production of the Lands of Agriculturists; *inter alia*

(1) to inquire and report upon the Law of Ceylon relating to the hypothecation of movable and immovable property and to the procedure for the enforcement of hypothacary charges on such property, with a view to removing such defects as may be fund therein;

(2) to make recommendations relating to the amendment of existing law and to the enactment of new legislation, with a view to removing defects and supplying deficiencies in the law which limit the availability of adequate credit facilities for agricultural, industrial and commercial purposes.

That Commission submitted four interim reports and a final report, and made recommendations in regard to the enactment, or the amendment, of a number of statutes: including Registration of Old Deeds and Instruments, Mortgage, Civil Procedure, Hypothecation of Crops, Registration of Documents, Trust Receipts, Higher-Purchase and Registration of Title. The terms of reference and the reports of that Commission sufficiently indicate the importance of appropriate legal procedures for the recovery of debts, whether secured or unsecured, in relation to the objective of providing adequate credit facilities for development: "by increasing the confidence of prospective lenders, the flow of credit to prospective borrowers will be stimulated" (Second Interim Report, paragraph 13).

In considering the objections to some of the Bills before us, it is relevant to note that the Mrotgage Commission viewed the introduction of parate execution with considerable disfavour, referring also to the policy of the Roman-Dutch law in this respect. It was considered inadvisable to introduce principles of English or Indian law in this respect-an exercise which, the Commission felt, would have made it necessary " to abolish almost completely, if not altogether, the principles of the Roman-Dutch law now obtaining. It would be a perilous adventure to superimpose one of many parts of a foreign system of law relating to land upon the fundamentally different land law of Ceylon... It is not desirable that a creditor should be able to have recourse to the property of the debtor without the intervention of a

Court." However, a limited exception was recommended in respect of parate execution by" approved credit agencies" (as defined in the Mortgage Act), in the case of certain special specific instances, of mortgages of movable property (in favour of such agencies), where the mortgagee had been given possession of that property; shares (sections 73-80 of the Mortgage Act), life insurance policies (sections 81-84), book debts (sections 90-95) and corporeal movables (sections 85-88). (see paragraphs 6 and 7 of that Report).

In paragraph 94 of the same Report, the Commission made the following observations:

> "...*parate execution* whereby a creditor without the prior intervention of the Court proceeds to sell assets belonging to his debtor is one looked upon with extreme disfavour by the Roman-Dutch Law. This attitude has been maintained throughout by our Courts which have discouraged attempts at such execution although recently they have permitted it to a limited extent and in very special circumstances. No witnesses before us seriously pressed the view that *parate execution* was sutiable to conditions in Ceylon. Informed public opinion rightly regards it as being open to grave objection and we are completely in agreement with that opinion. If nothing else it means that on the occasion when a creditor enters upon or otherwise deals with the property of his debtor, there is no public officer or public authority interposed between him and the resistance which his debtor might justifiably or even unjustifiably offer. An attempt by creditors to exercise such rights would, if nothing else provide frequent occasions for breaches of the peace... we have found it necessary to confer such rights on creditors of a defined class in the special case where movable property subject to mortgage has been placed in their possession by mortgagers, but it is an entirely different matter to permit a mortgagee himself to dispossess a mortgager of land or even of movables in the possession of the latter... questions do often arise genuinely...... as to the amount due on a mortgage as to whether the transaction was not a mortgage but something else, as to whether part payments had actually been made or properly credited, as to whether convenants in a bond have been performed or not, and upon numerous other such matters. To confer the right of *parate execution* would in effect mean that the mortgagee would be a judge in his own cause upon all these questions which are not always easy to determine even in judicial proceedings. If he were allowed, having determined this question himself, to sell the property and pass a good title to the purchaser, the mortgager would only be left with a right of action against him for any loss suffered by reason of a wrong determination. The mortgager would then be irretrievably without recourse to the land and an action for damages would afford him poor consolation. It may even happen that the mortgagee had no available assets and that the mortgager would thus be unable to obtain any satisfaction at all."

In recommending that "appproved credit agencies " be given the right of parate execution in respect of movables, the Commission observed:

> "As we point out in paragraph 94, the exercise of such a right by the mortgagee is likely to lead to a breach of the peace on the occasion when he attempts to take delivery of the property...... This objection does not arise in a case where corporeal movables are actually in the possession of the mortgagee. The other objection is that a mortgagee may exercise the power unfairly and to the prejudice of the debtor. We feel that this consideration does not weigh so heavily if the mortgagee is and approved credit agency. It is unlikely that such an agency would abuse the power. Even if it did so, its financial standing would be such that a debtor would be able to recover damages for any loss incurred by him." (paragraph 7.1)

It would thus appear that the principal reason for refusing to extend to "approved credit agencies" the right of parate execution in respect of mortgages of movable and immovable property, (not being in the possession of the mortgagee), was the possibility that breaches of the peace might ensue upon the attempted exercise of the right, and not the possibility of misuse or abuse of the right and the lack of adequate remedies in respect of such misuse or abuse. The Commission's recommendation was that "approved credit agencies" should consist of *(a)* "banking companies" notified by the Director of Commerce (the Monetary Law Act and the Banking Act were enacted only later), *(b)* five specified State institutions established by statute, and *(c)* a residual category consisting of companies, firms, institutions and individuals declared by the Director of Commerce to be approved credit agencies (which category the Commission expected to consist of agencies of high reputation, financial standing and integrity-paragraph 51).

The Commission has also recorded certain findings in regard to the extent of the Law's delays in mortgage actions, and the extent of dilatory defences and vexatious hindering of execution proceedings. Of the cases instituted in 1930, the Commission found that -

"decree was entered in a great many cases within six months of institution. Where this period was exceeded the delay was in some ceses due to death, insolvency and other causes not attributable to the wilful act of the mortgager. In a few the defence was genuine and successful. Cases in which a false defence seriously delayed the entry of decree were rare." (paragraph 11)

Thus the Law's delays and dilatory defences do not seem to have been so serious a problem at that time; certainly not serious enough to persuade that Commission of the justification for drastic measures such as the conferment of the right of parate execution, with the attendant risks of breaches of the peace, even on "approved credit agencies" of high reputation, financial standing and integrity. The question we have to determine is whether the conferment of that right on "banking companies" or their present-day equivalent, licensed commercial banks within the meaning of the Banking Act, No. 30 of 1988, involves any inconsistency with the Constitution.

PARATE EXECUTION: Institutions entitled to the right

As far as we have been able to ascertain in the limited time available to us, the following institutions are, or have been, entitled to the right of parate execution (in addition to those intitutions entitled thereto under the Mortgage Act):

The Commissioners of the Loan Board, under the Loan Board Ordinance (Cap. 311, 1980 Revn), No. 4 of 1865, enjoyed the right to obtain from a competent court "process of parate execution against the body and effects" of a defaulter. This appears to have been a summary remedy, possibly without a judicial adjudication on the claim, but the precise nature of this procedure is not clear. According to Marshall's Judgments (pages 173-174) "the principle of the process of parate execution is, that certain facts, which the law has declared shall render a party liable to this summary course of proceedings, being established to the satisfaction of the court, the previous stages of an ordinary suit at law are dispensed with, and the creditor is at once entitled to seize in execution the person or property of his debtor, in satisfaction of his debt...... It is called by Voet, Lib. 42, tit. 1, par. 48, execution, without the form of a

judgment: that is without previous judgment, for the decision of the court that parate execution shall issue, is in fact a decree or judgment. This process, however, so different from the cautious mode in which courts of justice proceed in ordinary cases, can only be granted in those instances, in which the law has given authority to demand it." This process of parate execution is not as extensive as the right of parate execlution conferred by later statutes.

The State Mortgage Bank estalished by Ordinance No. 16 of 1931, had the right of parate execution in respect of property mortgaged to it (sections 62 to 70); as loans were required to be secured by a mortgage of *immovable* property, this right would not have extended to movable property.

The Agricultural and Industrial Credit Corporation, established by Ordiance No. 19 of 1943, had the right of parate execution in respect of immovable property mortgaged to it (sections 68 to 84).

The State Mortgage and Investment Bank, established by Law No. 13 of 1975, (Cap. 306, 1980 Revn.) succeeded to and took over the business of the State Mortgage Bank and the Agricultural and Industrial Credit Corporation and has the right of parate execution in respect of property mortgaged to it (section 47 to 64), and this includes both movable and immovale property.

The Ceylon Savings Bank, established by Ordinance No. 12 of 1959, had from 1995 the right of parate execution in respect of immovable property mortgaged to it (sections 25 and 26).

The National Savings Bank, established by Act No. 30 of 1971, (Cap. 305 1980 Revn.), succeded to and took over the business of the Ceylon Savings Bank, and has the right of parate execution in respect of property mortgaged to it (sections 52 to 61), possible not extending to movable property.

The People's Bank, established by Act No. 29 of 1961, (Cap. 303, 1980 Revn), has the right of parate execution in respect of immovable property morgaged to it (section 30 of the Act makes sections 69 and (sic) 84 of the Agricultural and Industrial Credit Corporation Ordiance applicable): as well as in respect of movables.

The Bank of Ceylon, established by Ordinance No. 53 of 1938 (Cap.302, 1980 Revn.) has, after amendment by Law No. 10 of 1974, the right of parate execution in respect of movable and immovable property mortgaged to it (sections 15 to 31).

The National Development Bank, established by Act No. 2 of 1979, (Cap. 208, 1980 Revn). has the right of parate execution in respect of immovable property mortgaged to it (sections 37 to 53).

The Regional Rural Development Banks, established by Act No. 15 of 1985, have the right of parate execution in respect of movable and immovable property mortgaged to them (section 34 makes Part V of the State Mortgage and investment Bank Law applicable).

The Commissioner of National Housing under the National Housing Act No. 37 of 1954, (Cap. 336, 1980 Revn.), has the right of parate execution in respect of immovable property

mortgaged (sections 72 to 88), and sections 26 and 63 enable the Minister to make these provisions applicable to any loan granted by a building society or to loans granted by all building societies.

The National Housing Development Authority, established, by Act No. 17 of 1979, (Cap. 337, 1980 Revn.), has the right of parate execution in respect of immovable property mortgaged to it (sections 42 to 60).

While all these are instances of the right of parate execution being granted to specific institutions, in 1968 the right of parate execution in respect of immovable property was extended, by the Tourist Development Authority Act, No. 14 of 1968, to all *"approved credit agencies"* in general, in respect of loans granted by them on the security of land alienated by the Ceylon Tourist Board. "Approved credit agency" was defined to mean any commercial bank within the meaning of the Monetary Law Act, and to include any other institution for the time being specified in the Eighth Schedule; the Development Finance Corporation of Ceylon was included in that Schedule. Although the prior written approval of the Tourist Board had to be obtained, the extensive nature of the powers conferred is apparent form sections 21 and 22; the creditor may require the borrower to prove that the loan is being applied for the intended purpose; he may, without assigning any reason, require additional security and/or require repayment in whole or part.

The provisions of sections 25 to 45 of that Act correspond, broadly, to clauses 2 to 18 of the Recovery of Loans by Banks (Speical Provisions) Bill; and the provisions of section 43 of that Act correspond, broadly, to clauses 62C to 62F and 62H of the Mortage (Amendment) Bill.

CONSTITUTIONALITY:

(a) EQUALITY:

The Mortage Act confers a (limited) right of parate execution on approved credit agencies in resect of mortgaged movables in their possession. The statutes referred to above confer the right of parate execution, *generally*, in respet of mortgaged immovable property, on the State, Mortgage and Investment Bank, the National Savings Banks, the People's Bank, the bank of Ceylon, the National Development Bank and Regional Rural Development Banks; and confer on these institutions, apart from the national Savings Bank and the National Development Bank, the right of parate execution, *generally*, in Respect of mortgaged movables as well. The effect of the Recovery of Loans by Banks (Special Provisions) Bill, if enacted, would be to confer the right of parate execution, *generally*, in respect of both movable and immovable property, on the Development Finance Corporation of Ceylon and licensed commercial banks within the meaning of the Banking Act, No. 30 of 1988; these institutions presently have only the limited right of parate execution in respect of mortgaged immovables (conferred by Act No. 14 of 1968), and this limited right would thus be extended to cover all immovable and movable property. The effect of the National Development Bank of Sri Lanka (Amendment) Bill, if enacted, would be to confer the right of parate execution, *generally*, in respect of movable property, on that Bank. The resulting position would be that all State lending institutions (being "public corporations" within the meaning of Article 170 of the Constitution and the Finance Act, No. 38 of 1971), and all licensed commercial banks, would have the right of parate execution, *generally*, in respect of both movable and immovable property; the only exceptions would be the National Savings Bank (possibly for the reason that it is empowered to invest only on a first mortgage of immovable property: section 39(2)(i)(iv).

In regard to the State lending institutions, the conferment of rights which would ensure uniformity or equality is not inconsistent with Article 12 of the Constuiution; rather, it achieves a greater degree of equality among the institutions constituting a class. Insofar as licensed commercial banks are concerned, they were equally treated in the Mortgage Act (in regard to movables in their possesion) and in Act No. 14 of 1968 (in regard to one class of immovable property). Having regard to the role played by commercial banks in the provisions of credit for the development of the economy, and the control or supervision to which they are subject under the Monetary Law Act and the Banking Act, and considering that two Stateowned commercial banks already have this right, the amendment tends to achieve a greater degree of equality in this respect as well. We therefore determine that the provisions of the Recovery of Loans by Banks (Special Provisions) Bill and the National Development Bank of Sri Lanka (Amendment) Bill are not inconsistent with Article 12 of the Constitution.

A consequence of this classification is that other lenders are not entitled to the same rights; this differentiation is not arbitrary or unreasonable, and is refereable to legitimate object, namely, to facilitate the recovery of debts by two categories of institutionsal lenders who, in the legislative eye, play a significant role in the provision of credit for the development of the economy. The consequential discrimination from the point of view of borrowers, has been stressed; why should a borrower from one of these "privileged" lending insitutions be subject to disadvantages to which borrowers from other institutions are not subject? This is almost ineviable. Whenever there is a classification permitted by Article 12, there will be consequential differences. If Article 12 permits A to be diffencetly treated to B, the fact that A's relatives, or dependants, or persons who have contractual dealings with him, thereby suffer some disadvantage which B's relatives, dependants, etc, do not suffer will not have the effect of invalidating an otherwise proper classification.

(*b*) Judicial power:

Dr. H. W. Jayewardene, Q.C., on behalf of the Bar Association addressed us at length upon the concept of judicial power under the Soulbury Constitution and the Constitutions of 1972 and 1978; he sought to draw a distinction between judicial power as it existed before 1972 and after, but we do not agree that the concept of judicial power underwent any transformation in consequence of constitutional changes, although the manner of its exercise and the extent of its entrechment may have varied. He cited 63 N.L.R. 313, 64 N.L.R. 313, 68 N.L.R. 265, 68 N.L.R. 73, and 69 N.L.R. 289, but these decisions are not of much assistance in determining the question whether parate execution is an exercise of judicial power.

He strenuously contended that the grant of the right of parate execution to a creditor "operates as a dilution of the judicial power and a transfer of a part thereof to a non-judicial body of individuals.". If the grant of that right involves such a "dilution", the dilution commenced many years ago, and the transfer of that right in respect of immovable property to institutions not controlled by the State commenced 22 years ago with the Tourist development Act, No. 14 of 1968. If was also urged in the written submissions filed on behalf of the Bar Association that two tasts should be applied–

"(a) applying the Holmes test, if the final act is the recovery by a creditor of money due to him from his defaulting debtor, then the previous inquiry must be judicial process; and

(b) applying the historical test of Roscoe Pound, hitherto with a few exceptions......... the provision for recovery of an unpaid mortgage debt has always been a judicial process."

A survey of the legislative history of the extension of the right of parate execution reveals that those instances can hardly be dismissed as " a few exception"; it is not even suggested the State lending institutions which already enjoy this right play a less significant role, in the provision of cerdit for the national economy, than the institutions now sought to be added. Mr. Kadirgamar in his clear and succinct submissions drew our attention to a series of decisions, dealing mainly with the owner's right to retake possession of property let under hire-purchase agreements (42 N.L.R. 539, 68 N.L.R. 517, 76 N.L.R. 193, 77 N.L.R. 337 and 77 N.L.R. 559); the policy and history of the law as revealed therein was not adverse to the conferment of the sight of parate execution. The historical test thus affords little support to the objections to the Bills; if at all, the historical test tends to support the view that parate execution is not necessarily an exercise of judicial power. Dr. Jayewardene contended that the fact that past legislation, which either was not, or could not be, challenged did not establish that parate execution was not an exercise of judicial power, and that the historical test would be relevant only in a case of doubt. He submitted that properly analysed parate execution was an exercise of judicial power.

The Holmes test enunciated in the *Prentis* case, 211 U.S. 210, was that "the nature of the final act determines the nature of the previous inquiry". Here, the Bill does not provide for an "inquiry" and it is not possible to apply this test.

Mr. Goonesekera in a short and lucid submission drew our attention to five very relevant determinations of this Court in regard to the Universities Bill, the National Housing Bill, the Proscribing of the L. T. T. E. (Amendment) Bill, the State Lands (Recovery of Possession) Bill, and the Poisons (etc) Bill, (Reported in the Decisions of the Supreme Court on Parliamentary Bills 1978-83, at pages 1, 25, 53 and 171, and in the 1984-86 volume at page 3). In the Universities Bill determination while stating that the impugned provisions "appear to confer judicial power" there is no unequivocal finding (with reasons) that those provisions do confer judicial finding, or that they were inconsistent with the Constitution; such finding appears to have become unnecessary in view of the state's undertaking that they would be amended. In any event, those provisions related to the course of pending proceedings, and for that reason may well be regarded as affecting judicial power. The amendment suggested ensured that the ultimate decision was by the Court. In regard to the National Housing Bill, it was not held that the Commissioner's order was judicial, but only that the Minister's power on apeal was judicial; the inconsistency was held to cease if a right of appeal to a court or tribunal was given. The Proscription Bill and the Poisons Bill involved a power of forfeiture of property and the grant of bail, and in the absense of recourse to a judicial tribunal, inconsistency with Article 4 (c) was apparent. In regard to the State Lands Bill, a provision denying an affected person the right to a hearing or to make representations in respect of a "quit notice" was held to be inconsistent with Article 4 (c) as "it seeks to oust the exercise by the court of the judicial power".

It would appear from the determinations relating to the National Housing Bill and the State Lands Bill that it was the absence of provision for recourse to the Courts, for judicial determination of rights and liabilities, that rendered the impugned provisions inconsistent. When it was pointed out that clauses 4 and 5 of the Recovery of Loans by Banks Bill do not exclude a right of recourse to the Courts. Mr. Goonesekere submitted that a right of appeal should be expressly granted, and that the existence of a right to insititue a declaratory action or to apply for a prerogative writ was not enough. In the National Housing Bill, provision was made for an *order* by the Commissioner, and hence provision could reasonably have been made for an appeal therefrom; in clauses 4 and 5, there is no "order", and hence an appeal

cannot be provided for. It appears to us that what is relevant is the existence of a right of recourse to the Courts; under clauses 4 and 5, the banks concerned do not conclusively determine legal rights and liabilities, but take action on the basis of an unilateral assertion that there has been a default or a contravention of the terms of the loan. This is not made final, or conclusive, and there is no attempt to exclude the right to judicial remedies. Clause 15 of the Bill makes the certificate of sale conclusive proof, but only that provisions in regard to the sale have been complied with.

Mr. Premaratne submitted that these provisions do not, and are not intended to, take away the right of recourse to the Courts, and that all questions of default and the quantum thereof, and contravention of the terms of the loan agreement, are fully open to decision by the Courts, unfettered by any presumption or inference based on the action taken by the bank. He stated that the right to seek declaratory relief from the District Court and to apply for a prerogative writ was available. This is a case where the bank's jurisdiction "depends upon facts which must exist objectively before the tribunal has power to act. As to these jurisdictional facts the [bank's] decision cannot be conclusive, for otherwise it could by its own error give itself powers which were never conferred upon it by Parliament" (Wade, Administrative Law, 5th edn, page 250). Wade also refers (at pages 553 and 555) to two early cases explaining the wide scope of certiorari and prohibition:

> "For this court will examine the procedings of all jurisdictions erected by Act of Parliament. And if they, under pretence of such Act, proceed to incroach jurisdiction to themselves greater than the Act warrants, this Court will send a certiorari to them, to have their proceedings returned here"

Rv Glamorganshire Inhabitants (1700) 1 Ld Raym 580.

> "My view of the power of prohibition at the present day is that the Court should not be chary of exercising it, and that wherever the legislature entrusts to any body of persons other than to the superior Courts the power of imposing an obligation upon individuals, the Courts ought to exercise as widely as they can the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament."

Rv Local Government Board (1882) 10 Q. B. E. 309.

It would seem that the grant of statutory powers entitles the Court to treat the recipient as a statutory public authority which is subject to certiorari and prohibition as well as to declaration and injunction (Wade, page 567).

Had there been provision in the Bills, the necessary effect of which was to exclude recourse to the Courts, notwithstanding the history of parate execution, both legislative and as contained in judicial decisions, we would have entertained a doubt as to whether the Bills were inconsistent with Article 4(c), so as to be deemed to have been determined to be inconsistent with that Article, in terms of Article 123(3), in which event they could only have been passed by the special majority required under paragraph (2) of Article 84, However, in view of the foregoing, and in particular the submission made by Mr. Premaratne, we hold that the Bills, properly interpreted, do not exclude the right of recourse to the Courts, and there is therefore no ousting of or interference with judicial power. In 72 N. L. R. 25, a provision that every person concerned in exporting goods (contrary to restriction) shall, at the election of the Collector of Customs, forfeit either treble the value of the goods or a penalty of Rs. 1,000, was held not to be an adjudication, and the only determination having the legal effect of an adjudication was that which a Court would later make in an action brought by the Collector for recovery. Even certiorari was refused, for the reason (as stated by the Privy Council in

73 N. L. R. 289 affirming that decision) that this was a preliminary decision which did not bind the party. In the present case, the bank's action affects rights (although not binding) and certiorari lies. In 69 N. L. R. 197, the commissioner of Inland Revenue was authorised to impose a penalty for submission of an incorrect return unless the assessee proved to his satisfaction that there was no fraud or wilful neglect this was held not to be an exercise of judical power (approved in 72 N. L. R. 553, P. C.).

II. It was also submitted that clause 3 of the first Bill was inconsistent with Article 12 in that the right of obtaining a renunciation of the benefit of section 46 of the Mortgage Act was to be made available only to the institutions mentioned in the proposed section 47A(7). The Mortgage Act already recognises a class or category of "approved credit agencies" on whom special rights are conferred. The Class or category sought to be created by section 47A(7) is not identical thereto, though similar; it consits of a number of State lending institutions and all licensed commercial banks. For the reasons we have given earlier, this group of institutions can be viewed as a distinct class, and given equal treatment, both in the matter of parate execution and the renunciation of the benefit of section 46. There has been some criticism of the effect of section 47A, in that mortgagers do not have the right to exclude any specified property, or even their residences, but this is a matter which goes to the policy of the law, and not to its constitutionality. We determine that this clause is not inconsistent with the Constitution.

III. The last objection taken related to the proposed section 626 sough to be introduced by the first Bill. The provision would give a mortgagee exercising the right of parate execution certain preferential rifhts over tenants; however, a tenant who came into occupation of the mortgaged premises prior to the execution of the mortgage can preserve his right if, in response to a notice which the mortgagee is obliged to serve on him, he takes steps to register an document in the prescribed form within one month. Where a tenant fails to take such steps he nevertheless has a right to compensation. This provision is similar to those which confer priority on a later instrument over an earlier instrument if it is duly registered before the earlier instrument; with the deference ,in favour of the tenant, that he can act even after the mortgage is registerd. The fact that other tenants are not required to act in the same way makes no defference , firstly, because the obligation cast on the tenant is by no means inconvenient or onerous , and , secondly, the differentation arises from a reasonable classification made as to the institutions which are to enjoy the right of parate execution.

We accordingly determine that none of the provisions of these two Bills are inconsistent whit the Constitution or any provision thereof.

H.. A.. G de Silva
Judge of the Supreme Court

G.R. T. D. Bandaranayake
Judge of the Supreme Court

M. D. H. Fernando
Judge of the Supreme Court

R. N. M. Dheeraratne
Judge of the Supreme Court

S.B. Goonewardene
Acting Judge of the Supreme Court

Frist Reading :
23 . 01 . 1990 (Hansard Vol. 62 No . 4 Col . 838)

Sponsor :
Prime Minister , Minister of Finance and Minister of Labour and Social Welfare

Dicision of the Supreme Court conveyed to Parliment :
11 . 01 . 1990 (Hansard Vol . 62 No 2 Cols . 175 - 176 ; 177 - 186)

Second Reading :
30 . 01 . 1990 (Hansard Vol . 62 No 9 Cols . 1547 - 1663)

Committee Stage and Third Reading :
30 . 01 . 1990 (Hansard Vol . 62 No . Cols. 1663 - 1667)

Hon . Speaker's Certificate:
06.03.1990

Title: Mortgage (Amendment) Act, No. 3 of 1990

First Reading:
23.01.1990 (Hansard Vol. 62 No. 4 Col. 838)

Sponsor:
Prime Minister, Minister of Finance and Minster of Labour and Social Welfare

Decision of the Supreme Court conveyed to Parliament::
11.01.1990 (Hansard Vol. 62 No. 2 Cols. 175-176; 177-186)

Second Reading:
30.01.1990 (Hansard Vol. 62 No. 9 Col. 1667)

Committee Stage and Third Reading:
30.01.1990 (Hansard Vol. 62 No. 9 Cols. 1667 - 1687)

Hon. Speaker's Certificate:
06.03.1990

Title: **Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990.**

REGISTRATION OF DOCUMENTS (AMENDMENT)

A

BILL

to amend the Registration of Documents Ordinance

THE REGISTRATION OF DOCUMENTS (AMENDMENT) BILL

In the matter of a Reference under Article 122 (1) (b) of the Constitution

S. C. Special Determination No 5/90
(PPA/Parl/53)

Present :
H. A. G. de Silva, J.,
Bandaranayake, J.,
Fernando, J.,
Dheeraratne, J., and
Goonewardene, A. J.

Counsel :
Shibly Aziz, P. C., Additional Solicitor-General, with P. L. D. Premaratne, D. S. G., K.C.Kamalasabayson, S. S. C. A. Kasturiaratchi, S. C. and F. N. Goonewardene, S. C., for the Attorney-General.

The Court assembled for the hearing at 10.20 a.m. on 8th January 1990.

A Bill titled "An Act to amend the Registration of Documents Ordinance "("The Registration of Documents (Amendment) Act, No.   of 1989") was referred to this Court by His Excellency the President, in terms of Article 122(1) (b) of the Constitution, for the special determination of this Court whether the Bill or any provision thereof is inconsistent with the Constitution. The Bill contains a certificate to the effect that in the view of the Cabinet of Ministers the Bill is urgent in the national interest.

Mr. K. C. Kamalasabayson, Senior State Counsel, assisted this Court in this matter.

This Bill is consequential upon the Inland Trust Receipts Bill (to which Special Determination No 4/90 relates). Clause 3 of that Bill gives legal effect to inland trust receipts upon registration under the Registration of Documents Ordinance. Clause 2 of the Bill now under consideration seeks to amend Section 21 of the Registration of Documents Ordinance by adding a new sub-section requiring the Registrar to prepare and keep a book for the registration of inland trust receipts in terms of the Inland Trust Receipts Bill. We have examined the provisions of the Bill, and we determine that none of the provisions of the Bill are inconsistent with the Constitution or any provision thereof.

H. A. G. de Silva
Judge of the Supreme Court.

G. R. T. D. Bandaranayake
Judge of the Supreme Court.

M. D. H. Fernando
Judge of the Supreme Court.

R. N. M. Dheeraratne
Judge of the Supreme Court.

S. B. Goonewardene
Acting Judge of the Supreme Court.

First Reading:
23.01.1990 (Hansard Vol. 62 No. 4 Col. 839)

Sponsor:
Prime Minister, Minister of Finance and Minster of Labour and Social Welfare

Decision of the Supreme Court conveyed to Parliament:
11.01.1990 (Hansard Vol. 62 No. 2 Cols. 175-176; 187-188)

Second Reading:
30.01.1990 (Hansard Vol. 62 No. 9 Col. 1688)

Committee Stage and Third Reading:
30.01.1990 (Hansard Vol. 62 No. 9 Col. 1689)

Hon. Speaker's Certificate:
06.03.1990

Title: **Registration of Documents (Amendment) Act, No. 5 of 1990.**

CIVIL PROCEDURE CODE (AMENDMENT)

A

BILL

to amend the Civil Procedure Code

THE CIVIL PROCEDURE CODE (AMENDMENT) BILL

In the matter of a Reference under Article 122(1) (b) of the Constitution

S. C. Special Determination No. 6/90
(PPA/Parl/53)

Present :
H. A. G. de Silva, J.
Bandaranayake, J.,
Fernando, J.,
Dheeraratne, J., and
Goonewardene, A. J.

Counsel :
Shibly Aziz, P. C., Additional Solicitor-General, with P. L. D. Premaratne, D. S. G., K. C. Kamalasabayson, S. S. C. A. Kasturiaratchi, S. C., and F. N. Goonewardene, S. C., for the Attorney-General.

Dr. H. W. Jayewardene, Q. C., with L. C. Seneviratne, P. C., R. K. W. Goonesekera, Gamini Jayasinghe, Harsha Cabraal and Miss N. Rajapakse on behalf of the Bar Association of Sri Lanka,

R. K. W. Goonesekera with Gamini Jayasinghe on behalf of Sanath Jayatilleke;

Lakshman Kadirgarmar, with R. K. Suresh Chandra, Chula Bandara, Thusantha Wijemanne, S. Ranatunga and Miss Tamara Nanayakkara on behalf of the Sampath Bank;

R. D. C. de Silva, P. C., with Geoffrey Alagaratnam, R. Deviligoda and C. Liyanapatabendige for the Sri Lanka Banks Association.

The Court assembled for the hearing at 10.20 a.m. on. 8th January 1990.

A Bill titled "An Act to amend the Civil procedure Code" ("The Civil Procedure Code (Amendment) Act, No.   of 1989") was referred to this Court by His Exceleney the President, in terms of Article 122(1) (b) of the Constitution, for the special determination of this Court whether the Bill or any provision thereof is inconsistent with the Constitution. The Bill contains a certificate to the effect that in the view of the Cabinet of Ministers the Bill is urgent in the national interest.

Mr. K. C. Kamalasabayson, Senior State Counsel, assisted this Court in this matter.

The Bar Association of Sri Lanka and Sanath Jayatilleke, applied for, and were granted, an opportunity to make submissions in support of their objections to the Bill. The Sampath Bank and the Sri Lanka Banks Association applied for, and were granted, an opportunity to make submissions in support of the Bill.

The Bill seeks to make certain amendments to the Civil Procedure Code.

Clause 2 of the Bill seeks to make provisions enabling a prospective plaintiff, who find that the intended defendant is dead, to take steps to obtain an order for the substitution of a legal representative in place of such deceased person, where such prospective plaintiffs right to sue for relief survives.

Clause 4 of the Bill seeks to amend section 398, and to make new provisions for the substitution of a legal representative in place of a deceased defendant. Clause 5 makes a purely consequential amendment.

Clause 3 of the Bill seeks to amend section 192, by making new provision in regard to the rate of interest payable on the principal sum found to be due in an action for a sum of money due to the plaintiff, where no rate of interest has been agreed upon between the parties by the instrument sued on. Instead of a fixed rate, "the legal rate" is payable, being a rate fixed from time to time by the Monetary Board, regard being had to the current rates of bank interest.

Clause 6 seeks to make special provisions for the service of summons in actions under Chapter LIII of the Code, including service by registered post, through the defendant's head of department (where he is a public officer), or through his employer, and for proof of due service on the correct person.

The only objection taken was by Mr. R. K. W. Goonesekera in respect of a provision in clause 6, seeking to introduce a new section 705B to the effect that upon the defendant's failure to appear despite summons having been served in accordance with the foregoing procedure, the Court shall direct personal service through any process officer of Court,

> "or in any case *where the plaintiff is a lending institution* within the meaning of the Debt Recovery (Special Provisions) Act, No.   of 1989 [to which Special Determination No. 1/90 relates] through a process server licensed by the Fiscal appointed in terms of Article 113A of the Constitution and *who is working for an attorney-at-law, and authorised to serve summons on behalf of such attorney-at-law by whom he is so employed."*

It was submitted that this provision was inconsistent with Article 12. However, Mr. Goonesekera conceded that there was no such inconsistency in regard to the class of persons from among whom the Fiscal may select persons to be licensed as process servers. He submitted that a number of such persons may apply to be licensed but that the Fiscal may arbitratively select one in preference to the others. This possibility does not make the provision discriminatory, and if the Fiscal were to make a selection in violation of Article 12 (or any other fundamental right), remedies would be available therefor. He ultimately confined his submission to the fact that this procedure is to be available only in the case where the plaintiff is a lending institution within the meaning of the Debt Recovery (Special Provisions) Act. The manner in which summons in personally served on a defendant whether by a process officer of Court, or by a licensed process server appointed by the Fiscal-does not affect the right to equality and the equal protection of the law of either the defendant or the plaintiff, nor does it confer any special privilege or advantage on either party; it also does not affect the right to equality of the process servers. We see no merit in this objection.

Clause 8 provides for forms to be used in connection with the new provisions sought to be introduced by clauses 2 and 4.

We have examined the provisions of the Bill, and we determine that none of the provisions of the Bill are inconsistent with the Constitution or any provision thereof.

H.A. G. de Silva
Judge of the Supreme Court.

G. R. T. D. Bandaranayake
Judge of the Supreme Court.

M. D. H. Fernando
Judge of the Supreme Court.

R. N. M. Dheeraratne
Judge of the Supreme Court.

S. B. Goonewardene
Acting Judge of the Supreme Court.

First Reading :
23.01.1990 (Hansard Vol. 62 No. 4 Col. 839)

Sponsor :
Prime Minister, Minister of Fininance and Minister of Labour and Social Welfare

Decision of the Supreme Court conveyed to Parliament :
11.01.1990 (Hansard Vol. 62 No.2 Cols. 175–176; 188–190)

Second Reding :
30.01.1990 (Hansard Vol. 62 No. 9 Col. 1690)

Committe stage and third Reading:
30.01.1990 (Hansard Vol. 62 No. 9 Cols 1690 -1691)

Hon. Speaker's Certificate :
06.03.1990

Title : **Civil Procedure Code (Amendment) Act, No. 6 of 1990.**

CONSUMER CREDIT (AMENDMENT)

A

BILL

to amend the Consumer Credit Act No., 29 of 1982

THE CONSUMER CREDIT (AMENDMENT) BILL

In the matter of a Reference under Article 122(I)(b) of the Constitution

S. C. Special Determination No. 7/90
(PPA/Parl/53)

Present :
H. A. G. de Silva, J.,
Bandaranayake, J.,
Fernando, J.
Dheeraratne, J., and
Goonewardene, A. J.

Counsel :
Shibly Aziz, P. C., Additional Solicitor-General, with P. L. D. Premaratne, D. S. G., K. C. Kamalasabayson, S. S. C. A. Kasturiaratchi, S. C., and F. N. Goonewardene, S. C., for the Attorney-General

R. D. C. de Silva, P. C., with Geoffrey Alagarathnam, R. Deviligoda and C. Liyanapatabendige for the Sri Lanka Banks Association.

The Court assembled for the hearing at 10.20 a.m. on 8th January 1990.

A Bill titled "An Act to amend the Consumer Credit Act No. 29 of 1982" ("The Consumer Credit (Amendment) Act, No. 1 of 1989") was referred to this Court by His Excellency the President, in terms of Article 122(1)(b) of the Constitution, for the special determination of this Court whether the Bill or any provision thereof is inconsistent with the Constitution. The Bill contains a certificate to the effect that in the view of the Cabinet of Ministers the Bill is urgent in the national interest.

Mr. P. L. D. Premaratne, Deputy Solicitor-General, asisted this Court in this matter.

The Bill seeks to make certain amendments to the Consumer Credit Act No. 29 of 1982.

Clauses 2, 3 and 4 of the Bill seek to make amendments, by substituting the words "shall, on conviction after summery trial before a magistrate be liable", in place of the words shall be liable, "shall be punishable", etc., in sections 15, 17 and 24 of the principal Act, so as to make these offences triable summarily by a Magistrate. Clause 5 seeks to introduce a new section 29A making provision for cases where an offence under the Act is committed by a body of persons.

We have examined the provisions of the Bill, and we determine that none of the provisions of the Bill are inconsistent with the Constitution or any provision thereof.

H.A. G. de Silva
Judge of the Supreme Court.

G. R. T. D. Bandaranayake
Judge of the Supreme Court.

M. D. H. Fernando
Judge of the Supreme Court.

R. N. M. Dheeraratne
Judge of the Supreme Court.

S. B. Goonewardene
Acting Judge of the Supreme Court.

First Reading :
23.01.1990 (Hansard Vol. 62 No. 4 Col. 839)

Sponsor :
Prime Minister, Minister of Finance and Minister of Labour and Social Welfare

Decision of the Supreme Court conveyed to Parliament :
11.01.1990 (Hansard Vol. 62 No. 2 Cols. 175–176; 190-191)

Second Reading:
30.01.1990 (Hansard Vol. 62 No. 9 Col. 1692)

Committee and Third Reading:
30.01.1990 (Hansard Vol. 62 No. 9 Cols. 1692-1693)

Hon. Speaker's Certificate :
06.03.1990

Title : **Consumer Credit (Amendment) Act, No. 6 of 1990.**

MOTOR TRAFFIC (AMENDMENT)

A

BILL

to amend the Motor Traffic Act (Chapter 203)

THE MOTOR TRAFFIC (AMENDMENT) BILL

In the matter of a Reference under Article 122(1)(b) of the Constitution

S. C. Special Determination No. 8/90
(PPA/Par I/53)

Present :
H. A. G. de Silva, J.,
Bandaranayake, J.,
Fernando, J.
Dheeraratne, J., and
Goonewardene, A. J.

Counsel :
Shibly Aziz, P. C., Additional Solicitor-General, with P. L. D. Premaratne, D. S. G., K. C. Kamalasabayson, S. S. C, A. Kasturiaratchi, S. C., and F. N. Goonewardene, S. C., for the Attorney-General

The Court assembled for the hearing at 10.20 a.m. on 8th January 1990.

A Bill titled "An Act to amend the Motor Traffic Act (Chapter 203) "("The Motor Traffic (Amendment) Act, No. of 1989") was referred to this Court by His Excellency the President, in terms of Article 122(1)(b) of the Constitution, for the special determination of this Court whether the Bill or any provision thereof is inconsistent with the Constitution. The Bill contains a certificate to the effect that in the view of the Cabinet of Ministers the Bill is urgent in the national interest.

Mr. K. C. Kamalasabayson, Senior State Counsel, assisted this Court in this matter.

The Bill seeks to make certain amendments to the Motor Traffic Act, (Chapter 203).

Clauses 2, 3, 4 and 5 of the Bill seek to make minor amendments, by adding the words "or leasing agreement" in sections 7, 9, 13 and 14 of the principal Act, which now provides only for higher purchase agreements; this would enable applications for registration of a motor vehicle and for registration of a new owner to be made by, and for the registration of, the person who let the vehicle under a leasing agreement (in the same way as the person who let the vehicle under a hire-purchase agreement).

We have examined the provisions of the Bill, and we determine that none of the provisions of the Bill are inconsistent with the Constitution or any provision thereof.

H.A. G. de Silva
Judge of the Supreme Court.

G. R. T. D. Bandaranayake
Judge of the Supreme Court.

M. D. H. Fernando
Judge of the Supreme Court.

R. N. M. Dheeratne
Judge of the Supreme Court.

S. B. Goonewardene
Acting Judge of the Supreme Court.

First Reading :
23.01.1990 (Hansard Vol. 62 No. 4 Col. 840)

Sponsor :
Prime Minister, Minister of Finance and Minister of Labour and Social Welfare

Decision of the Supreme Court conveyed to Parliament :
11.01.1990 (Hansard Vol. 62 No. 2 Cols. 175–176; 191–192)

Second Reading :
31.01.1990 (Hansard Vol. 62 No. 9 Cols. 1693)

Committee Stage and Third Reading :
31.01.1990 (Hansard Vol. 62 No. 9 Cols. 1693 – 1694)

Hon. Speaker's Certificate :
06.03.1990

Title : **Motor Traffic (Amendment) Act, No. 8 of 1990.**

AGRARIAN SERVICES (AMENDMENT)

A

BILL

to amend the Agrarian Services Act No., 58 of 1979

THE AGRARIAN SERVICES (AMENDMENT) BILL

In the matter of a Reference under Article 122(1)(b) of the Constitution

S. C. Special Determination No. 9/90
(PPA/Parl/53)

Present :
H. A. G. de Silva, J.,
Bandaranayake, J.,
Fernando, J.
Dheeraratne, J., and
Goonewardene, A. J.

Counsel :
Shibly Aziz, P. C., Additional Solicitor-General, with P. L. D. Premaratne, D. S. G., K. G. Kamalasabayson, S. S. C., A. Kasturiaratchi, S. C., and F. N. Goonewardene, S. C., for the Attorney-General

Dr. H. W. Jayewardene, Q. C., with L. C. Seneviratne, P. C., R. K. W. Goonesekera, Gamini Jayasinghe, Harsha Cabraal and Miss N. Rajapakse on behalf of the Bar Assciation of Sri Lanka;

R. K. W. Goonesekera with Gamini Jayasinghe on behalf of Sanath Jayatileke.

The Court assembled for the hearing at 10.20 a.m. on 8th January 1990.

A bill titled "An Act to amend the Agrarian Service Act No. 58 of 1979" ("The Agrarian Services (Amendment) Act. No. of 1989") was referred to this Court by His Excellency the President, in terms of Article 122(1)(b) of the Constitution, for the special determination of this Court whether the Bill or any provision thereof is inconsistent with the Constitution. The Bill contains a certificate to the effect that in the view of the Cabinet of Ministers the Bill is urgent in the national interest.

Mr. P. L. D. Premaratne, Deputy Solicitor-General, assisted this Court in this matter.

The Bar Association of Sri Lanka and Sanath Jayatilleke, applied for, and were granted , an opportunity to make submissions in support of their objections to the Bill.

Section 27 of the principal Act enables a loan to be obtained, by the owner cultivator or occupier of any agricultural land, from a prescribed bank "by creating a mortgage or charge on such land or on any other immovable property which he owns or in which he has an interest". Clause 2 of the Bill seeks to define "interests" to include the *ande* rights of a tenant cultivator the rights of a leasee of such land and the rights of the majority of the co-owners of land held in "thattumaru". Such amendment would have the effect of making the rights specified capable of being mortgaged, even if under the existing law they are not capable of being mortgaged. There appears to be some ambiguity in the proposed amedment, which however would not affect its constitutionality, but in the limited time available we were not able to clarify the matter or to suggest a suitable amendment.

Clause 3 the Bill seek to amend section 29 of the principal Act. At present, when a borrower makes default (of section 28), the lender-bank may notify the Commissioner of Agrarian Services, who would then hold an inquiry as to whether the borrower is in default of the sum specified by the bank; after inquiry at which the bank and the borrower are entitled to be heard, if satisfied that any sum of money is due, he shall order the borrower (or heir or legal representative) to pay the amount due within a speified time. Upon failure to do so, the bank may apply to the Magistrate's Court to recover the sum due in like manner as a fine, and for this purpose a certificate under the hand of an authorised officer of the bank shall be conclusive proof that such sum is due from the defaulting borrower. It was submitted by Mr. Goonesekera, and was conceded by Mr. Premaratne, that the relevant officers who hold inquiries under this provision are appointed by the Judicial Service Commission. The proposed amendment seeks to dispense with an inquiry by the Commissioner, and to enable the bank to notify the magistrate's Court directly of the default, and to enable the sum specified in such notice to be recovered in like manner as a fine, for which purpose "a certificate under the hand of an officer authorised in that behalf by the prescribed bank to the effect that such sum is due to such bank from the defaulter named in the certificate shall be conculusive proof that such sum is due to such bank from such defaulter." *Prima facie*, this provision appears to deny to the borrower anyopportunity of proving that he is not in default; or even that he did not obtain any loan from the prescribed bank. This would suggest that the lender-bank is, in effect, conclusively determining the legal liability of the alleged defaulter. However, scrutiny of the provisions of section 28, as well as of the proposed section 29, seems to suggest that these provisions can become opertive only when in fact there is a default, but the proper interpretation of these provisions is in doubt, particularly as the proposed sub-section appears to preclude the borrower from proving that he is not in default. In these circumstances, we entertain a doubt whether the provisions of clause 3 of the Bill, in taking away the right to an inquiry by an officer appointed by the Judicial Service Commission and by seemingly denying the Magistrate's Court the power to adjudicate on the liability of the borrower, is inconsistent with the provisions of Article 4(c) of the Constitution, and those provisions must be deemed to have been determined to be inconsistent with that Article in terms of Article 123(3) and may only be passed by the special majority reuired under the Provisions of paragraph (2) of Article 84 of the Constitution.

Mr. Premaratne stated that it was not the intention of this Bill to deny the borrower the right to have the question whether he was in default judicialy determined; that sub-section (2) was intended to permit recovery in like manner as a fine only of such sum, if any as is found to be due", and that sub-section (3) should correspondingly be amended by substituting the words "*Prima facie*" for the word "conclusive". Upon such amendment being made, the provisions of clause 3 would cease to be inconsistent with the Constitution.

Clause 4 of the Bill seeks to add to section 30 a new sub-section (2), (which is identical to section 33 (2) of the Agricultural Lands Law, No. 42 of 1973), the effect of which is to make any debt due or payable to a prescribed bank by any owner or occupier of agricultural land a first charge upon crops, agricultural produce, cattle, fodder for cattle, and agricultural implements, where the loan granted by such bank has been used, wholly or partly, for raising such crops or purchasing such assets. Mr. Goonesekera strongly criticised this provision, pointing out that this would deny the debtor the benefits of exemption from seizure presecribed by section 218(b) of the Civil Procedure Code, and would leave him with only the clothes he was wearing. He contended that this would amount to cruel, inhuman and degrading treatment inconsistent with Article 11, and discrimination contrary to Article 12.

He cited the determination of this Court in regard to the Essential Public Services Bill (Decisions of the Supreme Court on Parliamentary Bills, 1978-83, page 65) in support of the former contention. These offences were made punishable with imprisonment for a minimum term of two years, and in addition, to the mandatory forferiture of all property, movable and immovable as well as the madatory removal of the offender's name from any register maintained under any written law which entitled him to practise a profession or vocation. Reference was made to certain decisions of the American Courts, in regard to "cruel and *unusual*" punishment, including *Robinson v. California*, 370 U. S. 660, where it was held that "a punishment out of all proportion to the offence may bring it within the bar against cruel and unusual punishment", this Court held that such forfeiture and removal "constitute excessive punishment and savours of cruelty". What is unusual or excessive is not necessarily cruel, but the punihsment provided for in that Bill would have been cruel except where the particular offence committed was grave. There is a great difference between criminal punishments of that nature and the seizure and sale of property purchased with money provided by a lender, upon default by the borrower; further, cluase 4 appears to be intended to enable credit to be given to persons who have no land and little movable property to offer as security, and the creation of a charge over assets produced or purchased with such loans cannot be regarded as cruel, inhuman or degrading treatment of punishment. Since the creation of such charge is at least partly for the purpose of benefiting a class or category of persons. by enabling them to obtain credit facilities which they would otherwise not be able to obtain, it is not inconsistent with Article 12.

Clause 4 also seeks to add a new sub-section (3) enabling the bank to enforce the aforesaid first charge by seizure and sale of the property subject to such charge, even if it is in the possession of a third party. This would tend to affect the borrower's ability to sell his produce and cattle, and even to diminish the price receivable, as the lender-bank has the right to seize and sell the same even from a purchaser for value without notice. It is relevant to mention that the Mortage Commission in its Second Interim Report (paragraph 187), while recommedning provisions for crop mortgages, expressly preserved the right of even a mortgager or crops freely to sell his produce; here, even without a mortgage, the producer's right to sell his produce is seriously impaireal. This provision appears to go far beyond a legitimate right of parate exeution, extending to property not mortgaged, in the hands of *bona fide* third parties who may have purchased for value, and with no opportunity for relief or remedy through a Court. We entertain a doubt whether this provision is inconsistent with the provisions of Article 4(*c*) of the Constitution; it must therefore be deemed to have been determined to be inconsistent with that Article, in terms of Article 123(3) and may only be passed by the special majority required under the provisions of paragraph (2) of Article 84 of the Constitution.

Mr. Premaratne agreed that the provision needs reconsideration, as for instance by deleting the words "notwithstanding the fact that the property is in the possession of a third party". Upon such amendment being made, the provisions of clause 3 would cease to be inconsistent with the Constitution.

H. A. G. de Silva
Judge of the Supreme Court

G. R. T. D. Bandaranaike
Judge of the Supreme Court

M. D. H. Fernando
Judge of the Supreme Court

R. N. M. Dheeraratne
Judge of the Supreme Court.

S. B. Goonewardene
Acting Judge of the Supreme Court

First Reading:
23.01.1990 (Hansard Vol. 62 No. 4 Col. 840)

Sponsor:
Prime Minister, Minister of Finance and Minister of Labour and Social Welfare

Decision of the Supreme Court conveyed to Parliament:
11.01.1990 (Hansard Vol. 62 No. 2 Cols. 175-177; 192-195)

Second Reading:
30.01.1990 (Hansard Vol. 62 No. 9 Col. 1694)

Committee Stage and Third Reading:
30.01.1990 (Hansard Vol. 62 No. 9 Cols. 1695-1697)

Hon. Speaker's Certificate:
06.03.1990

Title: **Agrarian Services (Amendment) Act, No 9 of 1990.**

NATIONAL DEVELOPMENT BANK OF SRI LANKA (AMENDMENT)

A

BILL

to amend the National Development Bank of Sri Lanka Act No., 2 of 1979

THE NATIONAL DEVELOPMENT BANK OF SRI LANKA (AMENDMENT) BILL

In the matter of a Reference under Article 122(1) (b) of the Constitution

S. C. Special Determination No 10/90
(PPA/Parl/53)

Present :
H. A. G. de Silva, J.,
Bandaranayake, J.,
Fernando, J.,
Dheeraratne, J., and
Goonewardene, A. J.

Counsel :
Shibly Aziz, P.C., Additional Solicitor-General, with P. L. D. Premaratne, D. S. G., K. C. Kamalasabayson, S. S. C. A. Kasturiaratchi, S. C., and F. N. Goonewardene, S. C., for the Attorney-General;

Dr. H. W. Jayewardene, Q. C., with L. C. Seneviratne, P. C., R. K. W. Goonesekera, Gamini Jayasinghe, Harsha Cabraal and Miss N. Rajapakse on behalf of the Bar Association of Sri Lanka.

The Court assembled for the hearing at 10.20 a. m. on 8th January 1990.

A Bill titled "An Act to amend the National Development Bank of Sri Lanka Act No. 2 of 1979" ("The National Development Bank of Sri Lanka (Amendment) Act, No. of 1989") was referred to this Court by His Excellency the President, in terms of Article 122(1) (b) of the Constitution, for the special determination of this Court whether the Bill or any provision thereof is inconsistent with the Constitution. The Bill contains a certificate to the effect that in the view of the Cabinet of Ministers the Bill is urgent in the national interest.

Mr. P. L. D. Premaratne, Deputy Solicitor-General, assisted this Court in this matter.

The Bar Association of Sri Lanka applied for, and was granted, an opportunity to make submissions in support of its objections to the Bill.

The object of the Bill is to amend the principal Act in order to extend the right of parate execution already enjoyed by the National Development Bank in respect of immovable property mortgaged to it, so as to include that right in respect of mortgaged movables as well. For the reasons given in our determinations in regard to the Mortgage (Amendment) Bill and the Recovery of Loans by Banks (Special Provisions) Bill (Special Determinations Nos 2/90 and 3/90), we determine that none of the provisions of this Bill are inconsistent with the Constitution or any provision thereof.

H. A. G. de Silva
Judge of the Supreme Court

G. R. T. D. Bandaranayake
Judge of the Supreme Court

M. D. H. Fernando
Judge of the Supreme Court

R. N. M. Dheeraratne
Judge of the Supreme Court

S. B. Goonewardene
Acting Judge of the Supreme Court

First Reading:
23.01.1990 (Hansard Vol. 62 No. 4 Col. 841)

Sponsor:
Prime Minister, Minister of Finance and Minister of Labour and Social Welfare

Decision of the Supreme Court conveyed to Parliament:
11.01.1990 (Hansard Vol. 62 No. 2 Cols. 175-176; 195-196)

Second Reading:
30.01.1990 (Hansard Vol. 62 No. 9 Col. 1697)

Committee Stage and Third Reading:
30.01.1990 (Hansard Vol. 62 No. 9 Cols. 1697-1698)

Hon. Speaker's Certificate:
06.03.1990

Title: **National Development Bank of Sri Lanka (Amendment) Act, No 10 of 1990.**

PUBLIC SERVANTS (LIABILITIES) (AMENDMENT)

A

BILL

to amend the Public Servants (Liabilities) Ordinance

THE PUBLIC SERVANTS (LIABILITIES) (AMENDMENT) BILL

In the matter of a Reference under Article 122(1) (b) of the Constitution

S. C. Special Determination No 11/90
(PPA/Parl/53)

Present :
H. A. G. de Silva, J.,
Bandaranayake, J.,
Fernando, J.,
Dheeraratne, J., and
Goonewardene, A. J.

Counsel :
Shibly Aziz, P.C., Additional Solicitor-General, with P. L. D. Premaratne, D. S. G., K. C. Kamalasabayson, S. S. C. A. Kasturiaratchi, S. C., and F. N. Goonewardene, S. C., for the Attorney-General;

The Court assembled for the hearing at 10.20 a. m. on 8th January 1990.

A Bill titled "An Act to amend the Public Servants (Liabilities) Ordinance (Chapter 103)" "("The Public Servants (Liabilities) (Amendment) Act, No. of 1989") was referred to this Court by His Excellency the President, in terms of Article 122(1) (b) of the Constitution, for the special determination of this Court whether the Bill or any provision thereof is inconsistent with the Constitution. The Bill contains a certificate to the effect that in the view of the Cabinet of Ministers the Bill is urgent in the national interest.

Mr. P. L. D. Premaratne, Deputy Solicitor-General, assisted this Court in this matter.

The object of this Bill is to deny the benefit of the principal Act in respect of a liability contracted by a public servant who has failed to disclose to the lender the fact that he is a public servant, or who has stated that his occupation or employment is other than that of a public servant, in response to any inquiry made of him by the lender in that respect.

We have examined the provisions of the Bill, and we determine that none of the provisions of this Bill are inconsistent with the Constitution or any provision thereof.

H. A. G. de Silva
Judge of the Supreme Court

G. R. T. D. Bandaranayake
Judge of the Supreme Court

M. D. H. Fernando
Judge of the Supreme Court

R. N. M. Dheeraratne
Judge of the Supreme Court

S. B. Goonewardene
Acting Judge of the Supreme Court

First Reading:
23.01.1990 (Hansard Vol. 62 No. 4 Col. 841)

Sponsor:
Prime Minister, Minister of Finance and Minister of Labour and Social Welfare

Decision of the Supreme Court conveyed to Parliament:
11.01.1990 (Hansard Vol. 62 No. 2 Cols. 175-176; 196-197)

Second Reading:
30.01.1990 (Hansard Vol. 62 No. 9 Col. 1698)

Committee Stage and Third Reading:
30.01.1990 (Hansard Vol. 62 No. 9 Col 1699)

Hon. Speaker's Certificate:
06.03.1990

Title: **Public Servants (Liabilities) (Amendment) Act, No 11 of 1990.**

CODE OF CRIMINAL PROCEDURE (AMENDMENT)

A

BILL

to amend the Code of Criminal Procedure Act No., 15 of 1979

THE CODE OF CRIMINAL PROCEDURE (AMENDMENT) BILL

In the matter of a Reference under Article 122(1) (b) of the Constitution

S. C. Special Determination No 12/90
(PPA/Parl./53)

Present :
H. A. G. de Silva, J.,
Bandaranayake, J.,
Fernando, J.,
Dheeraratne, J., and
Goonewardene, A. J.

Counsel :
Shibly Aziz, P.C., Additional Solicitor-General, with P. L. D. Premaratne, D. S. G., K. C. Kamalasabayson, S. S. C. A. Kasturiaratchi, S. C., and F. N. Goonewardene, S. C., for the Attorney-General;

The Court assembled for the hearing at 10.20 a. m. on 8th January 1990.

A Bill titled "An Act to amend the Code of Criminal Procedure Act No. 15 of 1979" ("The Code of Criminal Procedure (Amendment) Act, No.   of 1989") was referred to this Court by His Excellency the President, in terms of Article 122(1) (b) of the Constitution, for the special determination of this Court whether the Bill or any provision thereof is inconsistent with the Constitution. The Bill contains a certificate to the effect that in the view of the Cabinet of Ministers the Bill is urgent in the national interest.

Mr. P. L. D. Premaratne, Deputy Solicitor-General, assisted this Court in this matter.

Chapter XXXVIII of the Code of Criminal Procedure Act, No 15 of 1979, makes provision for the disposal of property regarding which any offence appears to have been committed, or which has been used for the commission of any offence. In relation to some of the provisions of that Chapter, the Court has to determine the person entitled to the possession of such property when such property is disposed of, either pending or after inquiry or trial. The object of this Bill is to provide that in the case of a vehicle let under a hire-purchase or leasing agreement, the person registered as the absolute owner of such vehicle under the Motor Traffic Act (Chapter 203) shall be deemed to be the person entitled to possession thereof for the purpose of Chapter XXXVIII. This does not involve any question of inconsistency with the Constitution.

We have examined the provisions of the Bill, and we determine that none of the provisions of the Bill are inconsistent with the Constitution or any provision thereof.

H. A. G. de Silva
Judge of the Supreme Court

G. R. T. D. Bandaranayake
Judge of the Supreme Court

M. D. H. Fernando
Judge of the Supreme Court

R. N. M. Dheeraratne
Judge of the Supreme Court

S. B. Goonewardene
Acting Judge of the Supreme Court

First Reading:
23.01.1990 (Hansard Vol. 62 No. 4 Col. 841)

Sponsor:
Prime Minister, Minister of Finance and Minister of Labour and Social Welfare

Decision of the Supreme Court conveyed to Parliament:
11.01.1990 (Hansard Vol. 62 No. 2 Cols. 175-176; 197-198)

Second Reading:
30.01.1990 (Hansard Vol. 62 No. 9 Col. 1700)

Committee Stage and Third Reading:
30.01.1990 (Hansard Vol. 62 No. 9 Cols 1700-1701)

Hon. Speaker's Certificate:
06.03.1990

Title: **Code of Criminal Procedure (Amendment) Act, No 12 of 1990.**

TRUST RECEIPTS (AMENDMENT)

A

BILL

to amend the Trust Receipts Ordinance

THE TRUST RECEIPTS (AMENDMENT) BILL

In the matter of a Reference under Article 122(1)(b) of the Constitution

S. C. Special Determination No. 13/ 90
(PPA/Par 1/ 53)

Present :
H. A G. de Silva, J,
Fernando, J.
Kulatunga, J,
Dheeraratne, A.J.
Goonewardene, A, J,

Counsel :
K. C. Kamalasabayson, S.S.C. for the Attorney -General; Lakshman Kadirgamar with Thusantha Wijemanna and Sinha Ratnautuga for the Sampath Bank.

The Court assembled for the hearing at 10.15 a.m. on 16th January 1990.

A Bill titled "An Act to amend the Trust Receipts Ordinance " ("the Trust Receipts (Amendment) Act, No. of 1989") was referred to this Court by His Excellency the President, in terms of Article 122 (1)(b)of the Constitution, for the special determination of this Court whether the Bill or any provision there of is inconsistent with the Constitution. The Bill contains a certificate to the effect that in the view of the Cabinet of Ministers the Bill is urgent in the national interest.

The Sampath Bank applied for, and was granted, an oppourtunity to make submission in support in the Bill.

Mr. K. C. Kamalasabayson, Senior State Counsel, and Mr. L. Kadirgamar assisted this Court in this matter.

The Trusts Receipts Ordinance (Cap.86) provides for the execution of Trust Receipts in respect of goods imported into Sri Lanka, and goods purchased for export from Sri Lanka, by a person who obtains an advance by way of loan or otherwise from an approved credit agency, as defined in that Ordinance.

Clauses 2 and 3 of the Bill seek to amend sections 2(2)and 3(2) of the principal Act by requiring that an additional undertaking - to insure the goods - be included in Trust Receipts both for imported goods, and for goods for exportation.

Clause 4 of the Bill seeks to amend section 4(1)(iv), which penalises a breach of, or a failure to comply with , any undertaking referred to in sections 2(2), 2(3), or 3(2) by making such breach or failure punishable on conviction " after summary trial before a Magistrate" and to increase the penalty to imprisonment for a period not exceding three years, or to a fine not less than the amount stated to be due in the Trust Receipt or to be payable thereunder, and not exceeding three times that amount.

Clause 5 seeks to introduce a new section 4A making provision for cases where an offence under the Act is committed by a body of person.

Clause 6 seeks to repeal the definition of "approved credit agency" and to substitute a new section 5, containing a new definition. Clause (a) of this definition corresponds to clause (a) of the former definition, and includes commercial banks but defines such banks by reference to the recent Banking Act, No 30 of 1988. Clauses (b), (c) and (d) of the new definition, refers to three State lending institutions; one of these is the successor of two State lending institutions mentioned in clause (b) of the former definition, and the other two - the National Development Bank and the Development Finance Corporation of Ceylon- were established after the principal Act was enacted, Licensed commercial banks and these State lending institutions can legitimately be regarded as constituting a class for the purpose of this enactment.

Mr. Kamalasabayson stated that clause 7 of the Bill was inconsistent with Article 76(3) read with article 12 of the Constitution, in that it enabled the Director of Commerce to add agencies to the class of "approved credit agencies" created by clause 6, but failed to specify appropriate guidelines for the exercise of this powers. Mr. Kadirgamar submitted that the discretionary power sought to be vested in the Director of Commerce was an executive administrative power, and not a power to make subordinate legislation. We are of the opinion that this clause empowers the Director of Commerce to expand the scope of the enactment, and to make it applicable to other institutions and individuals; it is a legislative power, rather than an executive power, and "Prescribed purpose" should be specified. We accordingly determine that clause 7 is inconsistent with Article 76(3), read with Article 12, of the Constitution, and may only be passed by the special majority requird under the provisions of paragraph (2) of Article 84 of the Constitution. The provisions of the proposed section 5(1) (e) sought to be introduced by clause 6 of the Bill have to be read with clause 7, and are affected by the same inconsistency. Accordingly, unless clause 7 is passed by the special majority as aforesaid, or suitably amended, paragraph (e) of the proposed section 5(1) will also be inconsistent with Article 78(3) of the Constitution, and may itself only be passed by the special majority required under the provisions of paragraph (2) of Article 84 of the Constitution.

We have examined the other provisions of the Bill, and we determine that none of the other provisions of the Bill are inconsistent with the Constitution or any provision thereof.

H. A. G. de Silva
Judge of the Supreme Court.

M. D. H. Fernando
Judge of the Supreme Court.

K. M. M. B. Kulatunga
Judge of the Supreme Court.

R. N. M. Dheeraratne
Judge of the Supreme Court.

S. B. Goonewardene
Acting Judge of the Supreme Court.

First Reading :
24.01.1990 (Hansard Vol. 62 No. 5 Col. 985)

Sponsor :
Prime Minister, Minister of Finance and Minister of Labour and Social Welfare

Decision of the Supreme Court conveyed to Parliament :
23.01.1990 (Hansard Vol. 62 No. 4 Cols. 729 – 731)

Second Reading :
30.01.1990 (Hansard Vol. 62 No. 9 Col. 1701)

Committee Stage and Third Reading :
30.01.1990 (Hansard Vol. 62 No. 9 Cols. 1701 – 1703)

Hon. Speaker's Certificate :
06.03.1990

Title : **Trust Receipts (Amendment) Act, No. 13 of 1990**

INLAND TRUST RECEIPTS

A

BILL

to provide for the execution of Inland Trust Receipts in conformity with specified requirements; and for matters connected therewith or incidental thereto.

THE INLAND TRUST RECEIPTS BILL

In the matter of a Reference under Article 122(1) (b) of the Constitution.

S.C. Special Determination No. 4/90
(PPA/Parl/53)

Present :
H. A. G. de Silva, J.,
Bandaranayake, J.,
Fernando, J.,
Dheeraratne, J., and
Goonewardene, A. J.,

Counsel :
Shibliy Aziz, P. C. Additional Solicitor -General, with P. L. D. Premaratne, D. S. G., K. C. Kamalasabayson, S. S. C., A. Kasturiaratchi, S.C., and F. N. Goonewardene, S.C., for the Attorney-General.

The Court assembled for the hearing at 10.20 a.m. on 8th January 1990.

A Bill titled "An Act to provide for the execution of Inland Trust Receipts in conformity with specified requirements; and for matters connected therewith or incidental thereto" ("The Inland Trust Receipts Act. No. of 1989") was referred to this Court by His Excellency the President, in terms of Article 122(1) (b) of the Constitution, for the special determination of this Court whe ther the Bill or any provision there of is inconsistent with the Constitution. The Bill contains a certificate to the effect that in the view of the Cabinet of Ministers the Bill is urgent in the national interest.

Mr. K. C. Kamalasabayson, Senior State Counsel, assisted this Court in this matter.

The Trusts Receipts Ordinance (Cap 95, 1980 Revn.) provides for the execution of trust receipts in respect of goods imported into Sri Lanka, and goods purchased for export from Sri Lanka, by a person who obtains an advance by way of loan or otherwise from an approved credit agency, as defined in that Ordinance. The Bill under consideration seeks to make like provision in respect of goods purchased in Sri Lanka.

Mr. Kamalasabayson stated that clause 6 of the Bill was inconsistent with article 12 of the Constitution, in that it enabled the Director of Commerce to add agencies to the class of "approved credit agencies" created by clause 5, but failed to specify appropriate guidelines for the exercise of his powers. We accordingly determine that clause 6 is inconistent with article 12 and may only be passed by the special majority required under the provision of paragraph (2) of Article 84 of the Counstitution.

We have examined the other provisions of the Bill, and we determine that none of other provisions of the Bill are inconsistent with the Constitution or any provision thereof.

H. A. G. de Silva
Judge of the Supreme Court.

G. R. T. D. Bandaranayake
Judge of the Supreme Court.

M. D. H. Fernando
Judge of the Supreme Court.

R. N. M. Dheeraratne
Judge of the Supreme Court.

S. B. Goonewardene
Acting Judge of the Supreme Court.

First Reading :
24.01.1990 (Hansard Vol. 62 No. 5 Col. 986)

Sponsor :
Prime Minister, Minister of Finance and Minister of Labour and Social Welfare

Decision of the Supreme Court conveyed to Parliament :
11.01.1990 (Hansard Vol. 62 No. 2 Cols. 175-177; 186-187)

Second Reading :
30.01.1990 (Hansard Vol. 62 No. 9 Col. 1703)

Committee Stage and Third Reading :
30.01.1990 (Hansard Vol. 62 No. 9 Cols. 1704 - 1706)

Hon. Speaker's Certificate :
06.03.1990

Title : **Inland Trust Receipts Act, No. 14 of 1990.**

CREDIT INFORMATION BUREAU OF SRI LANKA

A

BILL

to provide for the establishment of the Credit Information Bureau of Sri Lanka for the collection of credit information relating to borrowers from lending institutions and for the provision of such information to the shareholders of the Bureau, with a view to facilitating the distribution of credit to all sectors of the economy and to the informal sector, in particular, and for matters connected therewith or incidental thereto.

THE CREDIT INFORMATION BUREAU OF SRI LANKA BILL

In the matter of a Reference under Article 122(1) (b) of the Constitution.

S. C. Special Determination No. 14/90
(PPA/Parl/54)

Present :
H. A. G. de Silva, J.,
Fernando, J., and
Goonewardene, A. J.,

Counsel :
K. C. Kamalasabayson, Acting Deputy Solicitor General, with A. Gnanadasan, S. C., for the Attoney-General.

The Court assembled for the hearing at 10.00 a.m. on 16th February 1990.

A Bill titled "An Act to provide for the establishment of the Credit Information Bureau of Sri Lanka for the collection of credit information relating to borrowers from lending institutions and for the provision of such information to the shareholders of the Bureau, with a view to facilitating the distribution of credit to all sectors of the economy and to the informal sector, in particular; and for matters connected therewith or incidental thereto" ("the Credit Information Bureau of Sri Lanka Act, No. of 1989") was referred to this Court by His Excellency the President, in terms of Article 122(1)(b) of the Constitution, for the special determination of this Court whether the Bill or any provision thereof is inconsistent with the Constitution. The Bill contains a certificate to the effect that in the view of the Cabinet of Ministers the Bill is urgent in the national interest.

Mr. K. C. Kamalasabayson, Acting Deputy Solicitor-General, assisted this Court in this matter.

The Bill seeks to establish a Credit Information Bureau, as a body corporate, with an authorised capital of Rs. One Hundred Million, the shareholders being restricted to the Central Bank and other lending institutions (defined as licensed commercial banks, finance companies, the National Savings Bank, the National Development Bank, the State Mortgage and Investment Bank, and the Development Finance Corporation of Ceylon); the liability of a shareholder is limited to the amount, if any, unpaid in respect of his shares. The bill provides that the Monetary Board shall invite and receive applications for the initial issue of shares, and shall allot the shares in a specified proportion; the Central Bank shall hold 51% of the issued share capital, licensed Commercial Banks and Regional Rural Development Banks 30%, and other lending institutions 19%, subsequent allotments, as well as transfers, of shares shall be subject to the approval of the Monetary Board, which is required to endeavour to maintain the aforesaid ratio (of 51% : 30%: 19%). The Board of Directors of the Bureau shall consist of ten persons: two officers of the Central Bank nominated by the Monetary Board, two officers-one each - nominated by the Bank of Ceylon and the People's Bank, one person nominated by the Minister of Finance from among the Boards of Directors of the the National Savings Bank, the National Development Bank, the State Mortgage and Investment Bank, and the Development Finance Corporation of Ceylon, two persons elected by the shareholding licensed commercial banks other than the Bank of Ceylon and the People's Bank, one person elected by the shareholding finance companies, and the General Manager of the Bureau. The Bureau shall have its head office in Colombo, and may branch offices and agents at other places in Sri Lanka. This is the effect of clauses 2,3,4,5,8,9,10 and 11 of the Bill.

Clauses 12 to 20, and 22 to 29 of the Bill provide for the departments of the Bureau, its funds, borrowings, investments, reserves, financial year, audit, accountability to Parliament through the Minister, delegation of powers, duties and functions, secrecy, protection of the Bureau and the Board in respect of certain suits and prosecutions, power to make rules, offences, and interpretation. In clause 27(4) there is an erroneous reference to section 28(1)(a) and (b), instead of 27(1)(a) and (b).

The definition of " lending institution" in clause 29 does not include the Central Bank, Regional Rural Development Banks, the Bank of Ceylon and the People's Bank. It would seem form clause 10(2) that " lending institution" was intended to include the Central Bank and Regional Rural Development Bank. Similarly clause 5(1) refers to the Bank of Ceylon and the People's Bank and these two Banks appear to be regarded as "lending institutions" within the meaning of clause 10(2). Although the definition of " lending institution" includes "a licensed commercial bank" that phrase is defined in clause 29 as meaning a company licensed under the Banking Act, and hence would not include other institutions which are not companies. Mr. Kamalasabayson agreed that the definition of "lending institution" needed amendment so as to include the Central Bank and Regional Rural Development Banks, and that the definiton of " a licensed commercial bank" needed amendment so as to include institutions licensed under the Banking Act as well. But for such amendments, questions of inconsistency with Article 12 would arise , in that institutions which are not within the definition of " lending institution " (and there fore not bound to funish returns and information under clause 21) were nevertheless entitled as shareholders to receive confidential credit information.

The essential function of the Bureau is to collect and collate trade, credit and financial infor mation relating to borrowers and prospective borrowers of lending institutions, and to provide credit information on request to shareholders; for this purpose the Bureauis given certain powers and duties (clause 7) and is empowered to require any lending institution to furnish returns and informatin, and such institutions are thereupon compelled to furnish such return or information (clause 21);failing or refusing without reasonable cause to comply, and knowingly furnishing false or incorrect information, are offences (clause 27) . This scheme would enable a lending institution to determine the credit - worthiness of borrowers more accurately, since it would have much fuller information as to the business affairs of the prospective borrowers; it is in the interests of the lending institution as well as of honest borrowers, and would deter prospective borrowers from withholding informaton as to their liabilities to other lending institutions. The common law relationg to bankers and customer imposes certain duties of confidentialty on bankers, but this is always subject to exceptions made by statute. The fact that the Bill (in clause 21(2) adds yet another statutory exception to the common law rules involves no infringement of fundamental rights. The duty of furnishing information is cast upon all lending institutions. This raised the question of a possible infringement of Article 12 (1) in that a lending institution which was not a shareholder would be obliged to furnish information, but would not be entitled to receive information. However, the scheme of the proposed legislation is that all lending institutions are entitled to be shareholders; the Monetary Board has no discretion to refuse to allot shares to any particular lending institution, and its descretion is restricted only as to the quantum to be allocated to each applicant institution. Accordigly, every lending institution would be obliged to furnish credit information, and would receprocally receive credit information Hence there is no question of inequality or discrimination as between lending institutions *inter se.*

Questions of unconstitutionality arise, however, in two respects. Firstly, credit information is protected from disclosure in the hands of a particular borrower's bank (by agreement under the common law or the statute under which such bank was established) , and in the hands of the Bureau: disclosure by officers of the Bureau is prohibited (in the manner and to the extent set out in clauses 22 and 23), and attracts penalities under clause 27. Where such information is lawfully disclosed by the Bureau "in confidence" to a shareholder (under clause 7(d)), disclosure by such shareholder doest not attract the same penalty, or indeed any penalty. Mr. Kamalasabayson agreed that *prima facie* this involves an inconsistency with Article 12(1). Secondly, the object of the proposed legislation in requiring such credit information to be disclosed to the Bureau is presumbly as set out in the long title of the Bill. However, the duty of the Bureau to disclose such information to a shareholder (and the right of a shareholder to obtain such information) is not restricted by reference to any such purpose; it would appear that a shareholder is entitled to demand and receive such information for any purpose whatsoever. Here too Mr. Kamalasabayson agreed that a questions of inconsistency with Article 12(1) arises in that a shareholder would be given the advantage of obtaining confidential credit information, freely and of any purpose whatsover, which the Bureau would be entitled to obtain only for the purposes of the legislation.

For these reasons we entertain a doubt whether clauses 6 and 7(d) of the Bill are inconsistent with Article 12(1) of the Constitution and in terms of Article 123(3) such provisions are deemed to have been determined to be inconsistent with Article 12(1). However, Mr. Kamalasabayson stated, that clause 6 may be suitably amended by confining a shareholder's right to obtain information to the purposes for which the Bureau was to be set up; by adding to clause 6 words similar to –

> "with a view to facilitating the distribution of credit to all sectors of the conomy and to the informal sector, in particlular."

Further, clause 22, 23 and 27 should apply to a shareholder, and to directors, officers and servants of a shareholder, in the same manner as they apply to directors, officers and servants of the Bureau. An apporpriate amendement to that effect may be made in clause 6 itself, or elsewhere.

We have examined the provisions of the Bill, and we determine that, save as aforesaid, none of the of the provisions of the Bill are inconsistent with the Constitution or any provision thereof; and that upon amendments being made as indicated by us, clauses 6 and 7 (d), and the definition of "lending insitution" in clause 29, would cease to be inconsistent.

H. A. G. de Silva
Judge of the Supreme Court.

M. D. H. Fernando
Judge of the Supreme Court.

S. B. Goonewardene
Acting Judge of the Supreme Court.

First Reading :
07.03.1990 (Hansard Vol. 63 No. 2 Col. 239)

Sponsor :
Prime Minister, Minister of Finance and Minister of Labour and Social Welfare

Decision of the Supreme Court conveyed to Parliament :
20.02.1990 (Hansard Vol. 62 No. 13 Cols. 2173-2175)

Second Reading :
20.03.1990 (Hansard Vol. 63 No. 8 Cols. 993-1069)

Committee Stage and Third Reading :
20.03.1990 (Hansard Vol. 63 No. 8 Cols. 1069-1081)

Hon. Speaker's Certificate :
18.05.1990

Title : **Credit Information Bureau of Sri Lanka Act, No. 18 of 1990.**

CIVIL PROCEDURE CODE (AMENDMENT)

A

BILL

to amend the Civil Procedure Code (Amendment) Act, No. 79 of 1988

THE CIVIL PROCE DURE CODE (AMENDMENT) BILL

In the matter of a Petition under Article 121 of the Constitution.

W. M. V. Abeysekera.
15, Mudliyar Saram Mawatha,
Weliveriya, Matara

Petitioner,

S. L. No. 117/90 (Special)

Present :
H. A. G. de Silva, A. C. J.,
Fernando, J., and
Ramanathan, J.

Counsel :
K. C. Kamalasabayson, Senior State Counsel, with S. S. Iskandarajah, S. C., for the Attorney-General.

Petitioner absent and unreprsented.

HEARD AND DETERMINED ON: 25TH April 1990.

The Petitioner was absent and unrepresented. Mr. Kamalasabayson, Senior State Counsel assisted this Court in this matter.

This is a petition by W. M. V. Abeysekera of 15, Mudaliyar Saram Mawatha, Weliveriya, Matara, to the Supreme Court under Article 121 of the Constitution invoking our jurisdiction, in respect of a Bill entitled "An Act, to amend the Civil Procedure (Amendment) Act. No. 79 of 1988." The Petitioner avers (1) that there is no Act called the civil Procedure (Amendment) Act No. 79 of 1988 in the Legislative Enactments of Sri Lanka which is sought to be amended by this Bill. What is included in the said Legislative Enactments is the Civil Procedure Code (Amendment) Act No. 79 of 1988. This, to the Petitioner, is an attempt being made to enact laws causing confesion in the law and as such this Bill has been prepared so as to be in conflict with Article 12 of the Constitution. (2) That according to Article 80 of the Constitution a draft Bill which is passed by the Parliament is necessarily due to be included in the Legislative Enactments of Sri Lanka. Therefore if Section 93 of the Civil Procedure Code is to be amended it has to be amended by making reference to Section 93 of the Civil Procedure Code (Cap.101). This has not been done in the draft Bill. Further, he avers, that it is a grave injustice to disallow any amendments to a plaint in a case.

The Petitioner consequently suggests that the following amendments be included in the said draft Bill and that this Bill be withdrawn :

1. The title of the proposed Civil Procedure (Amendment) Draft Bill should be adjusted to read as Civil Procedure Code (Amendment).
2. The long title "an Act to amend Civil Procedure (Amendment) Act No. 79 of 1988" be altered to " Civil procedure Code (Amendment) Act".
3. The proposed short title should be: " This Act be cited as Civil Procedure Code (Amendment) Act No. of 1990.

The Petitioner is right in his contention that the long title to the Bill as well as Clauses 1 & 2 of the Bill incorrectly refer to Act No. 79 of 1988 as "The Civil Procedure Code (Amendment) Act No. 79 of 1988". Mr. Kamalasabayson agrees that this error should be rectified. But however this does not involve any question of constitutionality.

We see no merit in the other two contentions of the Petitioner. Since Act No. 79 of 1988 has not been brought into operation the proposed Bill correctly seeks to repeal Section 9 of Act No. 79 of 1988, and not Section 93 of the Civil Procedure Code. None of the contentions of the Petitioner involve a question of constitutionality. We accordingly determine that the proposed Bill nor any provision thereof is inconsistent with the Constitution.

H. A. G. de Silva
Acting Chief Justice.

M. D. H. Fernando
Judge of the Supreme Court.

P. Ramanathan
Judge of the Supreme Court.

First Reading :
06.04.1990 (Hansard Vol. 64 No. 3 Col. 163)

Sponsor :
Minister of Justice and Minister of Higher Education

Decision of the Supreme Court conveyed to Parliament :
26.04.1990 (Hansard Vol. 64 No. 6 Cols. 605-607)

Second Reading :
31.01.1991 (Hansard Vol. 70 No. 6 Cols. 500-585)

Committee Stage and Third Reading :
31.01.1991 (Hansard Vol. 70 No. 6 Cols. 585-598)

Hon. Speaker's Certificate :
08.03.1991

Title : **Civil Procedure Code (Amendment) Act, No. 79 of 1988 (Amendment) Act, No. 9 of 1991.**

PROVINCIAL COUNCILS (AMENDMENT)

A

BILL

to amend the Provincial Councils Act, No. 42 of 1987.

THE PROVINCIAL COUNCILS (AMENDMENT) BILL

In the matter of a Reference under Article 122 (1) (b) of the Constitution.

Present :

H. A. G. De Silva, Judge of the Supreme Court.
DR. A. R. B. Amerasinghe, Judge of the Supreme Court.
R. N. M. Dheeraratne, Judge of the Supreme Court.

Counsel :

D. W. Abeykoon with Eardley Seneviratne and Nimal Punchihewa for Petitioner – V. K. Yogashongory member of the E P R L F, Peter Jayasekara for Petitioner – Wimal jayasuriya. M. H. M. Ashraff with Rauff Hakeem and M. R. M. Salman for M. H. Cegue Isadeen, Leader of the Opposition of North-Eastern Provincial Council P. Sunil de Silva, P. C. – Attorney-General with M. S. Aziz, P. C., Additional Solicitor General and Mrs. M. Fernando, S. C. for State.

Court Assembled for the Hearing at 10.10 a. m. on 12th June, 1990.

A Bill titled "An Act to amend the Provincial Councils Act No. 42 of 1987" was referred to the Chief Justice by His Excellency the President in terms of Article 122 (1) (b) of the Constitution of the Democratic Socialist Republic of Sri Lanka for a special determination of the Supreme Court as to whether the Bill or any provision thereof is inconsistent with the Constitution. The Bill bears an endorsement under the hand of the Secretary to the Cabinet of Ministers to the effect that the Cabinet of Ministers has certified that in its view the Bill is urgent in the national interest. The Attorney-General appeared before us and assisted us in the consideration of the Bill and Messrs. D. W. Abeykoon, Peter Jayasekera, M. H. M. Ashraff Attorneys-at-Law addressed us on the Bill.

This Bill proposes to amend Section 5 of the Provincial Councils Act No. 42 of 1987 by the addition at the end of that Section of the new Subsection 3, insertion of a new Section 5A and a further addition of a transitional provision.

These provisions are designed to bring about *inter alia*, the dissolution of Provincial Councils in the circumstances set out in the proposed amendments. Submissions in opposition to the Bill were made on the basis that the proposed amendments were in conflict with Articles 154E, 154B (8) (C) and Article 125 of the constitution. The main therst of these submissions was that, since certain Fundemental Povisions regarding Provincial Councils including the Governor's powers of dissolution were conferred by the Constitution any other provision relating to the same subject matter could not be provided for by ordinary legislation.

The Learned Attorney-General drew our attention to Article 154Q(d) which requires the legislature to provide for "any other matter necessary for the purpose of giving effect ot the principles of provisions of this Chapter, and for any matters connected with, or incidental to, the provisions of this Chapter."

We observe that the provision for the oath or affirmation to be made or subscribed by the members of a provincial Council is specified in the Provincial Councils Act, No. 42 of 1987 and not in the Constitution. In as much as the submissions of learned Counsel were that the proposed amendment augmented the power of the Governor to dissolve a Provincial Council it would amount to an amendment of the Constitution.

We Consider this amendment has not in any way derogated from the powers of dissolution conferred on the Governor by the Constitution.

It was further submitted that in the exercise of the proposed powers conferred on the Governor he would be encroaching on the judicial powers vested in the Supreme Court under Section 125, with regard to the interpretation of the Constitution. However, in our view the exercise of the proposed powers of the Governor is in no way concerned with constitutional interpretation and does not judicial power.

In view of certain criticisms, the learned Attorney- Geneneral anticipated, he suggested the amendment of the proposed Subsection 3 by the addition of certain words. The proposed subsection 3 with these additional words would now read as follows :

> Where the Governor of a Province communicates to the Chairman of a Provincial Council established for that Province that that in the opinion of the Governor, a Member of the Provincial Council, has on the date specified in such communication, expressly repudiated or manifestly disawowed obedience to the Constitution, in contravention or violation of, the Oath or Affirmation taken or subscribed to as the case may be, by such member under Section 4 such Member shall be disqualified from sitting and voting as a Member of such Provincial Council, with effect from the date specified in such communication."

On a careful examination of the provisions of the proposed Bill, we are of the view that they are not inconsistent with the Constitution. Accordingly this Court determines that the Bill or any provision thereof is not inconsistent with the Constitution.

H. A. G. de Silva
Judge of the Supreme Court.

Dr. A. R. S. Amerasinghe
Judge of the Supreme Court.

R. N. M. Dheeraratne
Judge of the Supreme Court.

First Reading :
12.06.1990 (Hansard Vol. 65 No. 1 Col.20)

Sponsor :
Minister of Public Administration, Provincial Councils and Home Affairs

Decision of the Supreme Court conveyed to Parliament :
14.06.1990 (Hansard Vol. 65 No. 3 Cols. 269 -271)

Second Reading :
06.07.1990 (Hansard Vol. 65 No. 7 Cols. 1061 - 1062)

Committee Stage and Third Reading :
06.07.1990 (Hansard Vol. 65 No. 7 Cols. 1062 - 1065)

Hon. Speaker's Certificate :
06.07.1990

Title : **Provincial Councils (Amendment) Act, No. 28 of 1990.**

PROVINCIAL COUNCILS ELECTIONS (AMENDMENT)

A

BILL

to amend the Provincial Councils Elections Act, No. 2 of 1988.

THE PROVINCIAL COUNCILS ELECTIONS (AMENDMENT) BILL

In the matter of a Reference under Article 122 (1) (b) of the Constitution.

Present :
H. A. G. De Silva, Judge of the Supreme Court.
DR. A. R. B. Amerasinghe, Judge of the Supreme Court.
R. N. M. Dheeraratne, Judge of the Supreme Court.

Counsel :
D. W. Abeykoon with Eardley Seneviratne and Nimal Punchihewa for petitioner – V. K. Yogashongar member of the E P R L F Peter Jayasekera for petitioner - Wimal Jayasuriya M. H. M. Ashraff with Rauff Hakeem and M. R. M. Salman for M. H. Cegu Isadeen-Leader of the opposition of North-Eastern Provincial Council. P. Sunil de Silva, PC Attorney-General with M. S. Aziz, PC Additional Solicitor General and Mr. S. M. Fernando, SC for state.

Court Assembled for the Hearing At 10.10 a.m. on 12th. June, 1990

A Bill titled " An Act to amend the Provincial Councils Act. No. 2 of 1988" was referred to the Chief Justice by this Excellency the President in terms of Article 122 (1) (b) of the Constitution of the Democratic Socialist Republic of Sri Lanka for a special determination of the Supreme Court as to whether the Bill or any provision thereof is inconsistent with the Constitution. The Bill bears an endorsement under the hand of the Secretary to the Cabinet of Ministers to the effect that the Cabinet of Ministers has certified that in its view the Bill is urgent in the national interest. The Attorney General appeared before us and assisted us in the consideration of the Bill and Messers. D. W. Abeykoon, Peter Jayasekera, M. H. M. Ashrof, Attorneys-at Law addressed us on the Bill.

This proposed amendment to Section 10 of the Provincial Councils Elections Act No. 2 of 1988 is connected with and consequential to the proposed amendment to the Provincial Councils Act No. 42 of 1987. We have already made our determination on the proposed amendments to Act No. 42 of 1987 which have been simultaneously transmitted. This court determines that this Bill or any provision thereof is not inconsistent with the Constitution.

H. A. G. de Silva
Judge of the Supreme Court.

Dr. A. R. B. Amerasinghe
Judge of the Supreme Court.

R. N. M. Dheeraratne
Judge of the Supreme Court.

First Reading :
15.06.1990 (Hansard Vol. 65 No. 4 Col. 438)

Sponsor :
Minister of Public Administration, Provincial Councils and Home Affairs

Decision of the Supreme Court conveyed to Parliament :
14.06.1990 (Hansard Vol. 65 No. 3 Cols. 269;271 -272)

Second Reading :
06.07.1990 (Hansard Vol. 65 No. 7 Col 1065)

Committee Stage and Third Reading :
06.07.1990 (Hansard Vol. 65 No. 7 Col. 1066)

Hon. Speaker's Certificate :
06.07.1990

Title : **Provincial Councils Elections (Amendment) Act, No. 29 of 1990.**

APPROPRIATION (AMENDMENT)

A

BILL

to amend the Appropriation Act, No. 18 of 1989

THE APPROPRIATION (AMENDMENT) BILL

In the matter of a Reference under Article 122(i)(b) of the Constitution

Present :
H. A. G. de Silva, Judge of the Supreme Court.
K. M. M. B. Kulatunga P. C; Judge of the Supreme Court.
R. N. M. Dheeraratne, Judge of the Supreme Court.

Counsel :
K. C. Kamalasabayson D. S. G. with Chanaka de Silva State Counsel for the Attorney-General

Court Assembled for the Hearing At 10.15 a.m. on 13th July, 1990.

A Bill titled "An Act to amend the Appropriation Act No. 18 of 1989 was Referred to the Chief Justice by His Excellency the President in terms of Article 122(1)(b) of the Constitution of the Democratic Socialist Republic of Sri Lanka for a special determination of the Supreme Court as to whether the Bill or any provision thereof is inconsistent with the Constitutin. The Bill bears an endorsement under the hand of the Secretary to the Cabinet of Ministers to the effect that the Cabinet of Ministers has certified that in its view the Bill is urgent in the national interest."

Mr. Kamalasabayson, appeared before us and assisted us in the consideration of the Bill. The legal effect of the proposed Bill is stated to be to make provision for an increase of the aggregate of the proceeds of loans authorized to be raised during the financial year 1990.

We have examined the provisions of the Bill and are of the opinion that neither the Bill nor any provision thereof is inconsistent with the Constitution.

H.A. G. de Silva
Judge of the Supreme Court.

K. M. M. B. Kulatunge
Judge of the Supreme Court.

R. N. M. Dheeratatne
Judge of the Supreme Court.

First Reading :
18.07.1990 (Hansard Vol. 65 No. 9 Col. 1259)

Sponsor :
Prime Minister and Minister of Finance

Decision of the Supreme Court conveyed to Parliament :
17.07.1990 (Hansard Vol. 65 No. 8 Cols. 1104 –i 105)

Second Reding :
08.08.1990 (Hansard Vol. 65 No. 13 Cols. 1859 – 1939)
09.08.1990 (Hansard Vol. 65 No. 14 Cols. 1989 – 2039)

Committee Stage and Third Reading :
09.08.1990 (Hansard Vol. 65 No. 14 Cols. 2039 – 2040)

Hon. Speaker's Certificate :
24.08.1990

Title : **Appropriation (Amendment) Act, No. 31 of 1990.**

INLAND REVENUE (AMENDMENT)

A

BILL

to amend the Inland Revenue Act, No. 28 of 1979

THE INLAND REVENUE (AMENDMENT) BILL

In the matter of a Reference under Article 122(i)(b) of the Constitution

S. C. Special Determination No 19/90
(PPA/Parl/59)

Present :
Fermamdo, J.,
Kulatunga, J., and
Dheeraratne, J.

Counsel :
A. S. M. Perera, D. S. G., for the Attorney-General.

The Court assembled for the hearing at 10.50 a.m. October 1990.

A Bill titled "An Act to amend the Inland Revenue Act No. 28 of 1979" ["the Inland Revenue (Amendment) Act No. of 1990"] was referred to this Court by His Excellency the President, in terms of Article 122 (1)(b) of the Constitution, for the special determination of this Court whether the Bill or any provision thereof is inconsisent with the Constitution. The Bill contains a certificate to the effect that in the view of the Cabinet of Ministers the Bill is urgent in the national interest.

Mr. A. S. M. Perera, Deputy Solicitor–General, Assisted this Court in the determination of this matter, and we wish to place on record our appreciation of his clear and comprehensive elucidation of the nature, purpose, and effect of the proposed amendments.

This Bill seeks to make the following amendments:

Clause 2 : to add three institutions to the list of institutions whose profits and income are exempt from income tax under section 8;

Clause 3 : to add to the categories of persons whose official emoluments are exempt from income tax under section 9(i)(b) and (h);

Clause 4 : to add to the categries of companies, whose dividends are tax-free in the hands of shareholders during the period when the companies themselves are exempt from tax, companies which the Bill seeks to exempt from income tax under sections 17 C, 17D, 22DDD and 22 DDDD;

Clause 5: to add to the exemptions from captial gains provided for by section 14(a), capital gains arising on the sale of property if the proceeds are invested in companies carrying on certain specified undertakings; as well as capital gains arisily on the sale of shares or stock by venture capital companies, unit trusts and mutual funds and on the sale of units held by a person in a unit trust or mutual fund;

Clause 6: to add new sections 17B to 17G providing for tax holidays and tax exemptions in respect of certain new categries of approved undertakings, in various sectors;

Clause 7 : to make certain amendments in regard to the terms and conditions on which exemptions from income tax will be garanted in respect of specified exports, under

section 20 B;

Clause 8 : to exempt the profits and income of approved unit trusts and mutual funds from income tax for five years;

Clauses 17 to 20, 22, 23 and 25 : to make various provisions, and consequential amendments, in section 44, 60, 64, 135 and 163, in respect of unit trusts and mutual funds, regarding liability to tax, exclusion from the definition of "trust" and "trustee", asseessment procedures, etc;

Clauses 9 and 10 : to permit (a) deductions in respect of certain license fees, and (b) double deductions in respect of specified expenditure on export market development activity, scientific industrial and agricultural research, and employee–training (new sections 23 A and 23B), in ascertaining profits or income under section 23;

Clause 11 : to add to the categories of "qualifying payments" in section 31, and to specify the entitlement thereto in respect of the years of assessment commencing on or after 1.4.90;

Clause 12 : to amend section 32 in respect of the computation and rate of tax on capital gains arising from a change of ownership of quote public company shares;

Clauses 13 to 16, and 21 : to amend section 33 by providing that no with-holding tax is payable by quoted public companies (except in regard to payments of dividends to non-resident shareholders), and to make consequential amendments (a) to sections 35 and 38, and (b) by adding a new section 37A; clauses 13 and 16 also seek to correct a certain error in sections 33(2)(c) and 38(3)(c);

Clause 24 : to amend the Second Schedule by providing that quote public companies will no entitled to lower rate of tax (40%) for years of assessment commencing on or after 1.4.91, only if they are broad-based within the criteria laid down; and for the rates of tax payble, for the years of assessment commencing on or after 1.4.90, by unit trusts and mutual funds;

Clause 26 : seeks to give retrospective effect to the amendments to section 8, 9(i), 31(2)(b), 33(2) and 38(3) ; it was observed that date from which the amendment to section 31(2)(b) shall be deemed to come into force has not been specified, but this omission does not raise a question of inconsistency with the Constitution.

We have examined the provisions of the Bill, none of which raise any question of inconsistency with the Constitution. We determine that none of those provisions of the Bill are inconsistent with the Constitution or any provision thereof.

M .D. H. Fernando
Judge of the Supreme Court.

K. M. M. B. Kulatunge
Judge of the Supreme Court.

R. N. M. Dheeratatne
Judge of the Supreme Court.

First Reading :
12.10.1990 (Hansard Vol. 66 No. 15 Col.. 1986)

Sponsor :
Prime Minister and Minister of Finance

Decision of the Supreme Court conveyed to Parliament :
10.10.1990 (Hansard Vol. 66 No. 13 Cols. 1693 – 1695)

Second Reding :
31.01.1990 (Hansard Vol. 67 No. 7 Cols. 782 – 868)

Committee Stage and Third Reading :
31.10.1990 (Hansard Vol. 67 No. 7 Cols. 868 – 876)

Hon. Speaker's Certificate :
29.11.1990

Title : **Inland Revenue (Amendment) Act, No. 42 of 1990.**

SPECIFIED CERTIFICATES OF DEPOSIT (TAX AND OTHER CONCESSIONS)

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to provide for tax concessions to any person who has in his possession any specified certificate of Deposit; to enable the deposit in special accounts in the National Savings Banks of moneys representing his relevant profits or income, out of which such certificates were purchased; to impose and levy a tax on the moneys deposited in such special accounts; to indemnify persons who deposit moneys in such special accounts against prosecutions for offences in relation to such profits or income; and

for matters connected there with or incidental thereto.

THE SPECIFIED CERTIFICATES OF DEPOSIT (TAX AND OTHER CONCESSIONS) BILL

In the matter of a Reference under Article 122(1)(b) of the Constitution

S. C. Special Determination No. 18/90
(PPA/Parl/58)

Present :
Fernando, J.,.
Kulatunga, J., and
Dheeraratne, J.

Counsel :
S. Marsoof, S. S. C, with Miss A. N. Navaratne, S.C., for the Attorney-General.

The Court assembled for the hearing at 10.20 a.m. on 5th October 1990.

A Bill titled "An Act to provide for tax concessions to any person who has in his possession any specified certificate of Deposit; to enable the deposit in special accounts in the National Savings Bank of moneys representing his relevant profits or income, out of which such certificates were purchased; to impose and levy a tax on the moneys deposited in such special accounts; to indemnify persons who deposit moneys in such special accounts against prosecutions for offences in relation to such profits or income; and for matters connected therewith or incidental thereto" ["the Specified Certificates of Deposit (Tax and other concessions) Act, No....... of 1990"] was referred to this Court by His Excelleny the President, in terms of Article 122 (1) (*b*) of the Constitution, for the special determination of this Court whether the Bill or any provision thereof is inconsistent with the Constitution. The Bill contains a certificate to the effect that in the view of the Cabinet of Ministers the Bill is urgent in the national interest.

Mr. S. Marsoof, Senior State Counsel, assisted this Court in the determination of this matter.

The purpose of the Bill is to grant certain concessions and indemnities to persons who have failed to make returns, or have failed to make returns, or have failed to make full disclosure in their returns, of profits or income arising or accruing on or before 31st March 1989; if with such undisclosed profits or income certificates of deposit issued under the Treasury Certificates of Deposit Act, No. 9 of 1989, had been purchased between 20th June 1990 and prior to 1st January 1991, and if such certificates are thereafter sold to the National Savings Bank and the full proceeds of sale deposited in a special account in that Bank (the Commissioner-General of Inland Revenue certifying that the Act applies to such certificate of deposit), the person concerned becomes entitled to concessional, and almost nominal, tax at an effective rate of 7%. The payment of such tax would discharge his liabilities in respect of turnover tax, income tax, wealth tax, and surcharges on income tax and wealth tax (under the relevant statutes) for all years of assessment ending on or before 31st March 1989.

The Bill is similar in many respects to the Tax Amnesty Act, No. 5 of 1989, which was considered by this Court in Special Determination No. 3 of 1989 (P/Parl/2) on 6th April 1989 (Hansard of 8.4.1989, column 1154). It is not violative of article 12 to confer certain

advantages an immunities on tax evaders, upon making disclosure and making substantial payment in respect of previously undisclosed profits and income, although this might be more favoured treatment than that meted out to honest taxpayers under the normal tax laws. Such difference in treatment is based on a rational and intelligible basis of differentiation, reasonably related to the legislative objective of bringing a distinct category of persons (tax evaders) into the fiscal net in the future. Legislation of this kind is not intended for the sole purpose of benefiting tax evaders, but is enacted in recognition of the reality that there is tax evasion, which is both extensive and difficult to check or detect; it seeks to recover some revenue in respect of past evasion; and finally to secure full compliance in the future.

However, on closer scrutiny of the provisions of clause 8 of the Bill it appears that the benefits and immunities conferred on tax evaders may be quite disproportionate to the concessional taxes required to be paid. A person who purchases and thereafter sells to the Bank a certificate of deposit for, say Rs. 10,000, and deposits the full proceeds of sale in a special account in terms of clause 3, becomes (under clause 8 (a) (i)) exempt from payment of income tax and surcharge on income tax not merely on the proceeds of sale of that certificate of deposit (i.e. approximately Rs. 10,000), but from payment of *any* income tax or surchage on income tax, for any year (i.e. for all previous years) of assessment ending on or before 31.03.89, in respect of the *the whole* or any part of his "relevant profits or income" (which, as defined in clause 11, would include all undisclosed profits or income, and not merely such part thereof as was deposited in a special account). It was sought to be suggested that the phrase "equal in amount to the full proceeds of sale deposited by such him [sic] in any such special account as is referred to in section 3" which appears immediately after clause 8 (a) (ii) quallifies clause 8(a)(i) as well as Clause 8(a)(ii). However, we are of the view that clause 8(a)(i) is not qualified by that phrase for several reasons. The semi-colon at the end of clause 8(a)(i) indicates that it is not subject to any qualification; that semi-colon is followed by the word "or", and what follows is a provision complete in itself, inclusive of that qualifying phrase; clause 8(a)(iii) too incorporates that phrase, indicating that its omission in clause 8(a)(i) was deliberate. Finally, reference to the Sinhala text (which, by clause 12, prevails in the event of inconsistency) reveals that clause 8(a)(i) is not subject to such a qualification.

Clause 8(a)(ii) confers an exemption from the payment of wealth tax or surcharge on wealth tax "in respect of the whole or any part of his net wealth, equal in amount to the full proceeds of sale deposited by such him [sic] in any such special account as is referred to in section 3". The words "the whole or" appear to be superfluous, as the exemption appears intended to be limited to the amount deposited: the exemption should thus be in respect of *such part* of his net wealth..."

Clause 8(a)(iii) is ambiguous in that it lends itself to the interpretation that the whole of the turnover is exempt, if any part of the relevant profits or income ("equal in amount to the full proceeds of sale deposited by such him [sic] in any such special account as is referred to in section 3") arose or was derived therefrom.

Thus the tax evader, in the above illustration, would, in respect of a certificate of deposit for Rs. 10,000/- be exempt from income tax (and surcharge) for all years of assessment prior to 31.03.89 in respect of all income – whether Rs. 100,000/- p.a. or even Rs. 10,000,000/- p.a. He would not be liable to taxes on turnover, however high, if from that turnover there arose, or was derived, any part of his relevant profits or income equal in amount to the full proceeds of sale deposited in a special account; the exemption is not restricted to a proportionate part of the turnover: e.g. if from a turnover of Rs. 1 million, a profit of Rs. 100,000/-is obtained, and Rs. 10,000/- is deposited in a special account, it does not provide that only 10% of the turnover of Rs. 1 million is exempt.

Clause 8(b) refers to "the relevant profits and income referred to in paragraph (a)(i)" and "the whole or any part of the turrnover referred to in paragraph (a)(iii)", and does not appear to be restricted to such part of profits or income as is equal to the amount deposited, or to a proportionate part of the turnover. Thus by payment of tax in respect of a small portion of undisclosed profits or income, (and turnover), immunity from prosecution is conferred even in respect of the balance however large.

Clause 8 thus confer exemptions from taxes and immunities from prosecution on tax evaders on payment of sums which are unreasonably disproportionate to the taxes payable by honest taxpayers, with similar income, wealth and turnover. In section 8 the Tax Amnesty Act, No. 05 of 1989, the exemptions and immunities were restricted to the amounts disclosed and deposited in special accounts, and no reason has been given for the different approach in the case of the present Bill. For these reasons we entertain a doubt whether clauses 8(a)(i), (iii) and 8 (b) of the Bill are inconsistent with Article 12 (1) of the Constitution, and in terms of Article 123 (3) such provisions are deemed to have been determined to be inconsistent with Article 12 (1); they may only be passed by the special majority required under the provisions of pargraph (2) of Article 84.

learned Senor State Counsel however stated that it was not intended to confer such extensive concessions and immunities, and that (as in the case of the Tax Amnsety Act, No 5 of 1989) the concessions and immunities were intended to be restricted by reference to the amount deposited in a special account in terms of clause 3; he invited us to specify the amendments which would make those provisions cease to be inconsistent. While this Court has often proceeded to suggest amendments, this is no easy task in the limited period of 24 hours that is available for our determination, especially when there are many errors and inconsistencies in the texts of the Bills, as in this case. That task would be facilitated if an extended period of time is allowed for our determination: Article 122(1)(c) enables a period not exceeding three days to be allowed. Clause 8 would cease to be inconsistent if amended to restrict the concessins and immunities by reference to the amount deposited in a special account, in the following terms:

"8. Any person to whom this Act applies and who is deemed to have paid the tax referred to in section 4 shall not be liable –

(a) to pay –

(i) for any year of assessment ending on or before March 31, 1989, any income tax or surcharge on income tax under the law for the time being applicable to the imposition of income tax or surcharge on income tax, in respect of such part of his relevant profits or income as is represented by the proceeds of sale of specified certificates of deposit, deposited by him in a special account in terms of section 3;

(ii) for any year of assessment ending on or before March 31, 1989, any wealth tax or surcharge on wealth tax under the law for the time being applicable to the imposition of wealth tax or surcharge on wealth tax in respect of such part of his net wealth for a acquisition of which such part of his relevant profits or income, as is represented by the proceeds of sale of specified certificates of deposit, deposited by him in a special account in terms of section 3 had been utilized; or

(iii) for any quarter ending on or before March 31, 1989, any business turnover tax under the Finance Act, No. 11 of 1983, or any turnover tax under the Turnover Tax Act, No. 69 of 1981, in respect of such part of the turnover from which such part of his relevant profits or income, as is represented by the proceeds of sale of specified certificates of deposit, deposited by him in a special account in terms of section 3, arose, or was derived; or

(b) to a prosecution or to a penalty for any offence under–

(i) the law for the time being applicable to the impositon of income tax or surcharge on income tax, or wealth tax or surcharge on wealth tax, in relation to any year of assessment ending on or before March 31, 1989 in respect of, or in connection with, such part of his relevant profits and income referred to in paragraph (*a*) (i), or such part of his net wealth referred to in paragraph (*a*) (ii); or

(ii) the Finance Act, No. 11 of 1963, or the Turnover Tax Act, No. 69 of 1981, in relation to any quarter ending on or before March 31, 1989, in respect of such part of the turnover referred to in paragraph (*a*) (iii)."

The persons entitled to concessions and immuntitites under the Bill are restricted by virtue of the definition of "person" in clause 11: 'person' includes a company, and a body of persons, but does not *include* a partnership". We drew the attention of learned Senior State Counsel to the corresponding definition in the Tax Amnesty Act, which included a partnership. It appeared *prima facie* that the benefit of the Bill was being denied to one section of the class or category of "tax evaders"; while an individual, a body of persons, and a company carrying on businesses of a particular kind would be entitled to the benefits of the Bill, a partnership carrying on the identical business would not be entitled. Learned Senior State Counsel was unable to suggest any reason whatsoever for this differentiation and in the absence of a rational basis for such differentiation we hold that this provision is inconsistent with Article 12(1) of the Constitution, and may only be passed by the special majority required under the Provisions of paragraph (2) of Article 84 clause 11 would cease to be inconsistent if the words "but does not include a partnership" are omitted.

We also drew the attention of learned Senior State Counsel to certain ambiguities in clause 2(1). It is not indicated whether (*a*) and (*b*) are alternative or cumulative conditions; the Sinhala text indicates that they are alternative. It was stated that the ommission of the word "or was a typing error. Although clause 2(1) (b) refers to " a full and complete disclosure" it transpired that this means no more than that the person concerned should have disclosed the fact that he purchased the certificate in question out of undisclosed profits; accordingly, that provision should read"... voluntarily disclosed to the Commissioner-General or any other officer of the Department of Inland Revenue that he has purchased such certificate of deposit form and out of moneys representing the whole or any part of his relevant profits and income". We have exaimined the other provisions of the Bill, which are substantially the same as the corresponding provisions of the Tax Amnesty Act, No. 5 of 1989, and we determine that none of those provisions of the Bill are inconsistent with the Constitution or any provision thereof.

We therefore determine that, save as aforesaid, none of the provisions of the Bill are inconsistent with the Constitution or any provision thereof; and that upon amendments being made as indicated by us, clause 8 and the definition of "person" in clause 11 would cease to be inconsistent.

M .D. H. Fernando
Judge of the Supreme Court.

K. M. M. B. Kulatunge
Judge of the Supreme Court.

R. N. M. Dheeratatne
Judge of the Supreme Court.

First Reading :
11.10.1990 (Hansard Vol. 66 No. 14 Col..1859 – 1860)

Sponsor :
Prime Minister and Minister of Finance

Decision of the Supreme Court conveyed to Parliament :
09.10.1990 (Hansard Vol. 66 No. 12 Cols. 1553 – 1557)

Second Reding :
30.10.1990 (Hansard Vol. 67 No. 6 Cols. 689-776)

Committee Stage and Third Reading :
30.10.1990 (Hansard Vol. 67 No.6 Cols. 776-779)

Hon. Speaker's Certificate :
06.12.1990

Title : **Specified Certificates of Deposits (Tax and Other Concessions Act, No. 45 of 1990.**

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