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

1. Sunpac Engineers (Private) Limited,
   Temple Burge Step 11,
   Industrial Zone, Panagoda,
   Homagama.
2. Ranath Jayaweera alias Sanath Jayaweera,
   No. 379/B, Temple Road,
   Thalawathugoda.

   Plaintiffs

SC APPEAL NO: SC/APPEAL/11/2021
SC LA NO: SC/HC/LA/08/2021
CHC CASE NO: CH/CIVIL/514/2018 (MR)

Vs.

1. DFCC Bank PLC,
   No. 73/5, Galle Road,
   Colombo 03.
2. Schokman and Samerawickreme Auctioneers,
   No. 6A, Fair field Garden,
   Colombo 08.

   Defendants

AND NOW BETWEEN

1. Sunpac Engineers (Private) Limited,
   Temple Burge Step 11,
   Industrial Zone, Panagoda,
   Homagama.

2. Ranath Jayaweera alias Sanath Jayaweera,
No. 379/B, Temple Road,
Thalawathugoda.
Plaintiff-Appellants

Vs.

1. DFCC Bank PLC,
No. 73/5, Galle Road,
Colombo 03.

2. Schokman and Samerawickreme Auctioneers,
No. 6A, Fair field Garden,
Colombo 08.
Defendant-Respondents

1. Hatton National Bank PLC,
No. 479, T.B. Jayah Mawatha,
Colombo 10.

2. Seylan Bank PLC,
Seylan Towers, No. 90,
Galle Road, Colombo 03.

3. People's Bank,
No. 75, Sir Chittampalam A. Gardiner
Mawatha, Colombo 02.

4. Cargills Bank Limited,
No. 696, Galle Road,
Colombo 03.

5. National Development Bank PLC,
P.O. Box 1825,
No. 40, Nawam Mawatha.

6. Union Bank of Colombo PLC,
   No. 64, Galle Road,
   Colombo 03.

7. Nations Trust Bank PLC,
   No. 242, Union Place,
   Colombo 02.

8. Commercial Bank of Ceylon PLC,
   Commercial House,
   No. 21, Sir Razik Fareed Mawatha,
   Colombo 01.

9. Pan Asia Banking Corporation,
   No. 6A, Fair field Gardens,
   Colombo 8.

10. Bank of Ceylon,
    'BOC Square',
    Bank of Ceylon Mawatha,
    Colombo 01.

    1st-10th Intervenient Respondents

Before: Buwaneka Aluwihare, P.C., J.
Murdu N.B. Fernando, P.C., J.
S. Thurairaja, P.C., J.
E.A.G.R. Amarasekara, J.
A.H.M.D. Nawaz, J.
Kumudini Wickremasinghe, J.
Mahinda Samayawardhena, J.

Counsel: Rohan Sahabandu, P.C., with Chathurika Elvitigala, Sachini Senanayake and Nathasha Fernando for the 1st and 2nd Plaintiff-Appellants.

N.R. Sivendran, with Kaushalya Nawaratne, Renuka Udumulla, Dushyanthi Jayasooriya, Hansika Iddamalgoda and Manodha Mohotti for the Defendant-Respondents (DFCC Bank PLC).

Dr. Romesh de Silva, P.C., with S.V. Niles and Niran Anketell for the 1st Intervenient Respondent (Hatton National Bank PLC).

Palitha Kumarasinghe, P.C., with Gimeshika De Silva for the 2nd Intervenient Respondent (Seylan Bank PLC).

Kushan D'Alwis, P.C., with Jayaruwan Wijayalath Arachchi for the 3rd Intervenient Respondent (People's Bank).

Kushan D'Alwis, P.C., with Jayaruwan Wijayalath Arachchi for the 4th Intervenient Respondent (Cargills Bank Limited).

Geethaka Goonewardene, P.C., with Chanaka Weerasekara for the 5th Intervenient Respondent (National Development Bank PLC).

Geethaka Goonewardene, P.C., with Rishan Vidanagamage for the 6th Intervenient Respondent (Union Bank of Colombo PLC).

Palitha Kumarasinghe, P.C., with Viraj Bandaranayake for the 7th Intervenient Respondent (Nations Trust Bank PLC).

Dr. Harsha Cabral, P.C., with Nishan Premathiratne and Shenali Dias for the 8th Intervenient Respondent (Commercial Bank of Ceylon PLC).

Harsha Amarasekera, P.C., with Kanchana Peiris and Sachindra Sanders for the 9th Intervenient Respondent (Pan Asia Banking Corporation).

Susantha Balapatabendi, P.C., ASG, with Rajitha Perera, D.S.G., and Mihiri De Alwis, S.C., for the 10th Intervenient Respondent (Bank of Ceylon).

Argued on: 02.03.2023, 03.03.2023, 03.04.2023 and 04.04.2023.

Written submissions:

by the 1st and 2nd Plaintiff-Appellants on 18.05.2021, 02.02.2022, 10.08.2022, 27.02.2023 and 11.05.2023.

by the Defendant-Respondents on 20.07.2021, 18.08.2021 and 17.05.2023.

by the 1st Intervenient Respondent on 21.02.2023 and 15.05.2023.

by the 2nd Intervenient Respondent on 15.05.2023.

by the 3rd Intervenient Respondent on 22.11.2022.

by the 4th Intervenient Respondent on 22.11.2022.

by the 5th Intervenient Respondent on 27.10.2022.

by the 6th Intervenient Respondent on 30.11.2022.

by the 7th Intervenient Respondent on 15.05.2023.

by the 8th Intervenient Respondent on 12.05.2023.

by the 9th Intervenient Respondent on 07.06.2023.

by the 10th Intervenient Respondent on 24.02.2023.

Decided on: 13.11.2023

Samayawardhena, J.

Introduction

The 2nd plaintiff is one of the two directors of the 1st plaintiff company. The other director of the company is the wife of the 2nd plaintiff. Upon the request of the directors of the company, the defendant bank granted a loan to the 1st plaintiff company. The 2nd plaintiff mortgaged his land as security for the loan. The company defaulted on payment as agreed, and the bank took steps in terms of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990, as amended (hereinafter sometimes "the Act"), to recover the dues by selling the mortgaged property by

public auction (*parate* execution). Very close to the date of the auction, the 1st and 2nd plaintiffs rushed to the Commercial High Court and obtained an enjoining order preventing the bank from holding the auction on the ground that this Act is inapplicable to mortgages executed by persons who are not borrowers. The plaintiffs' position was that the loan was obtained by the 1st plaintiff company and the 2nd plaintiff who mortgaged the property as security to obtain the loan is a third party. The plaintiffs relied on the majority judgment of the Five Judge Bench of this Court (with one Judge dissenting) in *Ramachandran v. Hatton National Bank* [2006] 1 Sri LR 393 (hereinafter sometimes "*Ramachandran*") which held that the right of *parate* execution in terms of Act No. 4 of 1990 is not available to banks when the mortgagor is not the borrower. In short, the Act is inapplicable to what is conveniently called "third-party mortgages". However, the Commercial High Court subsequently refused to issue an interim injunction preventing future auctions. This appeal by the 1st and 2nd plaintiffs (hereinafter "the appellant") with leave obtained is from the refusal of the interim injunction.

Two years after the judgment in *Ramachandran*, in *Hatton National Bank v. Jayawardane* [2007] 1 Sri LR 181 (hereinafter sometimes "*Jayawardane*"), a Three Judge Bench of this Court restricted the applicability of the majority decision in *Ramachandran*. In *Jayawardane*, it was held *inter alia* that when the directors of the company are the mortgagors, they cannot be treated as third-party mortgagors since they have directly benefited from the financial facility made available to the company.

Thereafter, later decisions such as *Nelka Rupasinghe v. National Development Bank* [2014] 1 Sri LR 68 and *DFCC Bank v. Mudith Perera* [2014] 1 Sri LR 128 favoured the majority judgment of *Ramachandran* (without reservation); and decisions such as *Yasodha Holdings (Pvt) Ltd v. People's Bank* (CA/WRIT/1268/1998, CA Minutes of 29.02.2008-Divisional Bench), *Seylan Bank Limited v. Padmanathan* (CA/REV/702/2006, CA Minutes of 16.02.2010), *Yasasiri Kasthuriarachchi v. People's Bank* (SC/APPEAL/127/2014, SC Minutes of 02.06.2021) and *Commercial*

Bank of Ceylon PLC v. Nawa Rajarata Appliances (Pvt) Ltd (SC APPEAL/44/2016, SC Minutes of 05.10.2022) favoured the view taken in *Jayawardane*.

I might add that in view of the doctrine of *stare decisis* there was no occasion for a Three Judge Bench to overrule the majority decision in *Ramachandran*, and the only option available to a Three Judge Bench was to concur with *Jayawardane* as a measure to mitigate the full effect of *Ramachandran*.

It is common ground that the law is unsettled on this important question of law. It is to answer this question, i.e. whether the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990 is applicable not only to mortgages executed by borrowers but also to mortgages executed by third parties who are not borrowers, that this Bench of Seven Judges was constituted by His Lordship the Chief Justice.

The original case was filed in the Commercial High Court against DFCC Bank PLC. After leave was granted to the appellant on two questions of law, eight licensed commercial banks and two state banks intervened: the licensed commercial banks are Hatton National Bank PLC, Seylan Bank PLC, Cargills Bank Limited, National Development Bank PLC, Union Bank of Colombo PLC, Nations Trust Bank PLC, Commercial Bank of Ceylon PLC and Pan Asia Banking Corporation; the two state banks are People's Bank and Bank of Ceylon.

The two questions of law raised on behalf of the appellant are as follows:

(1) *Did the Commercial High Court err in law by determining that the 2nd plaintiff is a borrower within the meaning of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990?*

(2) *Is the ratio in the case of Hatton National Bank v. Jayawardane [2007] 1 Sri LR 181 that the director of a corporate entity who mortgages his property for a loan obtained by the corporate entity is a borrower, correct within the meaning of the aforesaid Act?*

The question of law raised on behalf of the licensed commercial banks reads as follows:

> *(3) Has the Board of Directors (within the meaning of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990) the power to, by resolution to be recorded in writing, authorize a person specified in the resolution to sell by public auction any property mortgaged to the Bank (whether by the borrower or any other person) as security for any loan in respect of which default has been made in order to recover the whole of such unpaid portion of such loan together with the money and costs recoverable under section 13 of the said Act?*

The two state banks raised the following question of law:

> *(4) Is any property (movable or immovable) mortgaged to the Bank of Ceylon or People's Bank as security for any loan as the case may be, in respect of which default has been made within the meaning of the Bank of Ceylon Ordinance, No. 53 of 1938, as amended, and the People's Bank Act, No. 29 of 1961, liable to be auctioned in terms of the respective Acts?*

The appeal was strenuously fought on both sides with weighty grounds. Mr. Rohan Sahabandu, P.C. for the appellant vehemently argued that the majority judgment in *Ramachandran* is correct and the judgment in *Jayawardane* is wrong. Conversely, Dr. Romesh De Silva, P.C. who is the lead counsel for the banks vigorously contended that the majority judgment in *Ramachandran* is wrong and hence the consideration of *Jayawardane* does not arise as it only introduced an exception to the rule laid down in *Ramachandran* that third-party mortgages are not subject to *parate* execution. I accept that if this Court answers the question of law formulated on behalf of the licensed commercial banks in the affirmative, the appeal virtually comes to an end and the consideration of *Jayawardane* will not arise.

The purpose of the Act

The Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990, is not an Act passed by Parliament in isolation. It is one of a series of Acts passed by Parliament in 1990 aimed at revitalising the country's economy by facilitating speedy recovery of debts. The package of Acts passed by Parliament in 1990 is:

(1) Debt Recovery (Special Provisions) Act, No. 2 of 1990
(2) Mortgage (Amendment) Act, No. 3 of 1990
(3) Registration of Documents (Amendment) Act, No. 5 of 1990
(4) Civil Procedure (Amendment) Act, No. 6 of 1990
(5) Motor Traffic (Amendment) Act, No. 8 of 1990
(6) Agrarian Services (Amendment) Act, No. 9 of 1990
(7) Consumer Credit (Amendment) Act, No. 7 of 1990
(8) National Development Bank of Sri Lanka (Amendment) Act, No. 10 of 1990
(9) Public Servants (Liabilities) (Amendment) Act, No. 11 of 1990
(10) Code of Criminal Procedure (Amendment) Act, No. 12 of 1990
(11) Trust Receipts (Amendment) Act, No. 13 of 1990
(12) Inland Trust Receipts Act, No. 14 of 1990
(13) Credit Information Bureau of Sri Lanka Act, No. 18 of 1990
(14) Inland Revenue (Amendment) Act, No. 22 of 1990
(15) Excise (Amendment) Act, No. 37 of 1990
(16) Banking (Amendment) Act, No. 39 of 1990
(17) Excise (Special Provisions) (Amendment) Act, No. 40 of 1990
(18) Inland Revenue (Amendment) Act, No. 42 of 1990
(19) Turnover Tax (Amendment) Act, No. 43 of 1990
(20) Specified Certificate of Deposits (Tax and Other Concessions) Act, No. 45 of 1990 and
(21) Industrial Promotion Act, No. 46 of 1990.

Thirteen Bills were presented to Parliament on 23.01.1990. This included the Debt Recovery (Special Provisions) Bill, the Mortgage (Amendment) Bill and the Recovery

of Loans by Banks (Special Provisions) Bill. Acts from No. 2 of 1990 to No. 14 of 1990 were all certified on 06.03.1990. Although at first glance, the Acts listed under (3)-(6), (9), and (10) above may seem out of place, a contextual reading reveals that the intention of the legislature was to include them as part of a comprehensive package aimed at fostering the economic development of the country.

A stable financial system is crucial for ensuring robust economic development in any country. A stable financial system helps facilitate efficient allocation of resources, access to credit, management of risks, and overall economic growth. It provides the necessary foundation for businesses and individuals to access funding for investments and economic activities. Within the framework of the Sri Lankan financial system, banks, as guardians of public funds, assume a pivotal function. Ensuring stability in the financial system necessitates the establishment of a secure and strong payment and repayment system.

J.C. Sutherland, *Statutes and Statutory Construction*, Vol. 2, 3rd edition (1943), states at page 502: *"Relevant conditions existing when the statute was adopted must be given due regard in the construction of statutes."*

The legislative intent behind the introduction of Act No. 4 of 1990 to rejuvenate the country's economy through the facilitation of expeditious debt recovery is clearly evident from the Hansards. Parliamentary debates are intricately linked to the mischief rule of interpretation (which I will address briefly later), as these official parliamentary proceedings assist in identifying the underlying mischief Parliament aimed to remedy through the statute.

Can Hansards be used to interpret statutes? There was reluctance on the part of English judges to consider proceedings in Parliament for the purpose of interpretation of statutes, but the seminal decision of the House of Lords in *Pepper v. Hart* [1993] 1 All ER 42 changed the thinking of English judges. *Pepper* lays down three conditions for inclusion of Hansard: (a) that the legislative provision must be ambiguous, obscure or lead to absurdity; (b) that the relevant statement is of a

Minister or other promoter of the Bill; and (c) that the statement made in Parliament is clear and unequivocal. Similar reluctance was shown by judges in Sri Lanka until the decision of Chief Justice Samarakoon in *J.B. Textiles Industries Ltd. v. Minister of Finance and Planning* [1981] 1 Sri LR 156. In *Shiyam v. OIC Narcotics Bureau* [2006] 2 Sri LR 156, a Full Bench of the Supreme Court held that Hansards could be made use of to ascertain the intention of the legislature and to interpret a statute which is ambiguous, obscure or leading to an absurdity. The question before the Full Bench in *Shiyam's* case required the interpretation of section 3(1) of the Bail Act and for this purpose the Court used the Hansards. Justice Bandaranayake (as Her Ladyship then was) stated at pages 164-165:

> *Learned Deputy Solicitor General for the respondents contended that the parliamentary proceedings could be used by the Court to ascertain the intention of the legislature.*
>
> *Until the landmark decision in Pepper v. Hart [1993] 1 All ER 42 the rule followed by the English judges had been that parliamentary debates reported in Hansard could not be referred to in order to facilitate the interpretation of a statute. However, by the decision in Pepper v. Hart (supra), a new practice came into being relaxing the exclusionary rule and permitting reference to parliamentary material. Referring to this new approach, Lord Griffiths in Pepper v. Hart (supra) stated that, "The Courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted."*
>
> *In Sri Lanka, the Courts were reluctant to consider the proceedings in the Parliament for the purpose of interpretation. However, the attitude of our Courts took a new turn tilting towards a purposive approach in J.B. Textiles Industries Ltd. v. Minister of Finance and Planning [1981] 1 Sri LR 156 where Samarakoon, C.J., expressed the view that, "Hansards are admissible to prove the course of proceedings in the legislature."*

Since the decision in J.B. Textile Industries Ltd., (supra), our Courts had acted with approval the acceptability in perusing the Hansard for the purpose of ascertaining the intention of the Parliament. Manawadu v. Attorney General [1987] 2 Sri LR 30. In fact in De Silva and Others v. Jeyaraj Fernandopulle and Others [1996] 1 Sri LR 22 Mark Fernando, J. adopted the observations of Samarakoon, C.J. in J.B. Textiles Industries Ltd., case (supra) which stated as follows: "The Hansard is the official publication of Parliament. It is published to keep the public informed of what takes place in Parliament. It is neither sacrosanct nor untouchable."

It is therefore apparent that the Court which now adopts a purposive approach, could refer to the Hansard for the purpose of ascertaining the intention and the true purpose of the legislature in order to interpret the legislation which is ambiguous, obscure or leading to an absurdity.

The speech made by the then Hon. Minister of Justice, Prof. G.L. Peiris at the introduction of the Bail Act, would thus be important in the interpretation of section 3(1) of the Bail Act.

It is now settled law that Parliamentary debates reported in Hansard can be made use of to interpret statutes.

Whilst presenting this package of bills to Parliament, the then Prime Minister *inter alia* explained the history and the purpose of those Bills (Parliamentary Debates (Hansard) Official Report, dated 23.01.1996, Vol. 62, columns 864-867):

Mr. Speaker, I have great pleasure in presenting to the House a set of Bills designed to improve the debt recovery environment in the country. These Bills will result in substantial changes in the laws and procedures governing the recovery of debts by banks and other financial institutions.

Banking institutions in Sri Lanka have for many years been making representations to the Ministry of Finance regarding the long delays which are

experienced in the recovery of bank debts which are in default. In many cases the legal proceedings for debt recovery drag on for periods of six to eight years. The banks state that the long delays and the high cost of recovery of bank debts is one of the causes for the high interest rates which are being charged by banks from borrowers. It is very desirable that interest rates should be reduced to the lowest possible level in order to encourage investment and development in the country. I hope that the implementation of the new legislation will help in achieving these objectives.

Equally important is the need to maintain the financial viability of banks and other lending institutions. The high level of defaults by persons who have borrowed from the banking system, particularly by those who have borrowed large sums of money from the State banks, threatens the financial stability of the banks. If this situation is allowed to continue there is a danger that some of our banks may eventually collapse, with disastrous consequences for the hundreds of thousands of small depositors who have placed their money in these banks. The experience we have had recently with a number of finance companies is a grim warning of what could happen. I am not suggesting that these finance companies collapsed solely because of the difficulties which they encountered in recovering their overdue loans. There were many other causes such as mismanagement, and in some cases fraud. But the difficulty and delay encountered in attempting to recover loans in default was certainly one of the contributory factors for the collapse of these finance companies. We do not want the same fate to overtake our banks.

The laws which I am presenting today have been drafted after careful and detailed study and consideration extending over a period of five years. In 1985 the then Minister of Justice appointed a high level committee to examine and report on matters relating to debt recovery in Sri Lanka. The committee was headed by a former Supreme Court Judge, Mr. D. Wimalaratne, while Mr. H.L. de Silva, a former Chairman of the Bar Association, and Mr. N.U. Jayawardene,

a former Governor of the Central Bank, were members of the committee. The committee submitted a valuable report in October 1985 with detailed recommendations and draft legislation for the improvement of the laws and procedures relating to debt recovery.

The Wimalaratne Report ran into considerable opposition from some sections of the legal profession. As a result, its recommendations, which would have greatly improved the debt recovery environment in the country, were not implemented at that time.

A committee was appointed in March 1988 jointly by the then Minister of Finance and the then Minister of Justice to examine the matter further and propose amendments which would assist in expediting debt recovery. The committee was chaired by Dr. A.R.B. Amarasinghe, at that time Secretary to the Ministry of Justice and now a Judge of the Supreme Court, and it included representatives of the Central Bank, the Sri Lanka Banks Association and the Bar Association of Sri Lanka. The committee made recommendations for some changes in the law relating to debt recovery. The laws proposed by the Amarasinghe Committee were more restricted in scope and effect than those which had been previously proposed by the Wimalaratne Committee.

The subject was also examined by Prof. Ross Cranston, Professor of Banking Law in the University of London, who was engaged as a consultant by the Ministry of Finance to report on the improvement of Sri Lanka's debt recovery laws and procedures. Prof. Cranston submitted a valuable report on this subject. Like the Wimalaratne Committee, Prof. Cranston recommended changes in the law which were more far reaching than those which had been proposed by the Amarasinghe Committee.

All these reports were carefully considered by the Ministry of Finance and the Central Bank. Based on the recommendations of the Ministry and the Central Bank, the Cabinet agreed on a large number of changes in the laws and

procedures relating to debt recovery. The changes in the laws are embodied in a package of 13 Bills, namely:

1. *the Debt Recovery (Special Provisions) Bill;*
2. *the Recovery of Loans by Banks (Special Provisions) Bill;*
3. *the Mortgage (Amendment) Bill;*
4. *the Registration of Documents (Amendment) Bill;*
5. *the Civil Procedure Code (Amendment) Bill;*
6. *the Consumer Credit (Amendment) Bill;*
7. *the Motor Traffic (Amendment) Bill;*
8. *the Agrarian Services (Amendment) Bill;*
9. *the National Development Bank of Sri Lanka (Amendment) Bill;*
10. *the Public Servants (Liabilities) (Amendment) Bill;*
11. *the Code of Criminal Procedure (Amendment) Bill;*
12. *the Trust Receipts (Amendment) Bill; and*
13. *the Inland Trust Receipts Bill.*

The majority of these Bills are based on the recommendations of the Wimalaratne Committee, though these recommendations have in some cases been modified by the Cabinet. The last two Bills relating to Trust Receipts are based on the recommendations of the Amarasinghe Committee.

All these Bills have been discussed in detail by a five-man Bench of the Supreme Court to ensure that they do not violate any of the provisions of the Constitution. The Supreme Court has suggested a few amendments to the Bills. These amendments will all be incorporated in the Bills in the form of Committee Stage amendments. These amendments are being tabled now in this House.

Since the 13 Bills contain a large number of detailed provisions, I felt it would be best if I tabled a statement explaining the provisions of each Bill. This has already been done. I will not therefore take up the time of the House in

explaining all the provisions contained in these Bills. I would like, however, to refer to the provisions of two of the most important Bills.

The Debt Recovery (Special Provisions) Bill provides a special procedure for the recovery of loans by lending institutions. In terms of this Bill, a lending institution can file a plaint in court setting out particulars of the loan in default. The court will then enter a decree nisi against the debtor. The decree nisi will be sent by registered post to the debtor or, where the debtor is an employee, it will be served through the employer. The debtor can then file an affidavit in court stating that there is an issue or a question which has to be tried by the court. If the defendant fails to show sufficient cause, the court will convert the decree nisi into a decree absolute. Thereafter it is not necessary for the lending institution to go to court again for a writ of execution. The decree absolute itself will be deemed to be a writ of execution issued to the Fiscal. The new procedure will be available to all banks and finance companies in the country.

Another important change is introduced in the Recovery of Loans by Banks (Special Provisions) Bill. Under this Bill the right of parate execution which has already been granted to the State banks will be extended to all banks in the country, but not to the finance companies. The right of parate execution enables a lending institution to sell the property mortgaged to it by a debtor who is in default without seeking the intervention of a court of law. Modern banking laws in other countries, in developed countries like the United Kingdom as well as developing countries like Singapore, allow the right of parate execution to banking institutions. <u>The right of parate execution will cover all property mortgaged to a bank whether movable or immovable...</u>

Joining the debate, the then Minister of Industry and the Leader of the House (who is the incumbent President of the Republic) quoted verbatim the following part of the Supreme Court Special Determination No. 1 of 1990 on the Debt Recovery (Special Provisions) Bill (Parliamentary Debates (Hansard) Official Report, dated 26.01.1996, Vol. 62, columns 1354-1355):

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 slower 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 same Minister explained the objectives of these debt recovery laws in this manner (columns 1355-1356):

The prevailing situation in the country necessarily warrants the state to provide the required legal provision for banks to lend more finance for production ventures without limiting their efforts to much safer areas of trade and business. They stick to trade and business because recovery is easier and would not go into other areas because recovery is more difficult. Their investment in productive ventures creates more employment opportunities. That is what we are trying to aim at. If we expect the banks to invest borrower' funds on high-risk bearing new ventures the legal framework should be such that with the least financial expense and without long delays funds advanced could be recovered. We are talking of money not being given. If it is a high risk

> *they should be able to recover the money. And from whom? From those who default not from a person who has been running a business for a long time as default. Banks always try to put a business on its feet first. One policy today is not to go in for liquidation of every venture. What can be put back on its feet is restructured. But they have to go against those habitual defaulters who think it is much easier today to default and go to court and hang on to the money. This is how other countries developed in Asia. Let us not be blind to reality. If there are more safeguards needed let the law operate for some time and we will think of it. But by opposing it you are not helping the country. You are not speaking on behalf of the persons who have deposited money. The middle class of the country are the ones who have deposited the money.*

The legislative history is a relevant factor to interpret provisions of a statute. In the case of *SZTAL v. Minister for Immigration and Border Protection* [2017] HCA 34 at para 14, Kiefel C.J. states:

> *The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.*

Let me also add that the new trend in the UK on how best to interpret a statute seems to be a shift from 'the intention of the legislature' to 'the purpose of the legislation'.

In the House of Lords case of *R v. Secretary of State for Health ex parte Quintavalle (on behalf of Pro-Life Alliance)* [2003] UKHL 138, Lord Bingham states:

> *The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.*

According to the Parliamentary debates quoted above, it is evident that Parliament fervently desired to assist the banking sector by facilitating speedy recovery of loans, and it did not intend to limit the expedited process only to cases where the debtor had mortgaged the property.

The character of the mortgagor was not a concern. If the payment is defaulted, the mortgaged property could be sold to recover the money.

In addition to the Parliamentary proceedings, the short and long titles of Act No. 4 of 1990 itself make it clear that this is a special Act enacted for the recovery of loans granted by banks to promote the economic development of Sri Lanka. With the risk of repetition, the title of the Act is "*Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990*", and the long title is "*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*." Long title is an important part of the Act

and can be used as an aid to the construction of the Act. (*Maxwell on the Interpretation of Statutes*, 12th edition, page 4)

Apart from the long title, the Act does not contain any reference to support the argument that only loans granted by banks for economic development can be recovered under the provisions of this Act. The recovery of loans granted by banks will contribute to the economic development of Sri Lanka; when money circulates, the economy will prosper.

The question arises as to why this special Act was introduced when the Mortgage Act, No. 6 of 1949, as amended, was already there (and still is) for the purpose of recovering loans granted by banks. The legislature recognised that while the ultimate outcome remained consistent (the sale of the mortgaged property for the recovery of loans), the duration required to conclude a hypothecary action filed under the Mortgage Act was unreasonably protracted. As a result, the lending portfolios of banks, their solvency, financial performance and other factors were significantly compromised, directly impacting the country's economic development. The classic example would be that after the Supreme Court decision in *Ramachandran* on 15.04.2005, the bank filed a hypothecary action in the Commercial High Court on 22.06.2006 to recover the money by judicial sale of the mortgaged property and this case still remains pending in Courts even after a span of more than 17 years.

Scheme of the Act: operative sections

Understanding the scheme of the Act is important in interpreting its various provisions and discerning the legislative intent behind its enactment.

The operative provisions of a statute are of great significance; they constitute the enacting part of a statute. *Halsbury's Laws of England: Statutes and Legislative Process*, Vol. 96 (5th edition, 2012), para 664 states:

> *The operative components of an Act are obviously by far most important, for they carry the legislative message directly. All other elements serve as commentaries on the operative components, of greater or less utility depending on their precise function.*

The operative sections of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990 are sections 3, 4 and 5. In other words, they are the principal or substantive sections of the Act. These substantive sections do not make a distinction between a borrower and a mortgagor; both the borrower who mortgages his property as security for the loan and a third party who mortgages his property as security for the loan obtained by the borrower are subject to the same treatment. In either situation, should the loan be defaulted, the mortgaged property is liable to be sold by public auction to recover the dues to the bank.

Let me quote the operative sections of the Act:

> *3.* ***Whenever default is made in the payment of any sum due on any loan****, whether on account of principal or of interest or of both, default shall be deemed to have been made in respect of the whole of the unpaid portion of the loan and the interest due thereon up to date; and the Board may in its discretion, take action as specified either in section 5 or in section 4;*
>
> *Provided, however, that where the Board has* ***in any case*** *taken action, or commenced to take action, in accordance with section 5, nothing shall be deemed to prevent the Board at any time from subsequently taking action in that case by resolution under section 4 if the Board deems it advisable or necessary to do so.*
>
> *4. Subject to the provisions of section 7 the Board may by resolution to be recorded in writing authorize any person specified in the resolution* ***to sell by public auction any property mortgaged to the bank as security for any loan in respect of which default has been made*** *in order to recover the whole*

of the unpaid portion of such loan, and the interest due thereon up to the date of the sale, together with the moneys and costs recoverable under section 13.

5(1). Subject to the provisions of section 7 the Board may by resolution to be recorded in writing authorize ***any person*** *specified in the resolution* ***to enter upon any immovable property mortgaged to the bank as security for any loan in respect of which default has been made*** *or where the terms of* ***any loan agreement are contravened in respect of such property*** *to take possession of, and to manage and maintain such property, and to exercise the same powers in the control and management of such property as might have been exercised by* ***the mortgagor*** *if he had not made default, or contravened the terms of such agreement.*

5(2). Whenever ***any sum of money*** *due on* ***any loan*** *granted for any agricultural or industrial undertaking* ***on the security of any plant, machinery or other movable property to the bank*** *is in default or where the terms of any loan agreement are contravened in respect of such property, the Board may authorize any person specified in writing to enter and take possession of such agricultural or industrial undertaking in which such plant, machinery or other movable property is situate, and exercise the same power in the control and management of such undertaking as might have been exercised if such property had been pledged or mortgaged.*

It is clear that section 4 of the Act, which serves as the central provision, empowers the board of directors of the bank to pass a resolution authorising any person "***to sell by public auction any property mortgaged to the bank as security for any loan in respect of which default has been made***" irrespective of whether the property was mortgaged by the borrower or a third party. The focus in sections 3-5 is on the mortgaged property and the mortgagor; who mortgages the property is immaterial.

The argument of learned President's Counsel for the appellant relying on the Divisional Bench decision of the Court of Appeal in *Yasodha Holdings (Pvt) Ltd v. People's Bank (supra)* that "any property mortgaged to the bank" in section 4 of the Act would mean "any one of the properties mortgaged to the bank by the borrower" is in my view unacceptable as a general rule. That interpretation is correct on the unique facts of that case. In the *Yasodha* case, the petitioner obtained several loans by mortgaging several properties. One of his arguments was that the Nuwara Eliya property could not be subjected to *parate* execution because it was not included in the offer letter for that specific loan that was defaulted. It is in that context the Court held that "*the bank is empowered to sell any immovable or movable property mortgaged to the bank as security for any loan in respect of which default has been made. The security need not be in relation to a particular loan in respect of which default has been made*." The facts of that case are totally different from the instant case. A principle laid down in a judgment shall be understood in the context of the peculiar facts and circumstances of that particular case.

I accept that in sections 7 and 13-17, the term used is "borrower", not "mortgagor". I also accept that a statute must be understood holistically, not piecemeal. But the important point to bear in mind is that sections 7 and 13-17 are procedural sections. In other words, they are subsidiary or subordinate sections of the Act. These procedural sections are there to facilitate the operative sections, which are sections 3-5 of the Act.

In the case of *Institute of Patent Agents v. Lockwood* [1894] AC 347, Lord Herschell L.C. observes at 360:

> *Well, there is a conflict sometimes between two sections to be found in the same Act. You have to try and reconcile them as best as you may. If you cannot, you have to determine which is <u>the leading provision</u> and which <u>the subordinate provision</u>, and which must give way to the other.*

In the case of *Project Blue Sky Inc. v. Australian Broadcasting Authority* [1998] HCA 28, McHugh, Gummow, Kirby and Hayne JJ (Chief Justice Brennan wrote a separate judgment) state at para 70:

> *A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court to determine which is the leading provision and which the subordinate provision, and which must give way to the other. Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.*

As seen from the recent decisions such as *Monash University v. EBT* [2022] VSC 651 at para 84 and *ENT19 v. Minister for Home Affairs* [2023] HCA 18 at para 87, the above dicta of Lord Herschell L.C. in *Institute of Patent Agents v. Lockwood* are consistently followed as good law.

In *Saiyad Mohammad Bakar El-Edroos v. Abdulhabib Hasan Arab and Others* 1998 4 SCC 343, on comparison between two Acts, one dealing with substantive law and the other with procedural law, Justice Misra states:

> *A procedural law is always subservient to the substantive law. Nothing can be given by a procedural law what is not sought to be given by a substantive law and nothing can be taken away by the procedural law what is given by the substantive law.*

Substantive sections of a statute aim at the ends which the legislature seeks to achieve while procedural sections aim at the means by which those ends can be

achieved. Procedural sections should not diminish what substantive sections provide, nor should they grant what substantive sections do not provide. They should align or harmonise with substantive sections. In order to achieve this, procedural sections should be interpreted liberally to facilitate the enforcement of the substantive sections. I must say with the utmost respect to Their Lordships that the majority decision in *Ramachandran* does not appear to have appreciated this important point.

The canons of statutory interpretation

When the wording of a statute is clear, there is no need for interpretation; the words speak for themselves. The Court cannot introduce new words or disregard existing words to give a different interpretation to the statute which the Court would think meets the ends of justice. The words, phrases and sentences must be construed in their ordinary, natural and grammatical meaning. This is known as the literal rule. The literal rule serves to prevent not only the undue expansion of narrow language but also the undue limitation of wide language. (Maxwell, pages 28-32; *N.S. Bindra Interpretation of Statutes*, 13th edition, pages 328-336)

In *Miller v. Salomons* (1853) 7 Ex. 475, Pollock C.B., states at 560:

> *If the meaning of the language used by the legislature be plain and clear, we have nothing to do but to obey it–to administer it as we find it, and I think, to take a different course is to abandon the office of Judge, and to assume the province of legislation.*

Learned President's Counsel for the appellant contends that "*Ramachandran case did not add words to the statute or read words into it, which are not there*". The ordinary interpretation of "*any property mortgaged to the bank as security for any loan*" found in the principal section of the Act (section 4) inherently encompasses property mortgaged to the bank by anybody – either the borrower or a third party. However, in *Ramachandran* this was restricted to the *property mortgaged to the bank only by the borrower*.

A literal and mechanical interpretation is not the sole interpretation that Courts are bound to give to the words of a statute. The golden rule permits the Court to depart from the plain and ordinary meaning of the words, if the Court thinks with good reasons that such meaning is inconsistent with the clear intention of the legislature or leads to absurdity or repugnancy. This rule respects the purposive interpretation of statutes: that sections of a statute shall be read contextually, not superficially or mechanically, keeping in mind the purpose, object, tenor or policy of the enactment. (Maxwell, pages 43-46, Bindra, pages 337-346)

In *Becke v. Smith* (1836) 2 M & W 191, Parke B., states at 195:

> *It is a very useful rule, in the construction of a statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no further.*

In *Warburton v. Loveland* (1929) 1 H & BIR 623, Justice Burton observes at 648:

> *I apprehend it is a rule in the construction of statutes, that, in the first instance, the grammatical sense of the words is to be adhered to. If that is contrary to, or inconsistent with any expressed intention, or declared purpose of the statute, or if it would involve any absurdity, repugnance, or inconsistency, the grammatical sense must then be modified, extended, or abridged so far as to avoid such inconvenience, but no further.*

In *Nokes v. Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 at 1022, Viscount Simon L.C. states:

> *Judges are not called upon to apply their opinions of sound policy so as to modify the plain meaning of statutory words, but where, in construing general words the meaning of which is not entirely plain there are adequate reasons for*

> *doubting whether the legislature could have been intending so wide an interpretation as would disregard fundamental principles, then we may be justified in adopting a narrower construction. At the same time, if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result.*

When the words in a statute are capable of having two or more constructions, the well-established rule laid down in the *Heydon's* case (1584) 3 Co. Rep. 7a, also known as the mischief rule, has been applied by Courts. This rule, which promotes purposive interpretation, requires the Court to ascertain what the law was before the making of the Act, what the mischief or defect in the previous law was, and how Parliament intended to address it. The Court must then determine how to rectify the mischief and further the remedy by imbuing the provisions with greater strength and vitality, all in order to give effect to the true intent of the makers of the Act.

In *Heydon's* case it was resolved by the Barons of the Exchequer at p.7b:

> *[T]he sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered:- (1st). What was the common law before the making of the Act. (2nd). What was the mischief and defect for which the common law did not provide. (3rd). what remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth. And, (4th). The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico.*

When the literal rule is applied to Act No. 4 of 1990, the operative sections favour the bank whilst the procedural sections favour the third-party mortgagor; it is evident that these two cannot coexist. Then the Court can legitimately look beyond the literal rule to discern the true legislative intent and seek reconciliation.

Harmonious construction is employed to resolve apparent inconsistencies or contradictions within the same law. Harmonious construction in law rests on the principle that every statute is enacted with a distinct purpose and intention, and therefore, it should be interpreted as a cohesive whole.

In *Sultana Begum v. Prem Chand Jain* AIR 1997 SC 1006, it was held:

> *[T]he rule of interpretation requires that while interpreting two inconsistent, or, obviously repugnant provisions of an Act, the courts should make an effort to so interpret the provisions as to harmonise them so that the purpose of the Act may be given effect to and both the provisions may be allowed to operate without rendering either of them otiose.*

In *ENT19 v. Minister for Home Affairs (supra)*, Gordon, Edelman, Steward and Gleeson JJ. state at para 87:

> *The context of the words, consideration of the consequences of adopting a provision's literal meaning, the purpose of the statute and principles of construction may lead a court to adopt a construction that departs from the literal meaning of the words of a provision. One such principle is that legislation must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. As expressed by Gageler J in SAS Trustee Corporation v Miles (2018) 265 CLR 137 at 157, "statutory text must be considered from the outset in context and attribution of meaning to the text in context must be guided so far as possible by statutory purpose on the understanding that a legislature ordinarily intends to pursue its purposes by coherent means". Where conflict appears to arise in construing an Act, "the conflict must be alleviated, so far as possible, by adjusting the meaning of the*

> *competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions", and this "will often require the court to determine which is the leading provision and which the subordinate provision, and which must give way to the other". [Project Blue Sky (1998) 194 CLR 355 at 382, quoting Institute of Patent Agents v. Lockwood [1894] AC 347 at 360.] Ultimately, the task in applying the accepted principles of statutory construction is to discern what Parliament is to be taken to have intended.*

In *Rajavarothiam Sampanthan and Others v. The Attorney General and Others* (SC/FR/351-356, 358-361/2018, SC Minutes of 13.12.2018) at 61 it was held:

> *The next principle of interpretation which should be mentioned is that, where there is more than one provision in a statute which deal with the same subject and differing constructions of the provisions are advanced, the Court must seek to interpret and apply the several provisions harmoniously and read the statute as a whole. That rule of harmonious interpretation crystallises the good sense that all the provisions of a statute must be taken into account and be made to work together and cohesively enable the statute to achieve its purpose.*

In the application of harmonious construction, both the golden rule and the mischief rule serve as valuable tools.

According to the golden rule, if the application of the literal rule leads to inconsistency within the statute, the Court can give an interpretation to achieve the manifest intention of the legislature. I have already stated that the manifest intention of the legislature is to facilitate the speedy recovery of loans granted by banks for the economic development of the country by *parate* execution.

In accordance with the mischief (*Heydon*) rule, the legislature had identified the shortcomings of the conventional legal recovery procedure and its adverse effect on the economic development of the country. An assortment of legislation was introduced to remedy this situation and Act No. 4 of 1990 is part of it. How can the

Court assist in suppressing the mischief and advancing the remedy to achieve the legislative intent?

Although the substantive sections 3-5 do not make a distinction between the borrower and mortgagor, the procedural or subordinate sections 7 and 13-17 use the term "borrower". On this basis, learned President's Counsel for the appellant argues that the Act is applicable only to the borrower who is also the mortgagor but not to a mortgagor who is not the borrower. I must reiterate that the subordinate sections cannot override the substantive sections although the contrary might be possible.

Maxwell at page 199, citing Lord Reid's statement in the House of Lords case of *Luke v. Inland Revenue Commissioners* [1963] AC 557 at 577 states:

> *Where to apply words literally would "defeat the obvious intention of the legislation and produce a wholly unreasonable result" we must "do some violence to the words" and so achieve that obvious intention and produce a rational construction.*

Subordinate sections of the Act

Let me now examine the procedural or subordinate sections of the Act individually to assess the validity of the argument of learned President's Counsel for the appellant.

Section 7 reads as follows:

> *7(1). Save as otherwise provided in subsection (2) the provisions of section 4 shall apply in the case of any default notwithstanding that the borrower may have died or that any right, title or interest whatsoever in the property mortgaged to the bank as security for the loan may have passed by the voluntary conveyance or operation of law to any other person.*

> *(2) Where a borrower is dead and probate of his will or letters of administration to his estate have not been issued to any person, the District Court of Colombo or the District Court of the district in which the property mortgaged to the bank by the borrower is situate, may upon application made in that behalf by a bank and after service of notice of the application on such persons, if any, as the court may order, and if satisfied that the grant of probate or the issue of letters of administration is likely to be unduly delayed, appoint a person to represent the estate of the borrower for the purposes of this section; and the provisions of section 4 shall not apply in the case of any default made by such borrower unless and until a person is appointed under this subsection to represent the estate of such borrower.*

According to section 7, the provisions of section 4 (whereby the bank can pass a resolution to sell the mortgaged property) shall not apply in the case of default made by a borrower who is dead, until a person is appointed to represent the estate of such borrower.

If the Court is to give literal interpretation to this section, only the mortgagor who is also the borrower is governed by this section but not the mortgagor who is not the borrower. In that eventuality, the property of the deceased mortgagor who is not the borrower can be sold by *parate* execution notwithstanding that a person has not been appointed to represent the estate of such mortgagor.

Such a literal construction causes injustice to a mortgagor who is not the borrower. Will the legislature enact statutes to oppress a group of people similarly circumstanced in that manner?

Should the Court in such circumstances, as argued by learned President's Counsel for the appellant, interpret that section to mean that the property of a mortgagor who is not the borrower cannot be sold by *parate* execution? Or should the Court find a solution that aligns with the intention of the legislature and the purpose of the

legislation? Canons of construction of statutes suggest that the Court must adopt the latter, not the former.

The argument of the learned President's Counsel for the appellant that the use of the term "borrower" instead of "mortgagor" suggests that only the property mortgaged by the borrower is liable to *parate* execution is unacceptable as such construction restricts the ambit of the substantive sections of the Act. Such an interpretation will do violence to the symmetry of this special law.

An intention to produce an unreasonable result should not be attributed to a statute when an alternative interpretation is possible. The Court can give a liberal construction to a section to avert injustice. In this instance, the Court can extend the meaning of the term "borrower" not only to the borrower who is also the mortgagor but also to the mortgagor who is not the borrower. To put it differently, the term "borrower" must be interpreted to include the mortgagor who has provided security for the loan obtained by the borrower. This construction can be adopted in respect of all other sections (i.e. sections 13-17) where the term "borrower" appears. Such interpretation is in consonance with the policy, object and spirit of the Act.

Section 13 reads as follows:

> *13. In addition to the amount due on any loan, the Board may recover from the borrower, or any person acting on his behalf –*
>
> *(a) all moneys expended by a bank, in accordance with the covenants contained in the mortgage bond executed by the person to whom the loan was granted, in the payment of premia and other charges in respect of any policy of insurance effected on the property mortgaged to such bank, and in the payment of all other costs and charges authorized to be incurred by the bank, under the covenants contained in such mortgage bond and executed by the borrower;*
>
> *(b) the costs of advertising the sale and of selling of the mortgaged property:*

> *Provided that the costs incurred under paragraph (b) shall not exceed such percentage of the loan as may be prescribed.*

Section 13 empowers the bank to recover the expenses and costs incurred by the bank in conducting the sale from the borrower in accordance with the covenants contained in the mortgage bond executed by the borrower. The literal interpretation of this section suggests that the bank can recover expenses as contained in the mortgage bond if the mortgage bond was executed by the borrower, not by a third party.

When the operative section of the Act empowers the bank to sell any property mortgaged to the bank (regardless of who mortgages the property), can this subordinate provision of the Act nullify the full effect of the operative section of the Act? The purposive interpretation of this section is when the mortgage is executed by a third party, the term "borrower" should mean both the individual who borrows money by mortgaging the property and the third party who mortgages the property on behalf of that individual. That is the way to suppress the mischief and advance the remedy. A construction that is excessively literal should be avoided when it results in an absurdity, especially if a more flexible interpretation would better serve the practical implementation of the Act.

Bindra, states at page 354:

> *The court can look behind the letter of the law in order to determine the true purpose and effect of an enactment when the language of the statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or some inconvenience, or absurdity, hardship or injustice, presumably not intended. In such cases, a construction modifying the meaning of the words and even the structure of a sentence is permissible, and in order to avoid absurdity or incongruity, even grammatical and ordinary sense of the words can in certain circumstances be avoided.*

Section 14 reads as follows:

> *If the mortgaged property is sold, the bank shall, after deducting from the proceeds of the sale the amount due on the mortgage and the moneys and costs recoverable under section 13, pay the balance remaining, if any, either to the borrower or any person legally entitled to accept the payment due to the borrower or where the Board is in doubt as to whom the money should be paid into the District Court of the district in which the mortgage property is situate.*

I do not think that even the literal interpretation of section 14 presents an anomaly. There is no compulsion in section 14 for the bank to give excess money to the borrower and not to any other person. If the borrower is not the mortgagor, the excess money can be deposited with the Court for the Court to release it to the correct person. Section 14 will not "*bring about a preposterous result*" as remarked at page 405 in the *Ramachandran* case.

However, once the aforementioned liberal interpretation of the term "borrower" is adopted, the question of depositing such excess money in Court does not arise.

As Maxwell points out at page 47, citing *Canada Sugar Refining Co. Ltd. v. R* [1898] AC 735, a statute shall be read as a whole and "*every clause of a statute is to be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute*."

Lord Hodge, in the UK Supreme Court's recent case, namely *R (on the application of O) v. Secretary of State for the Home Department* [2022] UKSC 3, declares:

> *The courts in conducting statutory interpretation are "seeking the meaning of the words which Parliament used": Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591, 613 per Lord Reid of Drem. More recently, Lord Nicholls of Birkenhead stated:*
>
> *"Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context."*

> *(R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd [2001] AC 349, 396). Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in Spath Holme, 397:*
>
> *"Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament."*

Section 15(1) reads as follows:

> *If the mortgaged property is sold, the Board shall issue a certificate of sale and thereupon all the right, title, and interest of the borrower to, and in, the property shall vest in the purchaser; and thereafter it shall not be competent for any person claiming through or under any disposition whatsoever of the right, title or interest of the borrower to, and in, the property made or registered subsequent to the date of the mortgage of the property to the bank, in any court to move or invalidate the sale for any cause whatsoever, or to maintain any right, title or interest to, or in, the property as against the purchaser.*

Learned President's Counsel for the appellant states that this is an important section that cuts across the banks' argument because when the property is sold (whether or not the mortgagor is the borrower), it is the right, title and interest of the borrower in the property that is transferred to the purchaser. He argues that the only inference

that can be drawn from this is that *parate* execution applies exclusively to the property of the borrower. I regret my inability to agree.

What this section says is that "*if the mortgaged property is sold, the Board shall issue a certificate of sale and thereupon all the right, title, and interest of the borrower to, and in, the property shall vest in the purchaser*". What is sold is "the mortgaged property", not "the borrower's property". If the borrower is the owner of the mortgaged property, the purchaser will acquire the borrower's right, title, and interest in the property. However, if the borrower is not the owner of the mortgaged property, the purchaser does not and cannot acquire the right, title, and interest of the borrower in the property since the borrower has no such right, title and interest in the property. Upon the issuance of the certificate of sale, the right, title and interest of the owner of the mortgaged property will pass to the purchaser. This section does not say that upon the mortgaged property being sold and the certificate of sale being issued, only the right, title and interest of the borrower are transferred to the purchaser.

Sometimes the letter of the law needs to yield to the spirit of the law. If the term "borrower" in this section is given a strict literal interpretation, it leads to a preposterous outcome. If I may repeat what Viscount Simon L.C. stated in *Nokes v. Doncaster Amalgamated Collieries Ltd (supra)* at 1022, "*if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we would avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result*."

Chief Justice Goddard in *Barns v. Jarvis* [1953] 1 All ER 1061 at 1063 states "*One has to apply a certain amount of common sense in construing statutes and to bear in mind the object of the Act*".

If the extended meaning to the term "borrower" is given (encompassing both the borrower who mortgaged the property and the third party who mortgaged the property), this anomaly can be averted.

Section 16(3)-(5) is to the following effect:

> *16(3). Where any immovable property sold in pursuance of the preceding provisions of this Act in the occupancy of the borrower or some person on his behalf or of some person claiming under a title created by the borrower subsequently to the mortgage of the property to the bank the District Court shall order delivery to be made by putting the purchaser or any person whom he may appoint to receive possession on his behalf, in possession of the property.*
>
> *(4). Where any immovable property sold in pursuance of the preceding provisions of this Act is in the occupancy of a tenant or other person entitled to occupy the same, the District Court shall order delivery to be made by affixing a notice that the sale has taken place, in the Sinhala, Tamil and English languages, in some conspicuous place on the property, and proclaiming to the occupant by beat of tom-tom or any other customary mode or in such manner as the court may direct, at some convenient place, that the interest of the borrower has been transferred to the purchaser. The cost of such proclamation shall be fixed by the court and shall in every case be prepaid by the purchaser.*
>
> *(5). Every order under subsection (3) or subsection (4) shall be deemed, as the case may be, to be an order for delivery of possession made under section 287 or section 288 of the Civil procedure Code, and may be enforced in like manner as an order so made, the borrower and the purchaser being deemed, for the purpose of the application of any provisions of that Code, to be the judgment-debtor and judgment-creditor, respectively.*

If the term "borrower" is given a narrow meaning, although any immovable property mortgaged to the bank can be sold under the principal sections of the Act, delivery of possession can be given to the purchaser only if the borrower is the mortgagor

but not when the mortgagor is not the borrower. That interpretation will result in absurdity and will allow the mischief to perpetuate.

Chief Justice Beaumont, in *Emperor v. Somadhai Govindbhai* (1938) 40 BOMLR 1082 remarked:

> *I protest against the suggestion that a Judge, construing an Act of Parliament, is a mere automaton whose only duty is to give out what he considers to be the primary meaning of the language used. A Judge must always consider the effect of any construction which he is asked to put on an Act of Parliament, and if he comes to the conclusion that a particular construction leads to a result which he considers irrational or unfair, he is entitled, and indeed bound, to assume that the Legislature did not intend such a construction to be adopted, and to try to find some more rational meaning to which the words are sensible.*

Maxwell states at page 201:

> *Where possible, a construction should be adopted which will facilitate the smooth working of the scheme of legislation established by the Act, which will avoid producing or prolonging artificiality in the law, and which will not produce anomalous results*.

To avert the anomaly, the term "borrower" shall include the mortgagor who is not the borrower. Such a liberal interpretation can easily be accommodated within the scope and purpose of the Act.

Bindra states at page 351:

> *In a liberal construction of the statute, its meaning can be extended to matters which come within the spirit or reason of the law or within the evil which the law seeks to suppress or correct, although, of course, the statute can under no circumstances be given a meaning inconsistent with, or contrary to the language used by the legislators. Consequently, any matter reasonably within*

> *the statute's meaning, may be included within the statute's scope, unless the language necessarily excludes it.*

Section 17 reads as follows:

> *Where the property sold has been purchased on behalf of the bank, the Board may at any time before it resells that property, cancel the sale by an endorsement to that effect on a certified copy of the certificate of sale, upon the borrower or any person on his behalf paying the amount due in respect of the loan for which the property was sold (including the cost of seizure and sale) and interest on the aggregate sum at a rate not exceeding the prescribed rate per annum. Such an endorsement shall, upon registration in the office of the Registrar of Lands, revest the said property in the borrower as though the sale under this Act has never been made.*

According to the literal construction of this section, the endorsement of cancellation on the certificate of sale shall revest the mortgaged property in the borrower as if the sale had never taken place. For the property to be revested, the borrower must have been the owner in the first place. Any argument that such an endorsement shall vest the property in the borrower whether or not he was the owner is untenable. If the sale is deemed not to have taken place, the property will revert to the original owner, who could be either the borrower or a third party. If the term "borrower" is given a liberal meaning to include the mortgagor who is not the borrower, no other explanation is necessary.

Bindra states at page 351:

> *Where the literal meaning of the words used in a statutory provision would manifestly defeat its object by making a part of it meaningless and ineffective, it is legitimate and even necessary to adopt the rule of liberal construction so as to give meaning to all parts of the provision and to make the whole of it effective and operative.*

In sections 2, 8 and 9, the use of the term "borrower" shall be understood as the borrower who is also the mortgagor and the mortgagor who is not the borrower. Both of them should register their addresses with the bank for receiving notices, including but not limited to notices of resolution and sale. I must state that although a mortgagor who is not the borrower may not be required to register his address according to the literal meaning of the section, the experience demonstrates that the bank sends all notices to both the borrower and the mortgagor and if the borrower is an incorporated body, to all the directors because what the bank wants is to recover the money, not the mortgaged property. This is what has happened in the instant case as well.

In terms of section 19, if the bank purchases the property at the sale, the bank shall not hold the property for a longer period than it is necessary to enable the bank to resell the property to recover its dues. In terms of section 14, the excess money shall be returned.

Bindra states at page 368:

> *Every statute must be construed ex visceribus actus, that is, within the four corners of the Act. When the court is called upon to construe the term of any provision found in a statute, the court should not confine its attention only to the particular provision which falls for consideration. The court should also consider other parts of the statute which throw light on the intention of the legislature and serve to show that the particular provision ought not to be construed as if it stood alone and part from the rest of the statute.*

Dictionary meanings of "borrower" and "mortgagor"

Dictionaries cannot be taken as authoritative pronouncements of the meanings of words used in statutes. However, the Courts, in the interpretation of statutes, may consult standard authors and make reference to dictionaries, including law dictionaries. (*R v. Peters* [1886] 16 QBD 636) The dictionary meanings of "borrower"

and "mortgagor" suggest that there might be instances where these terms could be used interchangeably, particularly in contexts related to loans and mortgages.

Black's Law Dictionary (11th edition), page 1214 defines "mortgagor" as "*Someone who mortgages property; the mortgage-debtor, or borrower*".

Law Dictionary, P.H. Collin (Universal Book Stall, New Delhi), page 178 "mortgagor" is defined as "*person who borrows money, giving a property as security*".

A Dictionary of Law (5th edition, edited by Elizabeth A. Martin, Oxford University Press), page 320 states: "*Mortgage – an interest in property created as a form of security for a loan or payment of a debt and terminated on payment of the loan or debt. The borrower, who offers the security, is the mortgagor; the lender, who provides the money, is the mortgagee*."

In *K.J. Aiyar's Judicial Dictionary* (11th edition, The Law Book Co (P) Ltd, Allahabad), page 773, the term "mortgage" is defined as follows:

> *A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. The transferor is called a mortgagor, the transferee, a mortgagee, the principal money and interest of which payment is secured for the time being are called the mortgage money; and the instrument, if any, by which the transfer is effected is called a mortgage deed. Simple mortgage – Where without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage money, and agrees expressly and impliedly, that in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgage property to be sold and the proceeds of the sale to be applied, so far as may be necessary, in payment of the mortgage money, the transaction is called a simple mortgage and mortgagee a simple mortgagee*.

Judicial remedy for imprecise legislative language

The purpose of the Act and the mischief the legislature intended to remedy are clear. Having regard to the intent, scope and object of the Act, it is quite apparent that the draftsman failed to use precise language in the Act. Had the attention of Parliament been drawn to this inadvertent oversight before the Bill was passed into law, I am certain that the term "borrower" in the Act would have been substituted with the term "mortgagor" to prevent any ambiguity. This simple change could have averted any confusion.

As a general principle the Court cannot assume a mistake in an Act of Parliament; the legislature is presumed not to have made mistakes. Changing the language of a statute is a serious step, but there is no blanket prohibition. Canons of statutory interpretation allow such action when there are compelling reasons to do so.

In the House of Lords case of *Vickers, Sons & Maxim Ltd v. Evans* [1910] AC 444 at 445, Lord Loreburn L.C. states that Court cannot "*read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself*."

In regard to substitution of words in a statute, Maxwell states at page 231:

> *Sometimes, where the sense of the statute demands it or where there has been an obvious mistake in drafting, a court will be prepared to substitute another word or phrase for that which actually appears in the text of the Act.*

If the draftsman or the legislature has failed to use apt words, the Court can intervene. Inadvertent mistakes on the part of the draftsman should not defeat the purpose of the Act. Maxwell further explains at page 228:

> *Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity which can hardly have been intended, a construction may be put upon it which modifies the meaning of the*

> *words and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, or by rejecting them altogether, on the ground that the legislature could not possibly have intended what its words signify, and that the modifications made are mere corrections of careless language and really give the true meaning. Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskillfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used. Lord Reid [in Cramas Properties Ltd v. Connaught Fur Trimmings Ltd [1965] 1 WLR 892 at 899] has said that he prefers to see a mistake on the part of the draftsman in doing his revision rather than a deliberate attempt to introduce an irrational rule: "the canons of construction are not so rigid as to prevent a realistic solution."*

Quoting a part of this excerpt from Maxwell, in *The King v. Vasey* [1905] 2 KB 748, Lord Alverstone C.J. substituted new words into the statute to fulfil the manifest object of the legislature. Said His Lordship at page 751:

> *Applying those principles to the present case, we have to see whether the amending section requires modification, on the ground that if it is to be taken literally it will be reduced to a nullity. It seems to me that the object of the section is perfectly plain, and no one can doubt that the intention of the Legislature was to prevent the destruction of fish in salmon rivers by putting lime or other noxious substances into the water. The draftsman must, however, have forgotten exactly how the section of the Malicious Injuries to Property Act, 1861, which deals with the matter runs. I have no doubt that he meant to provide that for the purpose of this Act the expression "salmon river" should be substituted for the description of waters enumerated in the earlier Act. If, therefore, the exact phraseology of the section of the amending Act is disregarded, and the words "or in any salmon river" are inserted in the earlier section after the words "in any*

> *such pond or water", that makes sense, and carries out the manifest object of the amendment.*

Similar sentiments were echoed in *The King v. Ettridge* [1909] 2 KB 24.

Bindra states at page 365-366:

> *When a language of the statute is plain and unambiguous it would not be open to the courts to adopt a hypothetical construction on the ground that such a construction is more consistent with the alleged object and policy of the Act. But where such a plain reading leads to anomalies, injustices and absurdities, the court may look into the purpose for which the statute was enacted and try to interpret it so as to adhere to the purpose of the statute. If words are to be added by the court in order to repair an omission in the Act, it should be possible to state with certainty that these words would have been inserted by the draftsman and approved by the legislature had their attention been drawn to the omission before the Bill had passed into law.*

Lord Denning in *Seaford Court Estates Ltd v. Asher* (1949) 2 All ER 155 at page 164 observes as follows:

> *Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticised. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a Judge cannot simply fold his hands and blame the draftsman. He must set to*

> *work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give "force and life" to the intention of the legislature. That was clearly laid down (3 Co. Rep. 7b) by the resolution of the judges [Sir Roger Manwood, C.B., and the other barons of the Exchequer] in Heydon's case (1584) 3 Co. Rep. 7a), and it is the safest guide to-day. Good practical advice on the subject was given about the same time by Plowden in his note (2 Plowd. 465) to Eyston v. Studd (1574) 2 Plowd. 463. Put into homely metaphor it is this: A Judge should ask himself the question how if the makers of the Act had themselves come across this ruck in the texture of it, they would have strengthened it out? He must then do as they would have done. A Judge must not alter the material of which the Act is woven, but he can and should iron out the creases.*

In the Supreme Court case of *Balasunderam v. The Chairman, Janatha Estate Development Board* [1997] 1 Sri LR 83, while interpreting sections of the Government Quarters (Recovery of Possession) Act, No. 8 of 1981, as amended, Justice Kulatunga stated at page 88:

> *In interpreting the Act, I have adopted the principle that words are to be construed in accordance with the intention as expressed, having regard to the object or policy of the legislation, which in the instant case is to facilitate the speedy recovery of Government quarters*.

I need only to repeat the same, with the substitution of the words "loans by banks" for the words "Government quarters".

Ramachandran v. Hatton National Bank

The central focus of this appeal hinged on the majority decision in *Ramachandran v. Hatton National Bank*.

The *ratio decidendi* of the majority decision in *Ramachandran* (at page 405) is that "*the provisions of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990 will not apply in respect of a mortgage given by a guarantor or any person other than a borrower to whom a loan has been granted by a Bank for the economic development of Sri Lanka*."

The gravamen of submissions made on behalf of the banks led by Dr. Romesh De Silva, P.C. is that the majority in *Ramachandran* took extraneous matters into consideration before they addressed the core issue. As a result, it was strenuously submitted that the majority considered the core issue with "*prejudice and bias against parate execution*". He strongly argued that *Ramachandran* has been wrongly decided and should be overruled by this Fuller Bench. Learned President's Counsel for the other intervenient banks associated themselves with the submissions of Dr. De Silva, P.C.

Ramachandran was decided on 15.04.2005. It is the submission of learned President's Counsel that, as seen from the judgment, the majority in *Ramachandran* did not give due consideration to any of the previous decisions on the matter before they arrived at the aforementioned conclusion. He highlights that in *Nalin Enterprises (Pvt) Limited v. Sampath Bank Limited* (HC (Civil) 199/2000(1) decided on 27.04.2001) the Commercial High Court held that under the Act No. 4 of 1990 *parate* execution is permissible in respect of any property mortgaged to the bank whether it be of the borrower or any other party, and the term "borrower" in the Act must be interpreted to include the mortgagor who had provided security for the loan obtained by the borrower. The Supreme Court in *Nalin Enterprises (Pvt) Limited v. Sampath Bank Limited* (SC/LA/14/2001, SC Minutes dated 23.07.2001) refused leave to appeal against this order by a bench presided over by His Lordship the Chief Justice who presided over the Bench in *Ramachandran*. The same conclusion was arrived at in the Commercial High Court case of *Sathasivam v. Hatton National Bank* (HC(Civil)174/2000(1) decided on 04.12.2002) and the Supreme Court in *Sathasivam v. Hatton National Bank* (SC/CHC/44/2002, SC Minutes of 30.01.2003)

refused leave to appeal against this order by a Bench presided over by Justice M.D.H. Fernando. In *Bank of Ceylon v. Dharmasena* (CALA/329/2000, CA Minutes of 07.10.2002) and in *Weerakoon v. Bank of Ceylon* (CA/970/2002, CA Minutes of 31.05.2002) by Benches presided over by Justice Amaratunga and Justice Thilakawardane, respectively, the Court took the same view. In *Ukwatte v. D.F.C.C. Bank* [2004] 1 Sri LR 164, Justice Sripavan (as His Lordship then was) also held that the terms "*any property*" and "*for any loan*" in section 4 of the Act, No. 4 of 1990 are not limited to the property of the borrower.

Although Mr. Rohan Sahabandu, P.C. for the appellant states that *Ukwatte's* case was considered in *Ramachandran*, there is no such indication in the majority judgment. It was the submission of Dr. De Silva, P.C. that until the majority decision in *Ramachandran*, all Courts that considered the matter did not confine *parate* execution solely to property mortgaged by the borrower. In reply, Mr. Sahabandu, P.C. did not draw the attention of this Court to any case decided prior to *Ramachandran* where the Court has given a restrictive interpretation to section 4 of the Act.

Dr. De Silva, P.C. stresses that the extensive discussion in the majority judgment on the historical and conceptual aspects of *parate* execution, including its origins in Roman Law, Roman-Dutch Law, and English Law, tends to portray *parate* execution as a negative concept. He contends that the discussion is purely academic and was not relevant to the matter at hand. The Supreme Court was tasked with deciding the statutory law introduced by Act No. 4 of 1990, rather than determining which law is applicable to the recovery of debts by banks. He further submits that the majority's view that common law, not English law, applies in *parate* execution proceedings is incorrect.

The cause of action allegedly accrued to the plaintiff in *parate* execution cases arises out of a banking transaction and not of a mortgage transaction. The mortgage is part of the banking transaction. In the instance case, the 1st plaintiff is the borrower and the 2nd plaintiff is the mortgagor. The bank resorts to *parate* execution of the

mortgaged property to recover the loan. In terms of section 3 of the Civil Law Ordinance, No. 5 of 1854, as amended, the law applicable in respect to banks and banking is the English law unless other provision is made applicable *by statute law*. (*De Costa v. Bank of Ceylon* (1969) 72 NLR 457) Roman-Dutch law is considered as the common law of Sri Lanka because it is the residuary law filling in the gaps only when the statute laws and special laws are silent. The transaction in question is governed by the English law, not by the Roman Dutch law.

Let me explain this in lucid language. When a person goes to a bank to obtain a loan, the bank asks for security. That security can be provided by the borrower himself or he can plead with another to give security on his behalf. The main transaction is the loan transaction between the bank and the borrower, not the security, which is incidental. The incidental transaction cannot be brought to the fore to thwart or undermine the main transaction. It is beside the point who provides the security. The covenants of the Mortgage Bonds remain the same for both the borrower and the third party. If another individual obliges the borrower's request and mortgages his property as security for the loan, and hands over his original title deeds to the bank, and if the borrower defaults on the loan payment, the bank should be able to recover the money by selling the mortgaged property. In practical terms, the guarantor or the mortgagor would be the debtor to the bank where the loan is in default. That is the purpose of providing security. If the mortgaged property is sold to recover the dues to the bank, the mortgagor must deal with the borrower, not with the bank. This is what happens in modern day banking, involving performance guarantees, advance payment bonds, letters of credit, credit card transactions etc. Once the demand is made, money is paid without informing the guarantor.

More specifically, learned President's Counsel for the banks, in unison, strenuously submitted that the *dicta* made on the constitutionality of the provisions of the Recovery of Loans by Banks (Special Provisions) Act are clearly unwarranted when a Divisional Bench of the same Supreme Court in Special Determination No. 3 of 1990 (which was taken up with No. 2 of 1990) had unanimously decided that none

of the provisions of the Recovery of Loans by Banks (Special Provisions) Bill were inconsistent with the Constitution. They particularly point out that the gravamen of the majority reasoning that the Recovery of Loans by Banks (Special Provisions) Act transfers judicial powers from Courts to the board of directors of the bank was fully considered and rejected by the Five Judge Bench of the Supreme Court in the said Special Determination. There is great force in this argument.

The majority in *Ramachandran* started interpretation of the provisions of the Act at page 401 in the following manner:

> *The Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990, the ambit of the provisions of which, is the substantial question on which leave has been granted, is undoubtedly a special provision, as its very title indicates and is a departure from the established law and procedure. The nature and extent of such departure will be examined in respect of each of its applicable provisions in the light of the preceding analysis of the established law and procedure.*

In *Ramachandran*, the Supreme Court started investigation into the constitutionality of the Act at page 396 in the following manner:

> *In a system based on the Rule of Law, these salutary requirements [the provisions of the Civil Procedure Code in regard to the execution of a money decree] cannot be considered as being time consuming, frivolous or unnecessary. The process of execution and sale is thus firmly within the ambit of judicial power, to ensure the orderly transfer of the right to property recognized and safeguarded by law and for the adjudication of all claims and interests that arise therefrom. One could imagine the mayhem that would ensue, if a landlord, creditor or owner is empowered to secure his rights by way of execution without recourse to a Court. Whatever be the economic benefit that may derive from it, such a process would be unthinkable. I have to make this observation, as the perspective from which any departure from or erosion of, the carefully established procedures that constitute the bedrock of the Rule*

> *of Law and the exercise of judicial power, should be examined, considered and decided upon.*

After referring *inter alia* to Articles 3, 4, 12(1), 105(1) of the Constitution, rules of natural justice etc. the Court repeated this at page 401:

> *These are basic concepts but they have to be restated as the perspective from which any departure from the established law and procedure should be examined and decided upon.*

I cannot but agree with Dr. De Silva, P.C. when he emphasises that there was no need to reexamine, reconsider and decide on, what had already been decided by a Five Judge Bench of the Supreme Court. The underlying reasoning of the majority view was based on Their Lordships' belief that Act No. 4 of 1990 ought not to have been made into law in the first place as it had been enacted in breach of the rights enshrined under Articles 3, 4, 12(1) and 105(1) of the Constitution. As seen from pages 401-404 of the *Ramachandran* judgment, it is on this basis Their Lordships were disinclined to consider the principal sections of the Act (sections 3-5) in line with the intended meaning of the legislature.

According to the analysis found on those pages, even if the borrower is the mortgagor, the bank cannot subject the mortgaged property to *parate* execution without judicial process. However, later in the judgment at page 405 Their Lordships take the view that there "may be some justification" for *parate* execution against the borrower "*on the basis that the person to whom the loan is granted being the borrower, has a continuing transaction with the Bank and should know the amounts paid by him or are in default*."

This approach, Dr. De Silva, P.C. submits, goes against the constitutional framework of our Constitution. In our Constitution, there is no provision for reviewing a decision made (under Article 123) in a Special Determination regarding the constitutionality of a Bill by a subsequent Bench. Nor does the Constitution provide for the review of the constitutionality of an Act. In terms of Article 80(3) of the

Constitution, "*Where a Bill becomes law upon the certificate of the President or the Speaker, as the case may be being endorsed thereon, no court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever*." Article 16(1) which falls under Chapter III on fundamental rights of the Constitution further states "*All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter*." This has in fact been acknowledged by Their Lordships at page 404 of the *Ramachandran* judgment.

There is no need to highlight that this is a special Act and is a departure from the established law and procedure because it is expressly stated in the Act itself. Where there are provisions in a special Act which are inconsistent with the general law and procedure, the general law and procedure must yield to the provisions of the special Act. Non-judicial sales do not take place for the first time after the enactment of this Act. As the Supreme Court in the first Special Determination No. 3 of 1990 states the right of *parate* execution has been exercising by the state banks and some state institutions for a very long time. The Divisional Bench in their first Special Determination lists out names of those banks and institutions:

(a) The State Mortgage Bank established by the Ceylon State Mortgage Bank Ordinance, No. 16 of 1931
(b) The Agricultural and Industrial Credit Corporation established by Ordinance No. 19 of 1943
(c) The State Mortgage and Investment Bank established by State Mortgage and Investment Bank Law, No. 13 of 1975 (which repealed the Ceylon State Mortgage Bank Ordinance and the Agricultural and the Industrial Credit Corporation Ordinance)
(d) The Ceylon Savings Bank established by Ordinance No. 12 of 1959
(e) The National Savings Bank established by Act No. 30 of 1971 (which repealed the Ceylon Savings Bank)
(f) The People's Bank established by the People's Bank Act, No. 29 of 1961

(g) The Bank of Ceylon established by the Bank of Ceylon Ordinance, No. 53 of 1938

(h) The National Development Bank established by Act No. 2 of 1979

(i) The Regional Rural Development Bank established by Act No. 15 of 1985

(j) The Commissioner of National Housing appointed under the National Housing Act, No. 37 of 1954

(k) The National Housing Development Authority established by Act No. 17 of 1979

(l) The Tourist Development Act, No. 14 of 1968 extended the right of *parate* execution to all "approved credit agencies" in respect of loans granted by them on the security of land alienated by the Ceylon Tourist Board

Second Special Determination in 2003

Learned President's Counsel for the appellant submits that the proposed amendment to the principal Act No. 4 of 1990 in the year 2003 was to include the property mortgaged by a person other than the borrower within the ambit of the Act, but the Supreme Court by Special Determination No. 22 of 2003 dated 26.08.2003 struck this down as unconstitutional and the banks are now trying to achieve indirectly what they could not achieve directly. Learned President's Counsel for the appellant indirectly invites this Court to consider this second Special Determination in 2003 to address the current issue before this Bench. Can this be done?

As seen from the dissenting judgment of Her Ladyship in *Ramachandran*, the 1st question of law on which leave to appeal was granted in *Ramachandran* was:

> *Has the Court of Appeal erred in law in holding that the determination made by the Supreme Court in the S.C. (SD) No. 22/2003 on the constitutionality of the Recovery of Loans by Banks (Special Provisions) (Amendment) Bill that a Bank is not entitled to sell by way of parate execution a property mortgaged to the Bank by a person other than the borrower, is not binding on the Court of*

Appeal in interpreting the provisions of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990?

This appears to be on a finding made in the *Ukwatte's* case *(supra)*. However, the majority judgment in *Ramachandran* did not address this issue but this was addressed in the dissenting judgment. In point of fact, the majority judgment does not make any reference to either the first Special Determination in 1990 or the second Special Determination in 2003. The second Special Determination was in respect of a Bill to amend the principal Act No. 4 of 1990 and not the principal Act itself. The second Special Determination cannot be considered as an interpretation of the principal Act No. 4 of 1990. What this Court in the instant appeal has been called upon to decide is the principal Act. Hence, the second Special Determination cannot be taken into consideration for the purpose of deciding this appeal.

Conclusion

The Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990, as amended, applies to any property mortgaged to the bank as security for any loan in respect of which default has been made irrespective of whether the mortgagor is the borrower or a third party.

The Bank of Ceylon Ordinance, No. 53 of 1938, as amended, and the People's Bank Act, No. 29 of 1961, as amended, apply to any property mortgaged to the said banks as security for any loan in respect of which default has been made regardless of whether the mortgagor is the borrower or a third party.

Accordingly, the majority judgment of *Ramachandran v. Hatton National Bank* [2006] 1 Sri LR 393 is overruled.

The 1st question of law raised by the appellant is answered in the negative and the 2nd question of law raised by the appellant is answered as "Does not arise".

The 3rd question of law raised on behalf of the licensed commercial banks and the 4th question of law raised on behalf of the two state banks are answered in the affirmative.

The order of the Commercial High Court refusing the application for interim injunction is affirmed and the appeal is dismissed.

In view of the importance of the question of law raised in this appeal, let the parties bear their own costs.

As agreed, the parties in the connected case No. SC/APPEAL/30/2021 will abide by this judgment.

Judge of the Supreme Court

Buwaneka Aluwihare, P.C., J.
I am in agreement with the judgment of Justice Samayawardhena.

Judge of the Supreme Court

Murdu N.B. Fernando, P.C., J.
I am in agreement with the judgment of Samayawardhena J.

Judge of the Supreme Court

A.H.M.D. Nawaz, J.

A banking institution lends money to **A (the borrower of a loan)** but takes as security for the loan an immoveable property belonging to **B (a third-party mortgagor).** The long vexed question of whether the bank (the lender) can put up for auction the third-party mortgagor B's property without the intervention of Courts (*parate execution*) was settled in the seminal case of ***Chelliah Ramachandran and Manohary Ramachandran v. Hatton National Bank; V. Anandasiva and 12 Others v. Hatton National Bank; C. Ukwatte and Another v. DFCC Bank and Another; M.D.Karunawathie and 5 Others v. DFCC Bank and Another*** *(sub nom Ramachandran and Another (SC Appeal No 5/2004) and Anandasiva and Another (SC Appeal No 9/2004) v. Hatton National Bank[1])* - a judicial precedent of 4 judges that is being impugned by several banks before this 7 judge bench as having been wrongly decided, whereas the Petitioners assert that this case has correctly laid down the legal position as to *parate execution* of immovable property in the country. In other words, as held by *Ramachandran and Another (SC Appeal No 5/2004) and Anandasiva and Another (SC Appeal No 9/2004) v. Hatton National Bank[2]* (henceforth sometimes referred to as the *Chelliah Ramachandran* case), both Petitioners in this case (SC Appeal 11/2021) as well as those in SC Appeal 30/2021 contend that no property mortgaged to the bank by a person who is not the borrower of the loan, can be sold at an auction.

In the same breath the Petitioners argue that the exception created to the *Chelliah Ramachandran* case in the decision of ***Hatton National Bank Ltd v. Samathapala Jayawardane, Ariyawathie Jayawardane and Rienzi Nalin Jayawardane*** *(*hereinafter sometimes referred to as *Jayawardane* case*)* (*sub nom Hatton National Bank Ltd v. Jayawardane and Others)[3]* is incorrect in fact and law, whilst the banks

[1] (2006) (1) Sri. LR 393.
[2] Ibid.
[3] (2007) 1 Sri.LR 181.

before us contend that *Jayawardane* case represents the correct view of the law concerning mortgages executed by a director of a corporate borrower.

In a nutshell, as the law stands today in the wake of these two decisions, two propositions of law stand out as plain as a pikestaff.

1) In terms of the majority decision of *Chelliah Ramachandran,* a lending institution cannot sell by auction the mortgaged property of a person unless he is also the borrower of the loan.

2) But in the case of a corporate borrower, *HNB v. Jayawardane and Others* establishes that *parate execution* of third-party mortgages is permitted, where the so-called third-party mortgagor is a director of the borrower company, who fully owned and controlled the corporate borrower to the extent of being its alter ego.

Both these propositions come up for a re-appraisal before this bench of 7 judges and If I may paraphrase the words of the English Court of Appeal in ***R (Association of British Civilian Internees (Far East Region) v Secretary of State for Defence***[4] to describe the pith and substance of the arguments of all leading President's Counsel for the banks, the time has come to perform the burial rites of *Chelliah Ramachandran*, whilst the President's Counsel, who in a lone battle against the array of President's Counsel espoused the cause of the Petitioners, has strenuously contended that it is *HNB Ltd v. Jayawardane and Others* (the *Jayawardane* case) which must suffer extinction.

It cannot be gainsaid that when the majority of 4 judges (S.N.Silva, C.J, Jayasinghe, J, Udalagama, J and Dissanayake, J with Shirani Bandaranayake, J dissenting), out of the 5 judges who heard the eponymous case of *Ramachandran and Another and Anandasiva and Another v. Hatton National Bank,* decided on 15 April 2005 that it

[4] (2003) EWCA Civ 473.

is the borrower's property that could be auctioned and not the property of the so-called third-party mortgagor, their pronouncement wrought a paradigmatic shift in the contours of mortgage financing by licensed banking institutions.

The correctness or otherwise of the decision of the 4 judges is the quintessential issue before this bench of 7 judges and whilst the banks challenge the correctness of the majority decision, it goes without saying that the banks have asserted impliedly, if not so in so many words, that the dissentient judgment of Shirani Bandaranayake, J (as Her Ladyship then was) must be preferred in that the mortgagee banks can exercise *parate executie* not only in respect of the immovable property of the borrower but also that of a third-party mortgagor. Allied to the argument of the Respondent banks and Intervenient banks in the two cases before us, is the correctness or otherwise of the decision of Jayasinghe J in *Hatton National Bank Ltd v. Jayawardane and Others* **-** namely when it comes to the borrowing of a corporate customer, the corporate veil must be lifted and the property of the mortgagor-director could be sold. Whilst the banks contended that directors who constitute shareholders in a company cannot hide behind the corporate entity as was correctly articulated in the case *of Hatton National Bank Ltd v. Jayawardane and Others*, the Petitioners have questioned the very basis of the reasoning of Jayasinghe, J in the above case. The veil lifting that the Supreme Court embarked upon in the case of *Hatton National Bank Ltd v. Jayawardane and Others* cannot be supported having regard to the legal indicia that authorize veil piercing in corporate law - an argument that the learned President's Counsel for the Petitioners Mr. Rohan Sahabandu vigorously put forward. In a nutshell it is the contention of the learned President's Counsel that veil lifting was not warranted at all on the facts and circumstances of the case of *Hatton National Bank Ltd v. Jayawardane and Others.*

Thus, the instant case engages before us a statutory interpretation of *parate* law or a re-appraisal of these two seminal cases as far as the provisions of Recovery of Loans (Special Provisions) Act, No.4 of 1990 (hereinafter sometimes referred to as

the Act, No.4 of 1990) are concerned. In this process a scrutiny of case law that have dealt with *parate execution* so far would also be made.

All that I have adumbrated by way of the above introduction flows from the facts immanent in the two cases before us and questions of law that have been formulated thereon.

As such it is apposite to look at the questions of law that come up for consideration. Initially on 8 February 2022, leave was granted by this Court on the following questions of law

i. "Did the High Court - (Commercial) err in Law by determining that the 2nd Plaintiff is a borrower within the meaning of the Recovery of Loans (Special Provisions) Act, No.04 of 1990?
ii. Is the ratio in the case of *HNB Ltd v. Jayawardane and Others* ([2007] 1 Sri.LR 181), that the director of a corporate entity who mortgages his property for a loan obtained by that corporate entity is a borrower, correct within the meaning of the Act, No.04 of 1990?"

Subsequently, this Court, by its order dated 14th September 2022, added two other questions of law which go as follows.

1) "Does the Board of Directors within the meaning of the Recovery of Loans by Banks (Special Provisions) Act, No.4 of 1990 as amended, have the power, by resolution to be recorded in writing, to authorize a person specified in the resolution to sell by public auction any property mortgaged to the Bank [whether by the Borrower or any other person] as security for any loan in respect of which default has been made, in order to recover the whole of such unpaid portion of such loan together with the money and costs recoverable under Section 13 of the said Act?
2) Is any property [immovable or movable] mortgaged to the Bank of Ceylon or the People's Bank as security for any loan as the case may be, in respect of which default has been made within the meaning of the Bank of Ceylon

Ordinance, No.53 of 1938 as amended and the People's Bank Act, No.29 of 1961, liable to be auctioned in terms of the respective Acts referred to?".

Thus, all these four questions constitute the parameters within which the arguments on behalf of the Petitioners and the banks, both Respondent and Intervenient, took place. Whichever way one looks at it, the sum and substance of the questions of law before us would boil down to two quintessential issues.

1) Whether *parate execution* of 3rd party mortgages are permitted under Recovery of Loans by Banks (Special Provisions) Act, No.4 of 1990 as amended.

If this Court arrives at the view that it is permissible, then the corollary would follow that the legal precedent *Ramachandran and Another (SC Appeal No 5/2004) and Anandasiva and Another (SC Appeal No 9/2004) v. Hatton National Bank*[5] (the *Chelliah Ramachandran* case) has been wrongly decided.

2) The 2nd question that repays attention is whether veil lifting was properly and legally resorted to in *HNB Ltd v. Jayawardane and Others* (the *Jayawardane* case), given the tenor of that decision that when a director of a corporate entity has mortgaged his immovable property as security for the loan of the company, the mortgaged property remains open to *parate execution*.

Before one proceeds to assay and appraise the above two kernel issues in the cases before us, a succinct reference to the factual template in the two cases before us becomes necessary.

Factual Matrix.

In both the appeals before us (SC Appeal 11/2021 and SC Appeal 30/2021), the loans had been advanced to the Petitioner Companies by their respective creditor

[5] Ibid.

banks. In the case of SC Appeal 11/2021, the bank that seeks the aid of the provisions of the Act, No.4 of 1990 for *parate execution* is DFCC Bank, whereas in SC Appeal 30/2021, the mortgagee banking institution is Sampath Bank PLC. Though only SC Appeal No. 11/2021 was taken up for argument, there was agreement that one judgment will apply to both cases since the questions of law arising on the material facts in each case are identical. Thus, there is commonality on the material facts in the cases. The mortgagee banks seek to sell by *parate execution* the immovable properties mortgaged to them by the directors of the Petitioner Companies to whom the dispersal of loans took place. Hence the argument on behalf of the Petitioners placed heavy reliance on the majority judgment of *Chelliah Ramachandran* which entails that the immovable properties mortgaged to the lending institutions by persons other than borrowers constitute third-party mortgages and thus are outside the reach of *parate executie* powers of the banks.

According to the Petitioners, as the *Jayawardane* case was wrongly decided, a veil piercing of the corporate borrower in the cases before us cannot take place so as to reach the properties of the directors. So much for the commonality on the material facts.

It must be stated at the outset that as acknowledged by all Counsel across the divide, a revisitation of *Chelliah Ramachandran* and *Jayawardane* cases certainly calls for a holistic and harmonious interpretation of the salient provisions of the *Recovery of Loans (Special Provisions) Act, No.4 of 1990* to which I will repair, but not before I have looked at the pros and cons of the arguments regarding the aforesaid decisions and how Roman Dutch Law position on *parate execution* was eroded and repudiated by later legislative changes in this country.

Such a foray into the common law on *parate executie* which existed before legislative changes in 1990 would become necessary as the all-important provisions of the Act, No.4 of 1990 namely sections 2, 3, 4, 5 and 15 containing expressions such as *any property mortgaged*, *borrower* and *mortgagor* give rise to a decision on their

interpretation in view of the rival arguments that have been made before us for such an interpretive process.

The Petitioners have advanced the argument that the above operative sections read together or separately impose restrictions on the banks to sell the property of a third-party mortgagor, whereas the banks have contended that for the purpose of recovery of the unpaid portion of loan facilities given to borrowers, the provisions of the Act, No.4 of 1990 do not distinguish between mortgages given by the actual borrower and a mortgage given by a third-party. If one looks at the operative sections of the Act, No.4 of 1990, one is struck by the profuse use of the word *borrower* in the sections and it is undeniably one of the reasons that led to the majority judges in *Chelliah Ramachandran* narrowing the scope of the expression "*any property mortgaged*" to mean only the property of the actual borrower.

Section 15 (1) - a narrow or broad interpretation?

I must also place in context one of the crucial sections of the Act, No.4 of 1990 namely Section 15, which the banks contended as requiring a broad interpretation. Section 15 (1) of the Act, No.4 of 1990, which refers to a post *parate* situation after the sale of the mortgaged property has taken place, is as follows:

> *If the mortgaged property is sold, the Board shall issue a certificate of sale and thereupon* ***all the right, title, and interest of the borrower to****, and in, the property shall vest in the purchaser; and thereafter it shall not be competent for any person claiming through or under any disposition whatsoever of the right,* ***title or interest of the borrower*** *to, and in, the property made or registered subsequent to the date of the mortgage of the property to the bank, in any Court to move or invalidate the sale for any cause whatsoever, or to maintain any right title or interest to, or in, the property as against the purchaser.*

Whilst Dr. Romesh de Silva, President's Counsel for Hatton National Bank -the 1st intervenient Respondent in SC/Appeal/11/2021 contended that the word *borrower*

in Section 15 (1) must necessarily include a third-party mortgagor and, other learned Counsel for the banks chorused in unison with him for such an interpretation, Mr. Rohan Sahabandu, President's Counsel for the Petitioners invited this Court to accept as correct the interpretation placed by the majority in *Chelliah Ramachandran* that it is the actual borrower's property that could be sold by auction at a *parate* execution. The use of the word *borrower* in sections 7 (1), (2), 8, 9 (a), 13, 14, 15 (1), 16 (3), 16 (4) and 16 (6) connotes uniformity in that it refers only to the actual borrower and cannot embed within it a third-party mortgagor- so argued Mr. Rohan Sahabandu PC. The word *borrower* must be given its literal meaning and not any extended meaning - so ran the argument of the learned President's Counsel in the case.

Same word, same statute, different meanings?

These contrary arguments also raise the all too important question - should a particular word, when used in a statute, must have the same meaning or given the context in which the legislation was enacted, can it bear a different meaning?

Whilst Mr. Rohan Sahabandu argued that the word *borrower* in the Act, No.4 of 1990 has one and the same meaning throughout the *parate executie* statute, Dr. Romesh de Silva invited the attention of the Court to the rule of statutory interpretation which looks back to the mischief that the Act, No.4 of 1990 sought to cure and in light of that curative exercise by the legislature to facilitate easy and speedy recovery of bank loans obviating the clogs and backlogs on recovery in Courts, the sum and substance of the argument for the banks therefore was that the word *borrower* should be given the extended meaning to include a third-party mortgagor.

Any property mortgaged to the bank

It was the contention of Mr. Sahabandu**,** PC that the phrase "…. *any loan on the mortgage of property….*" in section 2 (1) (a) of the Act, No.4 of 1990 must necessarily connote the property of the person to whom the loan is given, because the use of the expression "*the right, title or interest of the borrower to, and in, the property shall vest*

in the purchaser" in section 15 (1) makes it patently clear that it is the property of the actual borrower that could be sold.

A harmonious construction, according to Mr. Sahabandu PC, of the sections in the Act must necessarily lead to this interpretation. On the other hand, Dr. Romesh de Silva, PC argued otherwise. He strenuously contended that a literal construction of the word *borrower* and its linkage to any property of the actual borrower will result in absurdity and lead to the frustration of the purpose which the Act, No.4 of 1990 sought to achieve and in order to advance the remedy of speedy and effective recovery of non-performing loans, the word borrower must be given an expansive meaning to include a *third-party mortgagor*. So, the crux of the argument of the learned President's Counsel insisted on a repudiation of the *literal rule* of construction in respect of the word *borrower,* which profusely pervades the provisions of the Act, No 4 of 1990.

Thus, the cardinal issue in the case before us boils down to this nitty-gritty. How should the harmonization of the provisions in the Act, No. 4 of 1990 be achieved? Is it by placing a restrictive interpretation on the word *borrower* as was done in *Chelliah Ramachandran* or expanding it to include a third-party mortgagor who is another person other than the actual borrower? After all, one of the elementary rules of statutory interpretation is that, when there is a doubt about their meaning, the words of statutes are to be understood in the sense in which they best harmonize with the object of the enactment.

In light of all these arguments it falls to this Court to ascertain the meaning of the relevant words bearing in mind the fact that "*some general words are capable of more than one meaning depending on whether the word is interpreted narrowly or broadly*"[6]. Let me state at the very outset that whether one interprets a word narrowly or broadly depends **on context**. I will return to this after having discussed

[6] See Hall, Kathleen, Clare Macken, *Legislation and Statutory Interpretation*, LEXIS-NEXIS, Butterworths, 2020 at p 59.

the two rules of statutory interpretation that prominently figured in the submissions of the learned President's Counsel.

Common Law approaches to statutory interpretation.

It cannot be denied that the approach adopted by the Sri Lankan Courts to statutory interpretation is based on the common law approaches to interpreting legislation. The so-called rules of statutory interpretation aim at ascertaining the intention of Parliament because oftentimes the framers do not set forth the precise methodology of how judges could fill the interpretive void. While the ordinary meaning of the word is a matter of *fact*, its legal meaning is, self-evidently, a matter of *law*.

When Courts are interpreting legislation, it is necessary to attribute a legal meaning to the words as used in the particular legislation under consideration. In doing so, Courts often profess to be giving effect to the intention of Parliament. As Donaldson J. remarked in ***Corocraft Ltd v. Pan American Airways Inc*** [7]

> *The duty of the Courts is to ascertain and give effect to the will of Parliament as expressed in its enactments. In the performance of this duty the judges do not act as computers into which are fed the statutes and the rules for the construction of statutes and from whom issue forth the mathematically correct answer. The interpretation of statutes is a craft as much as a science and the judges, as craftsmen, select and apply the appropriate rules as the tools of their trade. They are not legislators, but finishers, refiners and polishers of legislation which comes to them in a state requiring varying degrees of further processing.*

Thus, the process of interpretation is not a mechanical one and there will inevitably be uncertainty as to the way in which a Court in any given case will attribute a meaning to the words used in the legislation. In this instance, a definition of the word *borrower* is not provided in the Act, to which this Court will have had regard,

[7] (1969) 1 Q.B 622, 638.

but even where that is the case it will still be necessary for this Court to give a meaning to the words used in the definition.

As I pointed out elsewhere, the words used in legislation may have one or more meanings. If the Court is of the view that the words, in **the context of the Act,** can have only one meaning, then it will give effect to that meaning and this will become the legal meaning of those words for the purposes of the particular statutory provision in question. This is unless the Court feels that this is clearly contrary to what the Court perceives to be the intention of Parliament in enacting those words. However, it is more likely that, because language is inherently imprecise and equivocal, even words which might be thought to have an obvious meaning can in fact have a number of different meanings. In such circumstances, in order to give a legal meaning to the words, the Court will be obliged to decide which meaning to adopt.

The Court may seek to resolve the ambiguity of meaning in a number of ways. How it is resolved depends to a large extent on, to use the words of Donaldson J above, which "tools of the trade" judges opt to select and apply. It is generally accepted that these "tools" include, *inter alia*, a number of so-called "rules," although these are not rules in the strict sense, as indicated by Lord Reid, in ***Maunsell v. Olins*** [8]

> *…….rules of construction…. are not rules in the ordinary sense of having some binding force. They are our servants not our masters. They are aids to construction……. Not infrequently, one "rule" points in one direction, and another in a different direction. In each case they must look at all relevant circumstances and decide as a matter of judgment what weight to attach to any particular "rule."*

The "rules" of interpretation.

[8] (1975) A.C. 373, 382.

I hasten to reiterate that, whichever rule(s) may be applied, the basic task will always be to give a meaning to the particular words used in the statute in question. Each rule is simply a means by which that may be achieved. They may be used singly or in combination. I will add further that judges are not bound to follow one (or indeed any) of them and do not have to announce in any way which "rule" they have used. It is perhaps better, then, to think of them as *approaches* to interpretation or as a framework for discussion, rather than as traditional rules or canons. Let me briefly refer to them and thereafter invoke other aids to construction which I think should be called in in order to resolve the issue before us namely should the word *borrower* in the Act, No.4 of 1990 bring within its scope the Petitioners who have provided the mortgage securities to the banks in question?

It has to be recalled that whilst Mr. Rohan Sahabandu relied on the literal rule on behalf of the Petitioners, Dr. Romesh de Silva for the intervenient bank advanced the mischief rule as the approach that should help ascertain the meaning of the word *borrower* and consequently the phrase *any property mortgaged to the banks*.

Suffice it to set out in brief the bare essentials of the rules that surfaced in the arguments of the learned Counsel before us, though it would appear academic. All such attempts prove to be nothing but the goal of ascribing the suggested meanings to the words *borrower* and the *property mortgaged*.

The Literal rule.

The literal rule provides that words must be given their plain, ordinary and literal meaning. The crux of the argument of Mr. Rohan Sahabandu PC was an invocation of the literal rule to the effect that the plain, ordinary and literal meaning of the word *borrower* would mean no one other than the actual borrower.

The rationale behind the use of the literal rule is that if the words of the statute are clear they must be applied as they represent the intention of Parliament as expressed in the words used. This is so even if the outcome is harsh or undesirable.

This was made clear in the ***Sussex Peerage Case***[9] **;** ***Cutter v. Eagle Star Insurance Co Ltd***[10]*[1997] 1 WLR 1082, CA;* ***Whiteley v. Chappell***[11]*.* For Sri Lankan cases which have alluded to literal rule - see ***J. A. P. Zebedee Fernando & Co. v. The Commissioner of Inland Revenue***[12] ***; Cinemas Ltd v. Ceylon Theatres Ltd***[13]***; S. Gunasekera v. A. Ratnavale***[14]***; Ladamuttu Pillai v. The Attorney-General***[15]***; Nadarajan Chettiar v. Tennekoon***[16]***; R. A. De Mel et al. v. Haniffa***[17]***; The Queen v. Mahatun***[18]***; Tissera v. Tissera***[19]***; Babappu v. Don Andris***[20] ***; Pathumma v. Sinna Lebbe***[21]***; Hameed v. Anamalay***[22]***; Kiri Banda v. Booth***[23] ***; Pieris v. Pieris***[24]***; The Attorney-General v. Perera***[25]***; Hamid v. Special Officer*** [26]***.***

The Golden rule.

The golden rule provides that words must be given their plain, ordinary and literal meaning as far as possible but only to the extent that they do not produce absurdity (narrow approach) or an affront to public policy (wide approach). For Sri Lankan cases which make reference to the golden rule see ***Sriyani v. Iddamalgoda, Officer in charge, Police Station, Payagala and Others***[27]***; Forbes & Walker Tea Brokers v. Maligaspe and Others***[28] ***; Tennekoon v. Somawathie Perera alias Tennekoon***[29]***;***

---

9 (1884) 1 CI & Fin 85.
10 (1997) 1 WLR 1082, CA.
11 (1898) LR 4 QB 147, DC.
12 66 NLR 256
13 67 NLR 97
14 76 NLR 316
15 59 NLR 313
16 51 NLR 491
17 53 NLR 433
18 61 NLR 540
19 2 NLR 238
20 13 NLR 273
21 18 NLR 330
22 47 NLR 558
23 5 NLR 284
24 9 NLR 14
25 12 NLR 161
26 21 NLR 353
27 (2003) 1 Sri.LR 14
28 (1998) 2 Sri.LR 378
29 (1986) 2 Sri.LR 90

Nanayakkara v. Kiriella (deceased) and Others[30]; United Motors Ltd. v. De Mel[31]; West v. Abeyawardena[32]; Nadar v. Leon[33] ; Pakiadasan v. Marshall Appu[34]; Badurdeen v. Commissioner for the registration of Indian and Pakistani residents.[35]

The rationale behind the golden rule is that it mitigates some of the potential harshness arising from use of the literal rule. This was referred to in ***Grey v. Pearson[36]***.

The Mischief rule

The mischief rule (or the rule in ***Heydon's Case[37]***) involves an examination of the *former* law in an attempt to deduce Parliament's intention (‘mischief’ here means 'wrong' or 'harm'). There are four points to consider:

1. What was the common law before the making of the Act?

2. What was the mischief and defect for which the common law did not provide?

3. What was the remedy proposed by Parliament to rectify the situation?

4. What was the true reason for that remedy?

The rule was restated in ***Jones v. Wrotham Park Settled Estates [38]*** in terms of three conditions:

---

[30] (1985) 2 Sri.LR 391
[31] (1982) 2 Sri.LR 549
[32] 53 NLR 217
[33] 30 NLR 123
[34] 52 NLR 335
[35] 52 NLR 354
[36] (1857) 6 HL Cas 61, HL.
[37] (1584) 3 C0 Rep 7
[38] (1980) AC 74, HL.

1. It must be possible to determine precisely the mischief that the Act was intended to remedy.

2. It must be apparent that Parliament had failed to deal with the mischief.

3. It must be possible to state the additional words that would have been inserted had the omission been drawn to Parliament's attention.

Mischief Rule[39] and Purposive Approach[40]

It is pertinent to point out that the mischief rule that dates back to the 16th century has since given rise to a modern development namely *the purposive approach* which requires the Court to interpret any statute or part of it in light of the purpose for which it was enacted. Here it behooves the judge to decide what the purpose of the Act was, and then ensure that its provisions are construed in a way which gives effect to that construction.

Lord Griffiths described this approach quite vividly in the leading English case of ***Pepper v. Hart[41]*** where the learned Justice stated thus:

> "*The days have long passed when the Courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The Courts must adopt a purposive approach which seeks to give effect to the true purpose of legislation."*

---

[39] For cases on mischief rule see *Silva v. Cooray* 33 NLR 25; *V. T. Ramalingam v. S. Sinnadurai* 67 NLR 45; *Mohamed Auf v. The Queen* 69 NLR 337; See *the Mischief Rule and The Brothels Ordinance* by H.M.Zafrullah in *The Colombo Law Review* (1978) Vol 4 at p. 119.

[40] For cases on purposive interpretation see; *Multi-Purpose Co-operative Society, Madawachchiya v. Kirimudiyanse and Others (2011) 1 Sri.LR 135; Malraj Piyasena v. Attorney-General and Others (2007) 2 Sri.LR 117; Shiyam v. Officer in Charge, Narcotics Bureau and Others (2006) 2 Sri.LR 156; Piyasena v Associated Newspapers of Ceylon Ltd and Others (2006) 3 Sri.LR 113); Thilanga Sumathipala v Inspector-General of Police and Others (2004) 1 Sri.LR 210; Madduma Banda v Assistant Commissioner of Agrarian Services and Another (2003) 2 Sri.LR 80; Somawathie v. Weerasinghe and Others (1990) 2 Sri.LR 121; Namasivayam v. Gunawardena (1989) 1 Sri.LR 394); Science House (Ceylon) Ltd. v. IPCA Laboratories Private Ltd. (1987) 1 Sri.LR 185.*

[41] (1993) AC 593 at 617; (1993) 1 All ER 42, HL

Thus, it is clear that, in Lord Griffiths' view it is necessary to give effect to the true purpose of legislation. Referring to the purposive approach and its applicability, Professor Crabbe has stressed on the fact that it is important to consider **the context of the section** that is to be interpreted without limiting it to its ordinary meaning.[42] In Professor Crabbe's words:

> "*The Purposive Approach thus takes account not only of the words of the Act according to their ordinary meaning, but also the context. 'Context' here does not mean simply linguistic context;* ***the subject matter, scope, purpose and (to some extent) background of the Act are also taken into consideration....***
>
> *The language used by Lord Griffiths in Pepper v. Hart is clear and cogent: to give effect to the true purpose of the legislation.* ***He did not say to give effect to the intention of Parliament*** (emphasis added)."

The Importance of Context

This approach, requiring regard to be had to the context, finds acceptance in other jurisdictions. As noted in the Australian High Court case of ***CIC Insurance Ltd v. Bankstown Football Club Ltd***[43], by Brennan CJ, Dawson, Toohey and Gummow JJ at 408:

> "*The modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses* ***"context" in its widest sense***".

A throwback at ***context in its widest sense*** throws open before a judge a plethora of intrinsic and extrinsic aids to unravel the meanings that have to be attributed to

---

[42] *Understanding Statutes*, p 97.
[43] (1997) 187 CLR 384

words and these aids emerge from several sources such as pre-parliamentary materials, Reports of Commissions and Hansards or even from other indications of purpose afforded by information relating to legal, social, economic and other aspects of society of which a judge is able to take judicial notice. In consequence, Courts, in considering the legislative purpose as a means of establishing what meaning Parliament intended words to have, have not restricted themselves to a consideration of mischiefs to be remedied but have looked to the general legislative purpose. In looking to general legislative purpose as well as mischiefs, Courts would be adopting a "*purposive approach*" when determining what meaning Parliament intended the words to have. In this interpretive process, context assumes importance and this bids us to look at the common law (i.e the legal position) before the Act, No.4 of 1990, and the mischief that the statute was intended to remedy.

Let me in those circumstances hark back to a historical excursus - the common law position on *parate execution* and how impediments that contributed to long and protracted proceedings in recovering back non-performing loans were sought to be overcome by a gradual attenuation of *parate* laws finally resulting in the Act, No.4 of 1990.

The Common Law on *Parate Execution* prior to 1990.

Immovables can be mortgaged under Roman-Dutch law, but the mortgagee does not obtain a right of ownership, only the right to recover payment of the debt secured by the mortgage through legal action.[44] Extra-judicial sale - known as parate execution - was forbidden in Roman-Dutch law. After 1871 it was possible to mortgage movables in Sri Lanka in only two ways - by delivery (pledge) or by registered bill of sale (which, however, did not validate the mortgage or give priority to the registrant).[45] As with the mortgage of

[44] Robert Warden (R.W.) Lee, *An Introduction to Roman-Dutch Law,* 5th ed. (Oxford, Clarendon, 1953), p. 200.
[45] See A.B. Colin de Soysa, *The Laws of Ceylon* (Colombo, Dharmasamaya Press, 1963), Vol. II, The *Law of Things*. p. 307.

immovables, the mortgagee of movables does not have a right of sale under Roman-Dutch law but has to obtain a judgment of the Court upon the mortgage-debt and then take out a writ of execution against the property. Walter Pereira, K.C states the matter of parate execution authoritatively in relation to both movables and immovables:[46]

> The effect of a mortgage is not that the creditor may retain the mortgaged property for himself or sell it on his own authority. It may not even stipulate by contract for the right of forfeiture of the ownership in default of payment, but he must after obtaining judgment allow the sale to take place according to legal process, and thus recover what is due to himself [Grot. 2.48.41). The position is stated by Van der Linden thus -where the debt secured by pledge or mortgage becomes due, the creditor is not at liberty to sell the pledge or thing mortgaged without a decree of the Court or a judgment to this effect…{V.d.L.1.12.5[47]}

However, in Roman law a first mortgagee ultimately acquired a power of sale which could not be excluded by express agreement.[48] Moreover, the tendency of judicial decisions in South Africa has been able to recognize the validity of an agreement for the extra-judicial sale of movables. In **Osry v. Hirsch, Loubser & Co. Ltd**[49] an agreement for the sale of movables by means of parate execution was held to be valid. It was a case of pledge. The Court also held that it was open to the debtor in such a case to seek the protection of the Court if he could show that, in carrying out the agreement and effecting the sale, the creditor had acted

---

[46] *The Laws of Ceylon* (Colombo, Government Printer, 1904), Vol. II., pp. 442-444.
[47] The references are to Grotius' *Introduction to Dutch Jurisprudence* and Van der Linden's *Institutes of the Laws of Holland*.
[48] E.R.S.R. Coomaraswamy, *The Conveyancer and Property Lawyer* (Colombo, 1949), p. 209; R.W. Lee, *op. cit., supra, footnote* 44, at p. 200.
[49] 1922 C.P.D. 531.

in a manner which prejudiced his rights. The case has been followed in other South African cases.[50]

The result of these decisions is that parate execution whereby a mortgagee can sell the security without the prior intervention of a Court is looked upon with disfavour by the Roman-Dutch law of Sri Lanka. Professor Robert Warden (R.W) Lee in his locus classicus An Introduction to Roman-Dutch Law cites the case of **Hong Kong and Shanghai Bank v. Krishnapillai**[51] to drive home the position that "parate executie is not allowed by the law of Ceylon"[52].

In that case, a businessman had pledged his shares in a Company as security for an overdraft. As was customary he had also given the bank a blank transfer of the shares together with a written authorization for the bank, if required, to sell the shares. Subsequently, the borrower became bankrupt without settling the overdraft and the bank moved to sell the shares (given as security) without a Court order.

The Supreme Court held that the bank was not entitled to do so. The Court took the view that the law relating to property (shares) and the mortgage of property was governed in Sri Lanka by its common law, namely, the Roman-Dutch law and not by English law. Although English law applied to "banks and banking", the loaning of money was "not an ordinary business of banking" and therefore merely because the mortgagee-creditor in this case was a bank, it did not automatically mean that Roman-Dutch law was displaced by English law. Under Roman-Dutch law, a creditor could not sell any security pledged to it without permission of a Court of law and if the bank in this case wished to sell the shares it must get the Court's approval. According to the judgment, the right of a pledgee to sell his security without recourse to a Court of law was a

[50] *E.g., Aitken v. Miller* (1951), 1 S.A. 153 (S.R.). See generally T. J. Scott and Susan Scott, *Wille's Law of Mortgage and Pledge in South Africa,* 3rd ed. (Cape Town, Juta & Co. Ltd., 1987), pp. 120-4.
[51] (1932) 33 N.L.R. 249
[52] See R.W. Lee, op. cit., *supra, footnote* 44, at p. 201.

matter of Roman-Dutch law. Further **Mitchell v. Fernando**[53] held that the Roman-Dutch law of mortgage applied to a mortgage of shares in a company. This was despite the fact that (i) the Civil Law Ordinance required that matters relating to joint stock companies be decided according to English, not Roman-Dutch, law; and (ii) shares were things unknown to the Roman-Dutch law. The Court categorized the issue as one of mortgage, not one with respect to joint stock companies, and applied the Roman-Dutch law.

By the time the **Hong Kong and Shanghai Bank** case was decided, the South African Roman-Dutch law had moved to a legal position where parate execution would only be available in the case of movables and, on one reading of the authorities, only in the case of pledge.[54] The above decision in **the Hongkong & Shanghai Banking Corporation** case rang alarm bells to the banking community at that time. The Sub-Committee on Commercial Legislation in Sri Lanka (Sessional Paper No.10 of 1939 paragraph 18) referred to this case and recommended legislation to protect banks from this Roman-Dutch law rule. Accordingly, the Mortgage Act was amended in 1949 whereby **'approved credit agencies'** were permitted by statute to realize movable property (for example, shares, life insurance policies and book debts) without getting a Court order.[55]

Legal Changes in 1990.

It is pertinent to observe at this stage that from 1990 onward licensed commercial banks in Sri Lanka were vested with parate powers over both immovable and movable securities as the special legislation, the Act No. 4 of 1990 that enables them to recover such securities speedily and without litigation was enacted. Along with it was enacted a slew of statutes among which the Debt Recovery (Special Provisions) Act, No.2 of 1990 is also pivotal in debt recovery. The two statutes, Act No.2 of 1990 and Act No.4 of 1990 which are categorized as special debt recovery legislation were

[53] (1945) 46 N.L.R 265.
[54] See the case of *Osry v Hirsch, Loubser & Co.Ltd., supra, footnote 48.*
[55] See part 2 of Mortgage Act (*Sections* 73-88).

the end products of a report issued in 1985 by a Debt Recovery Committee (DRC)[56], chaired by Justice D. Wimalaratne. The legislation was not enacted until 1990 because of very strong opposition from the Sri Lanka Bar Association which argued that the proposed legislation was "discriminatory, draconian in their nature and harsh and superfluous". All opposition notwithstanding, both statutes became law in 1990.[57]

On the other hand it must be mentioned that the Mortgage Act[58] "continues to give full effect to the conception of a mortgage as understood in Roman-Dutch law".[59] Thus, the Mortgage Act assumes that parate execution is not possible in the case of a mortgage of land, and so provides in detail for how hypothecary actions are to be conducted and their effect.[60] As I said before, the Act does permit an **approved credit agency**, which is a mortgagee of shares, debentures, stock, life insurance policies and corporeal movables deposited with the agency, to realize them without resort to the Courts.[61] A mortgagor can sue for any loss or damage suffered as a result of an agency not duly exercising its powers or not following the correct procedures.[62] Section 85, which deals with corporeal movables, requires that the corporeal movable be "actually in the possession and custody of the agency".

How the Roman-Dutch law against parate execution was departed from.

---

[56] *Report of the Committee Appointed by the Honourable the Minister of Justice Dr. Nissanka Wijeyeratne to Examine and Report on the Law and Practice Relating to Debt Recovery* (Colombo, **A** Ministry of Justice Project, 1985) (hereafter "Debt Recovery Committee Report"). The Committee was chaired by the late Justice D. Wimalaratne, a retired judge of the Supreme Court, and had as members **Mr. H. L.** de Silva, PC., later President of the Bar Association of Sri Lanka, and Mr. N. U. Jayawardena, a former Governor of the Central Bank.

[57] See an excellent account of the history behind the extraordinary legislation in the report of the Presidential Commission on Finance and Banking, Sessional Paper No 3 of 1992.

[58] Act No. 6 of 1949, as amended.

[59] A. B. Colin de Soysa, *op cit., supra,* footnote 45 pp. 336-7.

[60] See especially Sections 7 to 9, 16, 25, 33, 48, 52.

[61] Sections 73, 81, 85. To acquire the status of an approved credit agency, an institution or individual applies to the Director of Commerce, who refers the matter to a board (s. 114). Banks, finance houses and co-operative societies making loans have been approved under this provision.

[62] Sections 78, 84, 88.

Generally, as we have seen, the law in Sri Lanka had set itself against parate execution until the Roman-Dutch Law rule against parate execution was mitigated by the Mortgage (Amendment) Act in 1949 and the enactment of the Act No.4 of 1990. Over the years, however, a number of state or state related institutions have been given the right of parate execution by specific enactments. Until the introduction of the debt recovery package in 1990, the right of parate execution (i.e. the right of a creditor to sell the mortgaged property without recourse to Court) had been restricted to the two state commercial banks, i.e., the Bank of Ceylon and the People's Bank, and the other state lending institutions such as the State Mortgage and Investment Bank, the National Development Bank, the National Savings Bank and also the Development Finance Corporation of Ceylon. However, with the enactment of the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990, all licensed commercial banks were given the power of parate execution.

The Bank of Ceylon Ordinance as amended.

The power in the Bank of Ceylon Ordinance is illustrative. The bank is empowered to grant loans, advances or other accommodation on the security of a mortgage of any movable or immovable property. When default occurs, the board of directors of the bank may authorize a person to take possession of any immovable property or seize any movable property mortgaged to the bank and to manage and maintain such property as might have been done by the mortgagor if he had not made default.[63] Moreover, S. 19 provides that the Board of Directors may resolve to authorize a specified person to sell by public auction any movable or immovable property mortgaged to the bank as security for any loan in respect of which default has been made in order to recover the whole of the unpaid portion of such loan, and the interest due up to the date of the sale, together with the monies and costs recoverable under S. 18. If the mortgaged

[63] Bank of Ceylon Ordinance, as amended by Act No. 34 of 1968 and Law No. 10 of 1974, s. 17. See also s. 18 on the manager's powers.

property is sold, all right, title and interest of the borrower vests in the purchaser.[64]

I am making this allusion to the Bank of Ceylon Ordinance as its aforementioned provisions are identically mirrored in the Act, No.4 of 1990.

Before I move on to the 1990 constitutional challenge to the Recovery of Loans by Banks (Special Provisions) Bill in the Supreme Court, this account of the historical survey leading up to the 1990 legal changes, will not be complete without recalling some other Committees that followed the Debt Recovery Committee (DRC) headed by Justice D. Wimalaratne. All this exercise, I repeat, is for the purpose of situating the Act, No 4. of 1990 in its context, because as I pointed out before, the context of the text in its widest sense becomes imperative in the interpretation of the words in the aforesaid parate legislation.[65]

Between 1986 - 1990 the government appointed the following other Committees to consider the recommendations of the DRC namely,

(a) A Committee of officials of the Central Bank and legal officers of the state banks.

(b) A Committee of officials of the Ministry of Justice and Ministry of Finance.

(c) A Committee of officials of the Ministries of Justice and Finance, the Bar Association and the Sri Lanka Banks' Association.

The World Bank and the Asian Development Bank also submitted their views supporting the recommendations of the Debt Recovery Committee. At their request Mr. Ross Cranston the then Professor of Banking Law of the University of London who later ended up as a Solicitor General of England and an MP also reviewed the

---

[64] *ibid.,* s. 28. See also s. 29 on the purchaser's right to obtain a Court order for delivery of possession of the property.

[65] See the Australian precedent *CIC Insurance Ltd v Bankstown Football Club Ltd,* footnote 43 supra and the discussion titled ***the importance of context*** at pp 24-25 of this judgment.

DRC recommendations and substantially agreed with them. Finally, in early 1990, despite the continued objections of the Sri Lanka Bar Association, the recommendations of the Debt Recovery Committee (subject to some minor amendments) were accepted and enacted as one package in the following legislation.

It is not irrelevant to point out that the so-called disfavour that Roman-Dutch law showed *parate execution* of immovables was fast sliding into oblivion and the Supreme Court put a nail into the coffin when it proceeded to endorse the constitutional validity of debt recovery legislation package.[66]

S.C. Special Determination No 3/90.

In the hearing into the validity of the Bill which finally became Recovery of Loans by Banks (Special Provisions) Act, No.4 of 1990, it was strenuously argued by H.W. Jayewardene Q.C on behalf of the Bar Association that an exercise of *parate* powers on the part of Board of Directors of a bank amounted to a dilution of judicial power and a transfer of a part thereof to a non-judicial body of individuals. But the Court pointed out that if there was such a dilution, it had already taken place so many years ago when State Institutions had been bestowed with powers of *parate execution* in several statutes.

The Court pointed out that the Bank of Ceylon Ordinance No. 53 of 1938, as amended by Act No.10 of 1974, Peoples Bank (Amendment) Act No. 32 of 1986, National Savings Bank Act No.30 of 1971 and a host of other statutes have conferred *parate* powers on their respective Boards of Directors and in the end the determination concluded that there was no dilution or interference with judicial power. The Court observed as follows-

> "*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,*

[66] See Decisions of the Supreme Court on Parliamentary Bills (1990) Volume VI p 13.

> *both legislative and as constrained in judicial decisions, we would have entertained no 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 para (2) of Article 84.*

The Supreme Court further determined-

> *"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."*

Thus, the tenor of this passage is to the effect that conferment of *parate execution* powers on a bank is not a dilution of judicial power, in infringement of Article 4 (c) of the Constitution. That the bank does not exercise judicial power is put beyond doubt by the next pronouncement in the determination.

> *"In 72 NLR 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 NLR 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."*

Though the two well-known tests, *Holmes test* and the historical test of *Roscoe Pound* were urged before the Supreme Court for the proposition that banks sought to be vested with *parate execution* powers could be in effect exercising judicial power, this contention did not weigh in with the final determination of Court. In fact, the determination of the Supreme Court on this issue comports with the definition of

judicial power articulated by Griffith CJ in the Australian case of ***Huddart Parker v. Moorehead***:[67]

> "*The words "judicial power" as used in S.71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.*"[68]

Three elements are present in the definition of judicial power given by Griffith CJ; (i) a controversy; (ii) the controversy is about rights; (iii) a binding and authoritative determination. The **SC determination 03/90** speaks of a non-binding decision by banks which is susceptible to judicial review and the learned Deputy Solicitor General who assisted Court at the time of hearing had argued that there could be interposition of Courts in case of a board resolution. No doubt banks conferred with *parate* powers take action on the basis of a unilateral decision that there has been a default but the banks concerned do not conclusively determine legal rights and liabilities. According to the SC determination, the decision of the board of directors is not made final or conclusive and there is no attempt to exclude recourse to Courts.

Whilst the determination of H.A.G. de Silva J, G.R.T.D. Bandaranayake J, M.D.H. Fernando J, R.N.M. Dheeraratne J, and S.B. Goonewardena J, concluded in the pre-enactment review to the effect that *parate executie* does not allow the creditor to be the judge in his own cause, Sarath N. Silva CJ (with Jayasinghe J, Udalagama J, and Dissanayake J agreeing) chose to hold in the later *Chelliah Ramachandran* case that the provisions in the *Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990* contravene the basic safeguards of natural justice "*nemo judex in causa sua*".[69] It is problematic that the very argument of "*nemo judex in causa sua*" that was disposed

[67] (1909) 8 C.L.R 330.
[68] Ibid, 357.
[69] See the *Chelliah Ramachandran* case *footnote* 1 supra at p 404.

of by a 5 bench Special Determination in 1990 should again be revisited by a numerically lower composition of judges in *Chelliah Ramachandran* case.

Having regard to the fact that the Supreme Court held in the Special Determination No.3 of 90 that none of the provisions of the Recovery of Loans by Banks (Special Provisions) Bill was inconsistent with the Constitution or any provisions thereof, His Lordship S.N. Silva CJ, was quick to point out in the *Chelliah Ramachandran* case "*Be that as it may, under our Constitution the law is valid and we could only interpret its provisions.*" Thus, the majority of judges in the *Chelliah Ramachandran* case must be taken to have been mindful that the pre-enactment determination of five judges in SC Determination No 3/90 was binding on the question of whether there was *in esse* an exercise of judicial power or erosion thereof as Article 80(3) of the Constitution effectively prohibits post-enactment review in its peremptory declaration. As such the invocation of erosion of judicial power argument has no place in the overall consideration of the question whether the extrajudicial sale of properties mortgaged by third-parties could amount to an interference with judicial power.

It is worth recalling what the Supreme Court said in upholding, in the main, the constitutionality of one of a number of bills introduced to facilitate debt recovery:[70]

> *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 slower 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*

[70] The Debt Recovery (Special Provisions) Bill -S.C. Determination No 1/90 Decisions of the Supreme Court on Parliamentary Bills 1990 Volume VI p 3 at p 5.

> *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 aim of the legislation, as the Supreme Court noted, is to facilitate economic development, although it is fair to add that lenders both from within and outside the country had been pressing for legal changes for some time.

This is what the Debt Recovery Committee (DRC) had also recommended as far back as 1985 to the effect that *parate execution* in relation to corporeal movables be extended to other institutions.[71]

Despite opposition from the Bar Association[72] and the Central Bank committee[73], the Debt Recovery Committee (DRC) adhered to its views in a supplementary report, "*because movables in the custody of a borrower, secured by a mortgage, provides in the main the basic security for working capital of a trade or business. The right of parate execution in this instance will contribute to easy and enlarged availability, and reduced cost, of credit against such security.*"[74] It was the strong objections by the Bar Association to the suggested changes that put on hold the implementation of Justice Wimalaratne Committee recommendations of 1985.

The struggle for parate execution of immovables was a long time coming even before 1985. A recall of this long history is illustrative of how law can be thought to lag behind what is thought to be economically desirable. In

---

[71] Debt Recovery Committee Report, at p. 8.
[72] Bar Association of Sri Lanka, *Report of the Bar Association of Sri Lanka, Seminar on Report to ... Examine and Report on the Law and Practice Relating to Debt Recovery* (Colombo, 1987).
[73] Central Bank Committee, *Report of the Committee Constituted to Examine and Consider Certain Aspects of Law Relating to Recovery of Debt* (Colombo, 1987).
[74] *Summary of Comments on the Debt Recovery Committee (D.R.C.) Report and the Responses to these Comments* (Colombo, 1987). The Supplementary Report was prepared by two members of the Debt Recovery Committee, **Mr. H.** L. de Silva P.C. and **Mr. N.** U. **J**ayawardena (the chairman having passed away after the original report).

1934, the Ceylon Banking Commission reported its recommendations.[75] It had been established to report on existing conditions of banking and credit, and to consider feasible steps in respect of the provision of banking and credit facilities for agriculture, industry and trade. In the course of its Report, it made several suggestions as to reform of the law to increase the availability of credit by removing what were perceived to be legal handicaps.[76]..

> *Banks and commercial bodies have emphatically complained to us that the commercial laws of Ceylon do not help the creditor ... [The banks) rightly urged that, if the law helped the debtors against the legitimate rights of the creditor, no one should blame the latter if he became too cautious. We come to the conclusion that the legal machinery of the Island is very defective from the point of view of credit and lending, and that it should be overhauled if banking is to do its legitimate business.*

Specifically, the Banking Commission recommended changes in the law of security. The Commission suggested that the law relating to the mortgage of immovable property should be made to conform to Indian law.[77] Consequently, a mortgagee would in some cases have been able to realize his security by sale, enter into possession or appoint a receiver, all without recourse to a Court.[78] Generally, in relation to the mortgage of movables, it recommended a simpler scheme, together "with power to the lender to sell off the security in the event of the borrower failing to repay, after giving him due

---

[75] *Ceylon Sessional Papers,* No. XXII of 1934. The Commission comprised mainly bankers, Sir Sorabji N. Pochkhanawala, Managing Director of the Central Bank of India Ltd., and two Sri Lankans, Sir Marcus Fernando, Chairman of the State Mortgage Bank and Dr. Samuel Chelliah Paul F.R.C.S. Dr. (Professor) B. B. Das Gupta and **Mr. N.** U. Jayawardena, both later associated with the Central Bank of Sri Lanka, were secretary and assistant secretary respectively of the Commission.

[76] *Ibid.,* at p. 106. On Indian law: R. Ghose, *Law of Mortgage,* 6th ed. (Calcutta, Kamel Law House, 1988).

[77] *Ibid.*

[78] For a modern version of Indian Law on realizing security see *The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act*, 2002. (The SARFAESI Act).

notice.''[79] Significantly, the Commission concluded its discussion of legal reforms by identifying the unsuitability of the Roman-Dutch law to modern commercial and credit activities. "This is the main reason why the mercantile legislation in Ceylon is in its infancy and out of date …… Modernization of the legal system of Ceylon is a necessity for the smooth running of its commercial and banking machineries."[80] The recommendations of the Banking Commission were endorsed in part by the Sub-Committee on Commercial Legislation.[81]

Thus, the Banking Commission and the Sub-Committee on Commercial Legislation were trend setting and despite the correctional course that the Banking Commission and the Sub Committee on Commercial Legislation suggested, there were snags and snarls on the way.

It is fair to interpose here once again that I am indulging in this survey of the long history of suggested reforms as they provide the context in the **widest sense** for the final interpretation of the words borrower and any property mortgaged in the Act, No.4 of 1990. I entertain little doubt that having regard to the progressive rejection in this country of the so called dislike shown by Roman-Dutch law towards parate execution, there has to be a liberal interpretation of the word borrower in the Act, No.4 of 1990 and not a stultification of its purpose and history by strict, literal interpretations of statutes. I will expand on this presently but not before alluding to a restrictive view that the Mortgage Commission took of parate execution.

Mortgage Commission rejecting parate execution

The Banking Commission had recommended that the defects in the law which it had identified should be examined in depth by a special Commission. This

[79] *Ibid.*
[80] *Ibid.*
[81] See *Sessional Paper,* No. X of 1939. The Committee comprised government officials and a representative of the law firm F. J. & G. de Saram.

was the origin of the Mortgage Commission, appointed in November 1943. The Second Interim Report of the Commission[82] led to the Mortgage Act. In essence the Report and the Act rejected the approach of the Banking Commission: Instead, both cling to the Roman-Dutch principles of mortgage. The Report begins by rejecting the recommendations of the Banking Commission in relation to the mortgage of land. The reasons given can be gathered under four broad heads:

It would be a "perilous adventure" to superimpose one part of a foreign system of law (i.e., the English law of mortgage) upon the different system of land law in Sri Lanka; the evidence about delay in enforcing mortgages, and its adverse effects on the confidence of investors, was thin; the English rule, that a mortgagee should be able to sell the property on default without intervention of the Court, would lead to breaches of the peace:[83] and there was a need to protect borrowers. None of these reasons is overwhelmingly persuasive, except possibly the last Although it hardly featured in the Report, the nature of lending in Sri Lanka, and its consequences, in the first part of the 20th century had burnt itself into the collective consciousness of many and clearly influenced the Commission. The story, in brief, is that in colonial times the British banks would not lend to Sri Lankans, except the very wealthy or very influential. To borrow money, Sri Lankan businessmen and agriculturalists had to turn to foreign money-lenders - Afghans and the South Indian Nattukottai Chettiars. This meant that in the economic

[82] *Ceylon Sessional Papers,* No. V of 1945. The Commission comprised L. M. D. de Silva K.C. as Chairman (a prominent lawyer, who later sat on the Supreme Court and Privy Council); G. Crossette Thambyah as the other Commissioner (later Solicitor- General); and H. N. G. Fernando as secretary (later Chief Justice). The Commission was to report generally on the law of mortgage; to make recommendations for law reform "with a view to removing defects and supplying deficiencies in the laws which limit the availability in Ceylon of adequate facilities for agricultural, industrial and commercial purposes"; and, significantly, to report on the nature of protection for "the ancestral and other lands of agriculturalists, and to preserve a sufficient portion thereof for the maintenance of themselves and their families."

[83] "We are aware that in this country attachment to land and the desire at all costs to retain possession are one of the primary causes of crime": *ibid.* at p. 29.

depression of the 1930s, many Sri Lankan landowners were thus in the hands of foreign money-lenders to whom they had mortgaged their lands.[84]

> *The world-wide depression hit Ceylon as well . . . The banks having suspended all credit to the Chettiars after [abuses and collapses in the nineteen twenties] further tightened their lending policies. The Chettiars on their part, unable to obtain facilities from the banks, demanded the repayment of their loans from their Ceylonese borrowers. When they found that the Ceylonese were unable to pay, the Chettiars put their promissory notes in suit and foreclosed on their mortgages. The period between 1930- 1936 saw a spate of litigation initiated by the Chettiars against their Ceylonese borrowers who had defaulted in payment. One has only to scan the pages of the Ceylon Law Reports of that period to see the number of law- suits filed by the Chettiars against their debtors. Many a Ceylonese landowner lent his property to the Chettiars and many a Ceylonese debtor ended up in the Insolvency Court at the instance of his Chettiar creditor.*[85]

The Land Redemption Ordinance[86] resulted from the political pressure exerted by dispossessed landowners. It was to enable the Government to acquire land sold during the depression to pay off debts. The land was then to be restored to its original owners on the payment of its value in installments. For our purposes, however, the most important result was that, as previously mentioned, the Mortgage Act 1949 did not change fundamentally the Roman-Dutch law on parate execution.

---

[84] **H.W.** Tambiah, *Principles of Ceylon Law* (Colombo, **H. W.** Cave & Co., 1972), p. 485.
[85] W. Weerasooria, The Nattukottai Chettiar Merchant Bankers in Ceylon (Tisara Prakasakayo, 1973), p. xvi. It is only fair to add in defence of the Chettiars that they made credit fully available to Sri Lankans, were not careful about the security they took, and were very reluctant to have to realize their security.
[86] No. 61 of 1942.

It was so many years thereafter, as I pointed out earlier, that the DRC headed by Justice D. Wimalaratne recommended in 1985 that what was hitherto enjoyed by approved credit agencies in relation to movables must be extended to other institutions.[87] I have already traced the trajectory of the DRC recommendations to its final culmination in the 1990 Debt Recovery Legislation package. Though there was opposition, by the late 1980s, the view that the law of credit and security needed reform was shared widely by Government officials, bankers and also by some members of the legal fraternity.[88] In fact it was in December 1989 that the reform proposals carried the day when the Sri Lankan cabinet approved a series of bills to be introduced to the Parliament. In announcing the legislation, the Ministry of Finance noted that the present laws were "outdated and not in line with legislation governing bank loans in force in other progressive countries.[89]

Fourteen Bills were enacted by the Sri Lankan Parliament in early 1990. The Prime Minister noted the economic rationale behind the legislation.

> The banks state that the long delays and the high cost of recovery of bank debts are one of the causes for the high interest rates which are being charged by banks from borrowers. It is very desirable that interest rates should be reduced to the lowest possible level in order to encourage investment and development in the country[90].

---

[87] See *footnote* 71 supra.

[88] *E.g.,* Minister of Finance in *Hansard,* November 25, 1987, p. 898. See also, "If the right of the *parate execution* had been granted to the Finance Companies most of them would not have collapsed and the poor depositors would have been saved from being deprived of their life savings": *Legal Aid Newsletter,* Vol. 4, no. 5, May 1989, p. 1 (Comment).

[89] Ministry of Finance - Press Communique. Debt Recovery Legislation, December 21, 1989. In Parliament, the Prime Minister said: "Modern banking laws in other countries, in developed countries like the United Kingdom as well as developing countries like Singapore, allow the right of *parate execution* to banking institutions."

[90] *Hansard*, January 23, 1990, p. 864.

1. Debt Recovery (Special Provisions)	8. Agrarian Services (Amendment)
2. Mortgage (Amendment)	9. National Development Bank of Sri Lanka (Amendment)
3. Recovery of Loans by Banks (Special Provisions)	10. Public Servants (Liabilities) (Amendments)
4. Registration of Documents (Amendment)	11. Code of Criminal Procedure (Amendment)
5. Civil Procedure Code (Amendment)	12. Trust Receipts (Amendments)
6. Consumer Credit (Amendment)	13. Inland Trust Receipts
7. Motor Traffic (Amendment)	14. Credit Information Bureau of Sri Lanka

So in a nutshell whilst the Banking Commission (1934), Debt Recovery Committee (1985) and the Sub Committee on Commercial Legislation all recommended parate powers to banking institutions, the Mortgage Commission (1943) and the Mortgage Act (1949) was disinclined to countenance parate execution. But the enactment of the Recovery of Loans (Special Provisions) Act, No.4 of 1990 brought about the displacement of Roman-Dutch law on parate execution. It heralded a paradigmatic shift in the law of credit and security of this country. With the introduction of the Recovery of Loans (Special Provisions) Act, No.4 of 1990 parate executie powers were extended to other licensed commercial banks (LCBs) within the meaning of the Banking Act, No. 30 of 1988 and the banks established for special purposes under an Act of Parliament such as National Savings Bank (NSB), Development of Finance Corporation of Ceylon (DFCC) and Housing Development and Finance Corporation (HDFC).

Divergent Views on parate execution between 1990 and 2003

What followed the legislative reforms in 1990 is worth recounting. The prodigious litigation that was brought about due to extra judicial sales by banks

after the enactment of the Act, No. 4 of 1990 surfaced to the fore the issue of third-party mortgages. It was not infrequent that the mortgagee banks proceeded to pass resolutions to sell by auction properties mortgaged to them by third-parties who were not the actual borrowers of the non-performing loans. It became par for the course that whilst some of such auction sales passed muster, others did not qualify under the Act on the ground that it was only the property of the actual borrower that could be auctioned.[91]

As could be seen, the majority of the differing views came from the original Courts and it has to be noted that the Commercial High Court refused to accept the plaintiff's argument in **Jewarlarts Garments Ltd and Another v. The Hatton National Bank[92]** that the bank had no right to auction the property of a third-party. The same Court articulated a similar view in **Nalin Enterprises Private Limited v. Sampath Bank.[93]** In this case the Plaintiff-the corporate borrower argued that the Act No.4 of 1990 envisaged that the property mortgaged should necessarily be the property belonging to the borrower. Therefore, the defendant bank is not entitled to resolve to sell the property of the 2nd Plaintiff (the third-party mortgagor who was a director of the company) in terms of the Act, No.4 of 1990. The Commercial High Court Judge Mr. Wimalachandra HCJ (as he then was) refused to accept the argument of the corporate borrower Nalin Enterprises Pvt. Ltd. and decided that the word borrower must be interpreted so as to include a third-party mortgagor.

---

[91] See decisions to the effect that only properties of actual borrowers could be auctioned in *Link Acqua Farms (Pvt) Ltd and Others v. National development Bank Development Bank* (CHC (Civil) No 110/2000/1-order dated 17th August 2000); *Y.A.G. Dharmasena v Bank of Ceylon and Another* (DC Colombo 5351/Special- order dated 17th October 2000).

[92] CHC (Civil) 77/2000/1 Order dated 26th April 2001. The Commercial High Court held that since section 4 of the Act No. 4 of 1990 does not differentiate mortgages of a third-party from a mortgage by an actual borrower, there is no prohibition to adopt a resolution to auction the property of a third-party. But there is no attempt in the judgment as to how the sections in the Act could be harmonized.

[93] CHC (Civil) 1999/2000/1 Order 27th April 2001.

Even Gamini Amaratunga J in **Bank of Ceylon v. Yasapala Arambegedera and Others**[94] took the view that third-party mortgages remain liable for recovery of unpaid loans through parate execution.

In this tangle of decisions proliferating in the wilderness of single instances, as Tennyson called them in his Aylmer's Field, the law was left in a state of ambiguity and uncertainty.

The 2003 Amendment Bill to the Act, No.4 of 1990 was an attempt to clear all snags in interpretation but it failed to pass muster in its constitutional validity. But the manifestation of Parliamentary intention in the 2003 Amendment Bill to permit parate execution of third-party mortgages cannot be lost sight of.

2003 Amendment Bill

It was in the context of all ambiguity surrounding the position of third-party mortgages that the Parliament attempted to put at rest the controversy by coming forth in 2003 with an amending Bill entitled Recovery of Loans by Banks (Special Provisions) (Amendment) to amend the parent Act, No.4 of 1990.

The objective of the Amendment was basically as follows:

(i) To prevent the borrower, mortgagor or any claimant from making an application to Court to invalidate a resolution of the Bank's Board authorizing the sale of the property. This clause will also enable banks to exercise parate execution rights in respect of syndicated loans.

(ii) To identify the borrower more clearly in order to avoid any doubt.

(iii) To extend the scope given to banks to exercise the right of parate execution in respect of a mortgage of property, to include a third-

[94] CALA 329/2000 decided on 7.10.2002.

party mortgage.

(iv) To enable all "licensed specialized banks" and finance companies supervised by the Central Bank to exercise "parate execution" similar to licensed commercial banks.

SC Determination (SD) No. 22/2003[95]

The constitutionality of the Amendment Bill to Recovery of Loans by Banks (Special Provisions) Act was considered by Sarath N. Silva CJ, P.Edussuriya J, Hector Yapa J, J.A.N.de.Silva J and T.B.Weerasuriya J, on 26.08.2003 and the Court determined that the Bill could only be passed by the special majority required under the provisions of Article 84 (2) of the Constitution. It has to be noted that it was almost three years later when the Supreme Court next considered the question of *parate execution* of third-party mortgages in *Chelliah Ramachandran* case. One can certainly find the echoes of reasoning in the 2003 determination resonating in the *Chelliah Ramachandran* decision. In **S.C (SD) No. 22/2003** which considered the constitutionality of the Amendment Bill, the argument premised on the Rule of Law was once again raised and the Court held that it would be inconsistent with the Rule of Law and the requirements of our constitution as to administration of justice to invest in any person the power to decide in respect of his rights as against another, and further to empower that person who so decides to enforce his unilateral decision by the sale of property of such other person. It has to be observed that this very argument had been rejected outright by the previous S.C Determination 03 of 1990 and if it was not against the Rule of Law to vest in the board of directors a power to exercise *parate execution* in respect of direct mortgages, one fails to understand why it would be against the Rule of Law to invest the self-same board of directors with identical powers in respect of third-party mortgages.

[95] *Kusumin Kirthy Kumari v The Attorney General* - Decisions of the Supreme Court on Parliamentary Bills (1991-2003) Volume VII 425.

Another reason that the 2003 determination gives for declaring the bill inconsistent with the Constitution is that the Roman-Dutch law being our common law, has looked upon the process of *parate execution* with extreme disfavor. In fact, this reasoning pervades the spirit of the majority judgment in *Chelliah Ramachandran* of 15 April 2005.

The long peddling of this so-called opprobrium of Roman-Dutch law for *parate execution ad nauseum* all the way through 2003 to 2005 reduces it to absurdity-*reductio ad absurdum*, as there has been a gradual attenuation or whittling down of the Roman-Dutch law rule on mortgage of immovables but this inarticulate major premise of glaring repudiation of the Roman-Dutch law position reduces the effect of the 2003 Statutory Determination and the *Chelliah Ramachandran* decision that followed it.

As we saw in its historical conspectus, there was a statutory departure from Roman-Dutch law in 1990 and our legislature had moved away from the common law position many moons ago when it enacted an ubiquity of statutes vesting *parate* powers with several state institutions. Therefore, the precedential value of the *Chelliah Ramachandran* case is greatly reduced in light of the fact it uses the same argument that had been rejected in **Special Determination 03 of 1990** to bolster its own articulation. In the process both the 2003 determination and the *Chelliah Ramachandran* decision of 2005 which builds on it blissfully ignore the effect of statutory departures from the Roman-Dutch position. This would in turn reduce the soundness and logic of their *ratios.*

Undoubtedly our common law roots are Roman-Dutch, and splendid they are. But continuous development has come through adaptation to modern conditions, through case law, through statutes, and through the adoption of certain principles and features of English law such as the law on Banks and Banking. The original sources of Roman-Dutch Law are important, but extensive preoccupation with them is like trying to return an oak tree to its acorn. It is looking ever backwards. One is reminded of the biblical episode of Lot's wife. Lot's wife looked back and turned into

a pillar of salt. Our national jurisprudence must move forward, casting away its swaddling clothes.

Parate execution has come to stay in this country and the question is whether there has to be a distinction between mortgages provided by actual borrowers and those by third-party mortgagors.

A fact that the 2003 Amendment Bill brings out, though it did not enter the statute book, is worthy of recognition for purposes of statutory interpretation. The fact that the 2003 Amendment Bill sought to declare *parate execution* of third-party mortgages legal and valid unmistakably manifests the intention of Parliament that its inelegant drafting in 1990 that resulted in the word *borrower* being read literally was not its intended purpose. The fact that the Parliament always had both actual borrowers and third-party mortgagors in one class was as clear as clear can be, when it sought to clarify its intention in the Amendment Bill of 2003. The Parliament was seeking to unravel the ambiguity and it clearly spoke its mind in the Amendment Bill but the Amendment proved abortive in the end as a result of a declaration of constitutional invalidity.

Having pinpointed that the weight of the 2003 determination rests on slender threads, let me examine whether the 2005 *Chelliah Ramachandran* case can hold water on its own merit.

Chelliah Ramachandran Case[96]

Factual Template.

The Supreme Court heard two amalgamated appeals which raised identical issues. The appellants Chelliah Ramachandran and Manohary Ramachandran (husband and wife) had executed a mortgage of their immoveable property at 49, Collingwood Place, Colombo in favour of Hatton National Bank (HNB) at the request of the 4th

[96] See *Footnote* 1 supra

Respondent to the appeal, one Nadarajah Ganarajah. The reason for such an execution of the mortgage was a prior transaction in which the said Nadarajah Ganarajah had advanced money to Chelliah Ramachandran. Though the loan from HNB was for Nadarajah Ganarajah, the mortgage bond which secured the loan was from the husband and wife who had covenanted along with the debtor Ganarajah to repay the loan on demand and thus there was a joint and several obligation owed to the bank in the mortgage bond. When the repayment of the loan was in default, the bank noticed both the husband and wife- Chelliah Ramachandran and Manohary Ramachandran. In his response to the bank, Chelliah Ramachandran admitted that he had been paying the monthly dues regularly to the bank though Nadarajah Ganarajah defaulted.

The appellants sought writs of certiorari from the Court of Appeal to quash the resolutions of the Respondent Bank, HNB to sell by *parate execution* the property of the appellants (the third-parties) which was mortgaged to secure the loans as securities. The Court of Appeal refused interim relief sought by the appellants. It is in this backdrop that the all-important question of law surfaced in the Supreme Court-namely Can Hatton National Bank Ltd proceed to sell by *parate execution* the immovable property of a mortgagor who had not himself borrowed money from the bank?

Whilst the majority of 4 judges gave a restrictive interpretation of the term *borrower* and declared invalid *parate execution* of third-party mortgages, the minority judgement adopted a liberal and broad interpretation of the word *borrower* to encompass within it a third-party mortgagor as well. Both judgements teem with their own reasoning the pros and cons of which could now be assayed.

Majority Judgment

It is important to distill the legal reasoning on which the majority in the Supreme Court arrived at its decision. S.N. Silva CJ in *Chelliah Ramachandran* sought to

identify the category of persons against whom *parate execution* was intended to be made available by the Act as follows at page 404 of his judgment: -

> "*The submissions of Counsel for the Petitioner [in Ramachandran's case], is that the class of persons is clearly identified in the provisions of the Act commencing from Section 2 itself. Section 2(1)(a) requires 'every person to whom any loan is granted by a Bank on the mortgage of property' to register with the Bank the address to which a notice to him may be sent. I am inclined to agree with this submission since a Resolution of the Board to sell by Public Auction, as empowered by Section 4, has to be dispatched to this address in terms of Section 8. Similarly, the notice of sale in terms of Section 9 should be dispatched to that address.*
>
> *There is a clear link in the provisions between the taking of a loan and the mortgage. The law will apply where a mortgage is given by the person to whom the loan is granted. In Sections 7, 14, 15, 16 and 17 this person is identified as the 'borrower'. The borrower is none other than the person to whom a loan is granted and who is required in terms of Section 2 to register his address with the Bank. In terms of Section 14 where the mortgaged property is sold and an amount in excess of what is due to the Bank is recovered, such amount has to be paid by the Bank to the borrower. This clearly established that it is only the property mortgaged by a borrower that could be sold by a Bank to recover a loan granted to him. If the provisions are extended by a process of interpretation to cover a mortgage given by a guarantor, Section 14 will bring about a preposterous result in which the guarantor's property is sold and the excess recovered is paid by the Bank to the borrower. It is when confronted with their unanswerable contention that the Counsel for the Banks submitted that the term borrower should be interpreted to include any debtor and that where a loan is in default the guarantor would be a debtor*. ***The words 'borrower', 'guarantor' and 'debtor' have specific significance attaching to them in legal proceedings. These distinctions cannot be removed and the***

application of the special provisions law extended to encompass guarantors in view of the serious implications of its provisions as revealed in the preceding analysis." (*Emphasis added*).

Comments on the Majority Judgment

One can see that the majority judgment in *Chelliah Ramachandran* is dismissive of the argument that where a loan is in default the guarantor would be a *debtor*. The majority in *Chelliah Ramachandran* also states that the words "*borrower*", "*guarantor"* and "*debtor"* have specific meanings implying that they are distinct and separate and these distinctions can never be removed. It would appear that the legal position is to the contrary. Let me first set forth the argument based on joint and several liability of security providers along with principal borrowers, which the majority view in *Chelliah Ramachandran* case made short shrift of.

Joint and Several Liability of Principal Borrowers and Mortgagors

As in *Chelliah Ramchandran*, the mortgage bonds in the two cases before us impose joint and several liabilities on the directors for the borrowing of the respective Companies. In other words, both the principal debtors-the Companies in question and Director mortgagors have undertaken joint and several liability for the loans.

Black's Law Dictionary defines a joint and several bond as a bond in which the principal and interest are guaranteed by two or more obligors.[97] In a joint and several mortgage bond, two or more persons declare themselves jointly and severally liable for the debt of the principal borrower. A guarantor or a mortgagor, who has mortgaged his property to secure the repayment of the loan, stands on the same footing as a borrower. In such a situation the mortgagor has accepted the same liability as the borrower and when the default occurs, the mortgagor stands on the same footing as the borrower *vis a vis* the obligee (the bank).

[97] 11th Edition edited by Bryan Garner at pp 222; 1002.

When one examines the mortgage bond bearing No 6291 in SC/Appeal/11/2021, the phraseology is symptomatic of the joint and several covenant undertaken by both the Company (Sunpac Engineers Pvt Ltd) and the mortgagor, Ranath Jayaweera alias Sanath Jayaweera. The joint and several liability of the company and the mortgagor is expressed in no uncertain terms in the following tenor.

> *NOW KNOW YE AND THESE PRESENTS WITNESS that the Company and the Mortgagor do hereby covenant and agree with and bind and oblige themselves jointly and severally to the Bank that the Company and/or the Mortgagor shall and will on demand well and truly pay or cause to be paid at Colombo aforesaid to the Bank in lawful currency of Sri Lanka…*

This shows that the mortgagor Ranath Jayaweera incurs the same obligations as Sunpac Engineers (Pvt Ltd)-the principal borrower. Clause 10 of the mortgage bond makes it patently clear about the rights of the bank when it stipulates:

> *The Company and the mortgagor empower and require the bank in the event of exercising the parate execution rights conferred on it under the recovery of loans by banks (special provisions Act, No.4 of 1990) to appropriate the proceeds in such a way as to recognize the claim of the bank and effect payment giving effect to the provisions of these presents and the Company shall not interpose any objections thereto.*

The mortgage bond in question thus imputes obligations to both the borrower Sunpac Engineers (Pvt Ltd) and the mortgagor Ranath Jayaweera *qua* borrowers, as they have clearly covenanted and obliged themselves to the bank that they would be jointly and severally liable to repay the loan on demand. There is no necessity for the principal borrower Sunpac Engineers (Pvt Ltd) to be proceeded against first, before DFCC bank PLC could turn to Ranath Jayaweera alias Sanath Jayaweera – the mortgagor. But the majority judgment in *Chelliah Ramachandran* is quite oblivious to this aspect of coalescence of the borrower and mortgagor when default of payment has occurred and the majority in *Chelliah Ramachandran* clearly

misdirected themselves when they proceeded to hold that the words *debtor, guarantor and mortgagor* have fixed and distinct meanings which cannot be removed.

As the mortgage bond stands, it is a solidary obligation with both parties covenanting to repay the bank on demand. Both also covenant that the DFCC bank PLC could have recourse to the provisions of Act, No.4 of 1990 to sell by auction the mortgaged property belonging to the mortgagor Ranath Jayaweera. The mortgage bond is identical in terms and conditions to the mortgage bond as was confronted with by Court in *Chelliah Ramachandran*. In such circumstances, it is open to the mortgagee bank to proceed against the property of the third-party mortgagor first, as there is a joint and several liability.

This makes it clear that Ranath Jayaweera and Sunpac Engineers (Pvt Ltd) stand in the character of *borrowers* in the same breath; so one cannot ascribe distinct and different meanings to the words *borrower* and *mortgagor* as both tend to coalesce into one category as far as the liability to the bank is concerned. As the borrower defaults in the payment due to the bank, the liability of the mortgagor kicks in and is co-extensive with that of the principal borrower. Therefore, the majority in *Chelliah Ramachandran* fell into an error when they pronounced that the words such as *debtor* and *guarantor* bore distinct and fixed meanings. *En passant*, the definition of a mortgagor in Black's Law Dictionary as a mortgage-debtor or borrower has to be understood as a reference to a mortgage provider as a borrower in its extended meaning.[98]

I am also fortified in my reasoning by some comparative legislative developments across the Palk Strait. The *Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act*, 2002 (the SARFAESI Act) defines the term borrower to mean a person who fulfills two criteria viz (1) who has been granted financial assistance by any bank or financial institution, (2) who has given any guarantee or created any mortgage or pledge as a security for financial assistance

[98] See Black's Law Dictionary, 11th Edition. p 1214

granted by any bank or financial institution…[99]. The Indian Supreme Court has affirmed this position in ***Union Bank of India v. Rajat Infrastructure Pvt. Ltd. & ORS.***[100]

I hasten to point out that the liability for the third-party's property to be sold extra judicially arises by the third-party himself being considered as a *borrower* under the Act and it must be kept in mind that this statutory liability is independent of the contractual liability arising under the joint and several covenant in mortgage bond. Joint and several liability only supplements the statutory liability arising under the Act by virtue of the interpretation of the word to include a third party.

The word *borrower* includes a *mortgagor.*

From the foregoing it is indisputable without a scintilla of doubt that the word *borrower* takes in its sweep even a person who has given guarantee or created any mortgage or pledge as a security for the financial assistance granted by any bank or financial institution. The security interest means right, title or interest of any kind whatsoever upon property, created in favor of any secured creditor and includes any mortgage, charge and hypothecation. Therefore, a person who has created any mortgage or pledge as security for financial accommodation granted by any lending institution as defined or empowered in *parate execution* statutes is a *borrower* within the meaning of the word *borrower* in provisions such as section 15 (1) of the Act, No.4 of 1990 and this conclusion is inescapable having regard to the text, context and the resultant interpretation.

Text, Context and Interpretation.

All that I have undertaken above is to examine the text of the Act, No.4 of 1990 in relation to its context in its widest sense and utilize it to interpret the text.

---

[99] Section 2(f) of the SARFAESI Act; also see *footnote* 78 supra.
[100] (2020) 3 SCC 770 ; AIR 2020 SC 1172

As I said before, context in the 'widest sense' includes the legislative history of an Act, extrinsic materials, and 'any other circumstance that could rationally assist understanding of meaning': ***Commissioner of State Revenue EHL Burgess Properties Pty Ltd***[101]

In ***Reg. v. Schildkamp***[102] Lord Upjohn said at p.22G

> "*But, my Lords, this, in my opinion, is the wrong approach to the construction of an Act of Parliament. The task of the Court is to ascertain the intention of Parliament; you cannot look at a section, still less a subsection, in isolation, to ascertain that intention; you must look at all the admissible surrounding circumstances before starting to construe the Act. The principle was stated by Lord Simonds in* ***Attorney-General v. Prince Ernest Augustus of Hanover*** *[1957] A.C. 436, 461:*
>
> ***'For words, and particularly general words, cannot be read in isolation: their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use 'context' in its widest sense, which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those other legitimate means, discern the statute was intended to remedy.'***

Viscount Simonds does not specifically mention Law Commission Reports (the Law Commissions had not then been established). Nor does he mention white papers or other documents, but the material to which he referred included external material. So, what Viscount Simonds says about obtaining 'the colour and content' of a statute

---

[101] (2015) VSCA 269 at {52}.
[102] (1971) AC p 1

from its context must apply to pre-legislative material and other external aids that are available before us.

Based on the above, it is realistic to conclude that the word *borrower* in the Act bears different meanings in that it includes not only the person to whom the financial accommodation was granted but also the person who provides security for such financial accommodation. It makes no difference whether the person who provides the security is the actual borrower or a third-party.

The word *borrower,* having regard to legislative history behind *parate executie* in this country, statutory departures from Roman-Dutch law, purpose of the special law and even joint and several liability covenant in the mortgage instruments, has to be interpreted to extend to a mortgagor, inclusive of a third-party mortgagor. The context in the widest sense would also include the fact that the Parliament did not choose to leave the law as it stood, since the abortive Amendment Act of 2003 was sought to be enacted on the assumption that the impugned decision of *Chelliah Ramachandran* did not represent the law or parliamentary intention.

It is therefore irreconcilable to logic and common sense to contend that the Act, No.4 of 1990 makes a distinction between an actual borrower who provides a mortgage and a third-party who provides security on behalf of the actual borrower. Many a judicial decision have extended the meaning of words, from its normal and literal sense to their legal meaning or else the provisions in the Act would become useless and infructuous if a different treatment has to be given when the actual borrowers and mortgagors are different persons.

As rightly pointed by Lord Scarman, it would be perilous to assume that an English word of ordinary usage is to express only one particular meaning – see ***Infabrics Ltd v. Jaytex Ltd.***[103] Therefore it cannot be argued that the particular word *borrower*

[103] (1984) R.P.C 405

has been used uniformly in different parts of the statute and when Section 2 (1) of the Act, No.4 of 1990 uses the words ''*the mortgage of* property'', it would connote not only the property of the person to whom the loan is granted but also the property of a third-party who volunteers to provide security for the loan.

Furthermore, when Section15 (1) of the Act, No.4 of 1990 states that *"all the right, title, and interest of the borrower to, and in, the property shall vest in the purchaser…''*, the word *borrower* in the subsection would include the third-party who has provided the security for the financial assistance.

Before I part with this judgement, two questions repay consideration. What does one make of the cases such as Jayawardane[104] and DFCC v. Muditha Perera and Others?[105] How does this Court deal with the precedent of Chelliah Ramachandran, now that it has been held to be incorrectly decided?

Since I have concluded that the property of a third-party mortgagor becomes liable for parate execution, it follows that the legal precedent of Chelliah Ramachandran has been wrongly decided. In the same breath a re-appraisal of the Jayawardane case would be otiose as the property mortgaged by a director for the loan of the company would anyway be available for parate execution because of its character as a third-party mortgage. Laconically, on the strength of the repudiation of Chelliah Ramachandran by this Court, lending institutions would no longer require the aid of the Jayawardane case. An immovable property mortgaged by a director would now become available for parate execution merely on the basis that it is a third-party mortgage that qualifies for exposure to parate execution. However, it has to be recalled that there were arguments for and against the correctness or otherwise of the Jayawardane decision and whilst the Petitioners contended that the Jayawardane case was wrongly decided, the Respondent banks invited this Court to hold the

[104] (2007) 1 Sri.LR 181
[105] SC Appeal 15/10 decided on 25th March 2014

Jayawardane case as having laid down the law correctly, in the event this Court proceeded to depart from the Chelliah Ramachandran case.

Indeed there has been a question of law No (ii) that was raised on 8th February 2022 on the ratio of the Jayawardane case and in the circumstances, in order to complete the narrative, it behoves the Court to proceed to consider both HNB v Jayawardane and DFCC v Muditha Perera (supra).

HNB v. Jayawardane and DFCC v. Muditha Perera and Others (SC).

Hard on the heels of *Chelliah Ramachandran* followed the case of *Hatton National Bank Ltd., v. Jayawardane and Others*.[106] In this case the HNB granted a loan to a company (Nalin Enterprises Pvt) of which Jayawardane and others were directors. The directors hypothecated properties belonging to them to secure the loan. As the company defaulted in the payment of the loan the bank adopted a resolution in terms of Act No. 4 of 1990 to sell the property of Jayawardane and others. After some abortive litigation, the property was indeed sold at an auction and purchased by the bank. Jayawardane and Others instituted an action in the Commercial High Court and sought an order that the resolution was a nullity and the auction should be declared null and void on the ground of *laesio enormis.*

When the mater went up in appeal to the Supreme Court, the question of applicability of *Chelliah Ramachandran*'s case came up. Jayawardane and Others argued that they were third-parties whose properties could not have been sold. In other words, applying the ratio in *Chelliah Ramachandran's* case the directors argued that it was only the property of the company that could have been sold and not theirs. In effect the argument of the directors was that their hypothecation would not authorize HNB to have exercised *parate executie*, because the mortgage came from third-parties (the Directors of the Company).

[106] See *footnote* 3 supra

Jayasinghe J, (with Thilakawardane J, and Marsoof J, agreeing) lifted the corporate veil and held that the directors cannot hide behind the veil of incorporation of the company. The reasoning given by Jayasinghe J, for lifting the corporate veil was:

> *"It is quite obvious that the 1st and 2nd Respondents being Directors of the Company benefited from the facilities made available to the said Company by the Petitioner Bank and to that extent they cannot claim that the mortgages which secured the said facilities fall within the category of "third-party mortgages" as contemplated in the majority judgments of the Court in Ramachandran v. Hatton National Bank."*

This reasoning is indefensible in corporate law and logic. In company law corporate veil can be lifted only on some limited grounds namely (a) if the directors were utilizing the company as a vehicle of fraud or (b) it was necessary to interpret a document or statute or (c) the directors be construed to be agents in regard to the lending transaction. In this case no such exception existed. The judgment does not refer to the recognized grounds of lifting the corporate veil *in extenso*. How the directors benefited from the loan given to the company is not discernible as there is no evidence of fraudulent benefit to the directors though Nalin Enterprises Ltd was a closely knit, private company. What evidence was there before Court to conclude that the directors directly benefited from the loan facilities is not readily available upon a perusal of the judgment. What if the money lent to the company was used to purchase property for the company itself? Could it be concluded that the loan was exhausted and busted up by the directors, without that money having been used for the benefit of the company? Merely because the company is unable to pay the debt, can it be concluded that that failure to pay a debt would amount to fraud on the part of the directors? What if the company did not make enough profits to satisfy its liability?

There are no answers to these questions. Except for the bare assertion that the directors benefitted out of the loan, the *Jayawardane* case does not proffer proof of such a benefit. There must be irrefragable evidence to prove fraud and the

Jayawardane judgment does not substantiate any allegations of fraud against the directors. Therefore, there was no warrant for lifting the corporate veil on the facts of the case and the ratio in *Jayawardane* case cannot be taken to mean that if a loan is granted by a bank to a company and the directors mortgage their property to secure that loan, the mortgaged property could be reached for *parate execution*, but without any grounds for lifting the corporate veil.

The fact that the directors mortgaged their property for the loan of the company does not *ipso facto* give the bank a carte blanche to sell by an auction the properties of directors. In order to lift the corporate veil, there must be grounds for that exercise and the English cases have trawled out only a limited number of such grounds such as fraud.[107]

It cannot be denied that the *Jayawardane* case became an emollient and a panacea for the banks as it created an apparent exception to the ratio in *Chelliah Ramachandran* case. But its ratio cannot be applied uniformly to all directors who mortgage their properties for the loans of their companies. Moreover, the precedential value of the *Jayawardane* case is weakened by its inherent absence of logic and scant attention paid to recognized grounds of exception to the doctrine of separate corporate personality which was encapsulated in the seminal case of *Saloman v. A. Saloman and Co. Ltd.*[108]

In my judgment there was no warrant for lifting the corporate veil on the facts and the correctness of this decision is open to serious objection.

Let me now turn to the case of *DFCC v. Muditha Perera.*[109]

DFCC v. Muditha Perera and Others.

[107] See *Adams v. Cape Industries Plc* (1990) Ch 433 and a subsequent discussion of the principles in *Prest v. Petrodel Resources Ltd* (2013) AC 415.
[108] (1897) AC 22.
[109] See *footnote* 104 supra.

Saleem Marsoof J, who was a member of the Divisional Bench in *HNB v. Jayawardane* chose correctly in the later case of *DFCC v. Muditha Perera and Others* not to follow the case of *HNB v. Jayawardane.* As Baron Bramwell said about a point of law in 1872 **"[t]he matter does not appear to me now as it appears to have appeared to me then.",**[110] Saleem Marsoof J had just such a damascene conversion in *Muditha Perera's* case. Saleem Marsoof J chose to follow *Chelliah Ramachandran* in *Muditha Perera* and as a result, the property mortgaged by Muditha Perera to DFCC bank escaped foreclosure on the ground that it was a third- party mortgage.

Now that *Chelliah Ramachandran* has been held by this Court to have perpetuated an incorrect view of *parate execution* as regards third-party mortgages, this Court proceeds to hold that *Chelliah Ramachandran* would no longer be followed. I would not saddle this judgment with a slew of cases that have focused on *parate execution* since the decisions of *Chelliah Ramachandran, Jayawardane* and *Muditha Perera*.

Whichever way they were decided, they all constitute *res judicata* between the parties in those cases and the holding of this case before us would not bind the parties on the rights and liabilities had they been already determined in those cases.[111]

Answering the Questions of Law.

Having dwelt at length on an issue which required a comprehensive treatment, I now proceed to answer the questions of law in the following tenor.

Question No (i)- No

---

[110] Baron George W. W. Bramwell, Justice on the Court of the Exchequer, *Andrews* v. *Styrap,* 26 L. T. 706 (1872).

[111] See the CA decision of Wimalachandra J on the effect of *Chelliah Ramachandran* in a case which had proceeded beyond auction sale *Jayawardane v. Sampath Bank* (2005) 2 Sri.LR 34; see also` Chitrasiri J in *Seylan Bank Limited v. Sivanu Padmandan and 3 Others* (CA Revision Application) No 702/2006 (CA minutes of 16.02.2010.

Question No (ii)- To the extent that veil lifting in *HNB Ltd v. Jayawardane and Others* was not warranted on the facts and circumstances in the case, the ratio in the case is incorrect and in view of the holding in this case now, any director who mortgages his property would be a borrower within the meaning of Act, No.4 of 1990.

Question No (1) -Yes

Question No (2) -Yes

Should Chelliah Ramachandran be overruled?

In view of the answers to the questions of law, another question arises before one would part with this judgment. As I said before, the Divisional Court of this 7-judge bench finds that the 4 judge-bench decision of *Chelliah Ramachandran is* irreconcilable and it is undoubtedly within the competence of a numerically superior Supreme Court to overrule a decision of any Court containing a fewer number of judges-see ***Bandahamy v. Senanayake***.[112]

The doctrine of judicial precedent or binding precedent is one of the most fundamental aspects of any legal system. Precedent is based on the maxim, ***stare decisis et non quieta movere*****,** literally to stand by previous decisions and not to disturb settled matters; to adhere to precedents and not to depart from established principles. In common law systems a large part of the law is made of decided cases, i.e. judge made law or case law. These decisions carry the authority of law upon pronouncement and must necessarily bind later judges to ensure certainty, uniformity and *finis litium* (an end to litigation). The doctrine is important to give the system a sense of certainty and balance and to make it acceptable to the public.

But there are circumstances that destroy the binding force of a precedent and one such factor which is often cited as an exception to *stare decisis* is when it can be inferred that the deciding Court merely assumed the correctness of the propositions

[112] (1960) 62 N.L.R 313;

of law it was laying down. For instance, the assertion that the Roman-Dutch law in this country had viewed *parate execution* with abomination had merely been assumed to be correct with nary any attention being paid to the long line of statutory departures from this so-called loathing. The underlying covenant of joint and several liability inherent in the mortgage instrument of *Chelliah Ramachandran* just passed muster without its significance being brought to bear upon the right of a lending institution to proceed to *parate execution* when the third-party knowingly and without any trace of undue influence or duress had assumed the consequences of an extra judicial sale. A decision is said to be *sub silentio* when a particular point of law involved in the decision is not perceived by the Court or present to its mind. So *Chelliah Ramachandran* is one such precedent *sub silentio* and in such a backdrop the case cannot be an authority on the unperceived rules of law that have been allowed to pass *sub silentio*.

I am fortified in expressing the opinion that it is not desirable that the most authoritative Court in a country be bound by its own decisions. A comparative look across passport control discloses the practice of overruling discordant dissents in several jurisdictions.

Practice Statement of the House of Lords in 1966.

The House of Lords in a dramatic fashion recognized this. The Lord Chancellor, Lord Gardiner, on July 26th, 1966 announced in the House of Lords that in future the House of Lords would not regard itself as absolutely bound by its own decisions. This was quite contrary to an antiquated rule that the House had set down for itself that the House of Lords was bound by its past decisions-see ***London Tramways v. London County Council.***[113]

However, in the period that followed the *London Tramway*s decision it was felt that the effect of the decision was to constrain the development of the common law and

[113] (1898) AC 375.

that rather than ensuring predictability and certainty in the law, the effect was rather the opposite.

As a result, in 1966, all of the judges in the House of Lords joined together to issue a **Practice Statement** (a statement by the Court of a procedure that it intends to introduce) providing that in future the House would no longer regard itself as bound by its own earlier decisions. The statement was carefully worded to communicate that this new power to depart from decisions would be used sparingly to avoid creating uncertainty in the law.

The Practice Statement (Judicial Precedent) [1966] 3 All ER 77

The Practice Statement set out why the House of Lords was going to change its practice and how it thought it would exercise the new freedom to depart from earlier decisions of its own. It said:

> *Their Lordships recognise... that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions ... as normally binding, to depart from a previous decision when it appears right to do so.*

Together with the Practice Statement, the House of Lords published a press release which gave more explanation about the new practice. The key points that emerged from the Practice Statement and press release were that:

- The Court would only rarely depart from an earlier decision
- The Court would be most likely to use the new freedom in situations where there had been significant social change so that a precedent was outdated or inappropriate to modern social conditions, values and practices
- The Court would be likely to depart from an earlier decision if there was a need to keep English common law in step with law of other jurisdictions

- There was a special need for certainty in criminal law and as a result the Court would be very reluctant to depart from an earlier decision in a criminal case.

Horizontal precedent in the UK Supreme Court

Soon after the UK Supreme Court was established in 2009, Lord Hope gave a judgment in ***Austin v. Southwark London Borough Council***[114] in which he made it clear that the prior jurisprudence of the House of Lords had been transferred to the UK Supreme Court and that the UKSC would therefore not regard itself as bound by earlier decisions.

> *The Supreme Court has not thought it necessary to re-issue the Practice Statement as a fresh statement of practice in the Court's own name. This is because it has as much effect in this Court as it did before the Appellate Committee in the House of Lords. It was part of the established jurisprudence relating to the conduct of appeals in the House of Lords which was transferred to this Court by section 40 of the Constitutional Reform Act 2005. So the question which we must consider is not whether the Court has power to depart from the previous decisions of the House of Lords which have been referred to, but whether in the circumstances of this case it would be right for it to do so.*

R v. Shivpuri[115] was a criminal appeal in which the House of Lords overturned one of its own decisions - ***Anderton v. Ryan***[116] that had only been decided one year earlier. This was the first time that the House of Lords overturned its own decision in a criminal case and it was regarded as a spectacular decision when Lord Bridge (a member of the erroneous majority in *Anderton*) acknowledged the error and said:

---

[114] (2010) UKSC 28; (2010) 4 All ER 16
[115] (1986) 2 All ER 334.
[116] (1985) 2 All ER 355.

> "***the Practice Statement is an effective abandonment of our pretension to infallibility****. If a serious error, embodied in a decision of this House has distorted the law, the sooner it is corrected the better*".

There are a host of civil cases where one finds the House of Lords overrule previous decisions-see ***British Railways Board v. Herrington***[117]: ***Murphy v. Brentwood District Council***[118]; ***Austin v. Mayor and Burgesses of the London Borough of Southwark***[119]; ***Knouer v. Ministry of Justice.***[120]

Across the Palk Strait, one is reminded of Justice Khanna who was given the respect accorded to a hero everywhere he went because of his dissent in the famous ***Additional District Magistrate (ADM) Jabalpur v. Shivkant Shukla***[121]. The majority judgment in this case was expressly overruled by a nine-judge bench of the Supreme Court of India in ***Justice K.S.Puttaswamy (retd) v. Union of India***[122] and the minority judgment of Justice Khanna was restored.

Stare decisis is neither an "inexorable command"[123] nor "a mechanical formula of adherence to the latest decision",[124] it is a "principle of policy",[125] especially in constitutional cases. If it were an inflexible command, old cases would have continued and would never have been overruled. When considering whether to re-examine a prior decision which seems incorrect, the court must balance the importance of having legal issues decided against the importance of having them decided right. As Jackson, J, explained, this requires a "sober appraisal of the

---

[117] (1972) AC 877
[118] (1990) 2 All ER 908
[119] (2010) UKSC 28
[120] (2016) UKSC 9.
[121] (1976) 2 SCC 521 (the ADM Jabalpur case).
[122] (2017) 10 SCC 1.
[123] Lawrence v Texas, 539 US 558, 557, (2003).
[124] Helvering v Hallock, 309 US 109, 119 (1940).
[125] Ibid

disadvantages of the innovation as well as those of the questioned case, a weighing of the practical effects of one against the other".[126]

The great purpose of all this is a constitutional ideal-the rule of law and thus, ***Ramachandran and another (SC Appeal No 5/2004) and Anandasiva and another (SC Appeal No 9 of 2004) v. Hatton National Bank***[127] is accordingly overruled and the appeal is dismissed.

Judge of the Supreme Court

S. THURAIRAJA, PC, J.

I have had the advantage of reading the judgements of my learned brothers Nawaz, J. and Samayawardhena, J. in draft. I am in respectful agreement with both the said judgements, as I see no contradiction in principle between the opinions expressed therein. However, my conscience compels me to make some observations of my own, without prejudice to the opinions so propounded by my learned brothers.

Suppose an old man or woman who mortgages the roof over their head and the only property in their names so that a grandchild may have higher education, only to be neglected later on. Suppose an illiterate or a nescient who signs a mortgage bond—some of which are incomprehensible to even the learned men—as a third-party mortgagor, with the most benevolent of intentions, only to be defrauded. What comes of such classes of third-party mortgagors, if *parate execution* were to be effected against them. To this extent, this Court's historical reluctance to vest in the

[126] See Jackson, Robert H. (1944), "Decisional Law & Stare Decisis", American Bar Association Journal, 30 (6), pp 334-335.
[127] (2006) (1) Sri. LR 393.

board of directors such power to exercise *parate execution* in respect of third-party mortgages resonates with me.

Despite the shortcomings of the judgements in ***Ramachandran v. Hatton National Bank***[128] ***and Hatton National Bank v. Jayawardena,***[129] which Nawaz, J. has appraised in great detail, it cannot be gainsaid that said dicta have made a clear delineation and afforded protection to the aforesaid classes of third-party mortgagors who could otherwise be greatly prejudiced. Though common law, too, seeks to protect such persons, I cannot help but see such protection as inadequate.

Be that as it may, I cannot close my mind to sound legal reasoning, like which my learned brothers have set out, merely based on moral sentiment. The foregoing discussion has established, with irrefutably sound logic, why third-party mortgagors must be read within the meaning of *borrower* and I am therefore inclined to agree with the same.

Nonetheless, I invite the relevant authorities to take due cognizance of the concerns I have raised in formulating their policies, so that this decision, which to me appears utilitarian, may not perpetrate undesirable results.

JUDGE OF THE SUPREME COURT

E.A.G.R Amarasekara, J.

I had the opportunity of reading the judgments written by learned brothers Honourable Justice Nawaz and Honourable Justice Samayawardhena in its draft form. I am in respectful agreement with the final conclusion they have reached that, when a loan is granted by a bank on a mortgaged property, irrespective of the fact

[128] [2006] 1 Sri LR 393

[129] [2007] 1 Sri LR 181

whether the loan was released in the name of the mortgagor or not, mortgage property is subject to parate execution in terms of the Act No 4 of 1990 and other similar provision found in other relevant Acts, on which the State Banks which were represented before us rely.

I observe that my brother Judge Honorable Samayawardhena J. and Honourable Nawaz J. have answered the questions of Law No. 1, 3, and 4 in the same manner, namely question No. 1 in the Negative and No. 3 and 4 in the affirmative, for which I also agree. Honourable Samayawardhena J. has considered the 2nd question of law as one that does not arise. Honourable Nawaz J. has answered the 2nd question of law with certain comments. In my view, irrespective of reasons given by the Honourable judges who decided the **Hatton National Bank V Jayawardane (2007) 1 Sri L R 181,** due to the conclusions reached in this case, any property mortgaged to a bank to obtain a loan subject to the provisions of the relevant act is subject to parate execution. Thus, the 2nd question of law has to be answered stating that any director of a corporate entity who mortgage his property for a loan obtained by the corporate entity is a borrower within the meaning of Act No.4 of 1990.

I prefer to add few observations in the matter at hand with regard to the nature of obligations created by a Mortgage. Philip S James in his book '**Introduction to English Law', 12th Edition, by Butterworths,** at page 464 explains the origin of Mortgage as follows;

"*There are two principal forms of security, 'personal' security and 'real' security. Personal security usually requires a person who will stand surety for the debt. Real security requires some form of property; the borrower may, for instances, secure the loan by giving the lender a possession of his watch. If he is lucky, however, the borrower may own land; in this case he will be able to secure the debt upon the land. The best way of securing a debt upon land is by way of mortgage. 'Mortgage' is a strange word. It is said to derive from the ancient practice by which the borrower conveyed the land to the lender with a proviso for reconveyance should the loan be paid by a certain date; if the loan is not paid on that date the land become dead pledge ('mortgage') forever*

to the borrower, for it became the property of the lender. The word survives, although mortgages are no longer created in that way."

Even though the mortgages are created in many ways, it appears that in conventional mortgages, original flavour of lending and borrowing still remains with most of the transactions, especially that are found in transactions similar to matter at hand. Wille in his work "**Mortgage and Pledge in South Affrica"** at page 1 states that "*In its comprehensive sense, mortgage is defined as a right over the property of another which serves to secure an obligation*". At page 8, in describing the nature of the obligation he states as follows;

"*The principal obligation may be of any kind of nature, whether civil, pretorian, natural, or honorary (Marcianus, Dig, 20, 1, 5: Pothierad Pand, 20, 1 note 7). Thus, the obligation may arise from such causes as the lending of money, a dowry, a purchase, a sale, a letting, a hiring, a mandate (ibid, ibid) a suretyship (Ulpian, Dig., 13,7,9, 1), an eviction from sold property (Voet 20, 1, 20), or a judgment (Kadrinka V Lorentz 1914 T P D 32). Maasdorp (Vol. II, p 234) sums up the matter by saying that the original obligation may be any obligation whatsoever, which, in case of non-fulfilment, is capable of being converted into money value by claim of a compensation but as a general rule it is a money debt*"

Halsbury's Laws of England, 5th Edition, Vol. 77 at para 101, page 63 gives the meaning of a mortgage.

"*A mortgage is a disposition of property as security for a debt. It may be effected by a demise or sub demise of land, by a transfer of a chattel, by an assignment of a chose or thing in action, by a charge on any interest in real or personal property or by an agreement to create a charge for securing money or money's worth, the security being redeemable on repayment or discharge of the debt or other obligation. Generally, whenever a disposition of an estate or interest is originally intended as a security for money, whether this intention appears from the deed itself or form any other instrument or from oral evidence, it is considered as mortgage and redeemable*."

If above definitions and descriptions are taken together, it appears mortgagor is bound to pay the money value as a debtor at the end to get his interest in the property. His standing is similar to that of a borrower. This may be the reason for many dictionary meanings identify the mortgagor as a borrower. Counsel for the 1st Intervenient Petitioner has quoted some of them as follows;

Black's Law Dictionary 10th edition

Mortgagor- Someone to whom mortgages property; the mortgage-debtor.

Collins Law Dictionary

Mortgagor- person who borrows money, giving a property as security.

A Dictionary of Law Edited by Jonathan Law, 8th Edition

Mortgage- An interest in property created as a form of security for a loan or payment of debt and terminated on payment of the loan or debt. The borrower, who offers the security, is the mortgagor, the lender, who provides the money, is the mortgagee.

In a banking transaction providing financial facilities such as loans, the bank lends while the other side borrows. If there is a mortgage bond involved, in essence, mortgagor is also a borrower. He may borrow for himself or someone else. If he borrows for someone else, it does not make his standing different. In modern transaction, main credit card holder may get a supplementary card for one of his family members. Merely because he does not get the financial benefits of the supplementary card, he cannot say that he is not the borrower.

In my view, it is inherent in a mortgage bond that the mortgagor stands akin to a borrower even though the financial facility is taken in the name of someone else and in such a situation, he is not a mere guarantor.

In the above backdrop, I wish to look at the some of the provisions of Act No. 4 of 1990. When section 3,4 and 5 of the said Act are read together, the Act authorizes

either sale by public auction and or taking of possession of any property mortgaged in the manner prescribed by the Act whenever any sum is due on the relevant mortgage after passing a resolution and taking steps in accordance with the Act. These sections do not limit the auction or possession to the property mortgaged by the person in whose name the money is lent. To give such meaning a court has to add words to qualify the meaning of the word 'any property' found in said operative sections of the Act.

Section 14 provides for the payment of any excess money after the sale. The section starts with the words "If the mortgaged property is sold". The mortgaged property referred to there cannot be anything other than what is referred to in the aforesaid operative provisions, namely section 3, 4 and 5. This section is there to direct the distribution of the balance money after the sale and it is not meant to decide what should be sold in action or taken in to possession. The main focus in that section is the distribution of excess money. It relates only to what should be done after the sale. Thus, the words in it cannot be used to decide what should be sold and taken into possession under a resolution passed by the board. Since, the said section directs to give the excess money to the borrower or to persons who can claim under the borrower, in **Ramachandran V H. N. B. (2006) 1 Sri L R 393**, the majority of the bench considered it as an absurdity when the borrower is not the mortgagor. It must be noted that to mortgage one must have title, right or some interest in the property that can be mortgaged to secure the loan or money value of the transaction. As I explained in conventional mortgages the mortgagor stands similar to a debtor or borrower. In my view, the borrower in the said section means none other than the mortgagor who defaulted irrespective of the fact whether he receives the loan in his name or not.

In the **Ramachandran case**, it appears that it was the view of the majority that allowing parate execution of the property would deprive the mortgagor access to our courts to get his matter adjudicated through courts. It is true in a normal mortgage action the Bank should have commenced litigation by filing the action. It

must be noted that the default is generally proved using records of the banks which are considered as prima facie proof which may be hardly challenged only by cross examination. Now the position has changed and the Banks have given the authority to pass a resolution using such prima facie evidence but still I do not see any hindrance to access to justice and challenge such resolution prior to the entering of certificate of sale. The difference would be that it is now the alleged defaulter or the mortgagor who has to initiate proceedings.

The learned judges who heard the said **Ramachandran case** and the said **Jayawardena case** mentioned above would have contributed their best to solve the issues presented before them as per the submissions available before them. They may not have foreseen the other issues that may arise with such interpretations in future. Present interpretation, that exist after the said **Ramachandran case** has given an opportunity to many defaulters to annul the intention of the legislature expressed by bringing these legislations. For example, a defaulter who may get his name registered in CRIB, and unable to get further loans, may transfer his property to one of his family members name and get further loans through one of his colleagues while getting his family member to sign the mortgage. The said colleague does not take interest in paying as it is not his property at stake and the family member can take up the position that it is third party mortgage. The original defaulter may further file an action stating that he did not mean to transfer the title but it was a trust.

The number of cases on similar issues that have been filed in our courts to annul the resolutions on similar grounds may give an indication that the interpretation given in the **Ramachandran case** now serves the defaulters defeating the intention of the legislature expressed through passing the the Act No.4 of 1990 and similar laws, which may not have been foreseen by the learned Judges who decided **Ramachandran case**. This seems to be one of the reasons that the House of Lords, to some extent deviate from applying horizontal application of the Stare Decisis principle as there should be a balance between the need to develop law with the

passage of time and its consistency. Thus, with all due respect to the judges who decided **Ramachandran case** and **Jayawardena case**, I approve the departure from those decisions.

Judge of the Supreme Court

K. Kumudini Wickremasinghe, J

I have perused the draft judgments of both my learned brothers Hon. Justice A.H.M.D. Nawaz and Hon. Justice Mahinda Samayawardhena. Although different approaches have been used in the analysis, I am agreeable to the final outcome of both draft judgements.

The questions of law on which leave has been granted in this case are as follows:

1. Did the CHC err in law in determining that the 2nd Plaintiff is a borrower within the meaning of the Recovery of Loans by Bank Special Provisions Act.

2. Is the Ratio in the case HNB v Jayawardhena [2007] 1 S L R that the director of a corporate entity who mortgages his property for a loan obtained by that corporate entity is a borrower within the meaning of the Act.

3. Has the Board of Directors have the power to by resolution to sell by public auction any property mortgaged to the bank as security for any loan in respect of which default has been made in order to recover the whole of such unpaid portion of such loan together with the money and costs recoverable under Section 13 of the said Act.

4. Does any property mortgaged to the bank of Ceylon or the Peoples bank as security for any loan as the case may be, in respect of which default has been made within the meaning of Bank of Ceylon Ordinance No. 53 of 1938 as amended and the

Peoples bank Act no 29 of 1961 liable to be auctioned in terms of the respective acts referred to

When considering the analysis of both draft judgments, I believe that Ramachandran and Others v Hatton National Bank [2006] 1 Sri L.R. 393 is considered as an important jurisprudence in our country and that the salient principles set out by such a case must be given its due recognition in law and this court must take cognisance of the importance of this judgment in order to avert injustice in the future by overruling the same and the matter must be addressed in a diplomatic manner.

The highlight of the decision of Ramachandran and Others v Hatton National Bank [2006] 1 Sri L.R. 393 is that "*the provision of the Recovery of Loans (Special Provisions) Act No 4 of 1990 will not apply in respect of a mortgage given by a guarantor or any person other than a borrower to whom a loan has been granted by a Bank or the economic development of Sri Lanka*"

Considering the facts of this appeal I am in full agreement with my Learned brothers that the interpretation that needs to be given Recovery of Loans (Special Provisions) Act No 4 of 1990 by this court is that the Act applies to any property mortgaged to the bank as security for any loan in respect of which default has been made irrespective of whether the mortgagor is the borrower or a third party and not the ratio as of the above mentioned case.

However, we must keep in mind that prior to the decision of Ramachandran and Others v Hatton National Bank [2006] 1 Sri L.R. 393, where the majority decision gave a restrictive interpretation of the term borrower and declared invalid *parate* execution of the third party mortgages, innocent third party borrowers had no protection against *parate* executions under the Recovery of Loans (Special Provisions) Act No 4 of 1990 and we must ensure that innocent third party borrowers can still avail this avenue of justice in future.

In order to ensure that justice is done by this court I believe that we only need to analyse the relevant legal provisions, address the essential points, the lacunas and shortcomings of the abovementioned judgement, as it is better to articulate our arguments legally and limit it to so.

I have had the advantage of reading the observations made by Hon. Justice E.A.G.R. Amarasekara and I agree with his observation that "**the 2nd question of law has to be answered stating that any director of a corporate entity who mortgaged his property for a loan obtained by the corporate entity is a borrower within the meaning of Act No.4 of 1990**." Since the 1st question of law is answered in the positive it is only logical that the 2nd question of law, namely that the director of a corporate entity who mortgages his property for a loan obtained by that corporate entity is a borrower within the meaning of the Act is also answered in the positive. The Ratio in the case of HNB v Jayawardhena [2007] 1 S L R is that the veil of incorporation can be lifted in certain instances, excerpts of the case are set out below;

"*To pierce the corporate veil is an expression that I would reserve for treating the rights or liabilities or activities of a company as the rights or liabilities or activities of its shareholders. To lift the corporate veil or look behind it, on the other hand, should mean to have regard to the shareholding in a company for some legal purpose.*

As far as this case is concerned, it is quite obvious that the 1st and 2nd respondents, being directors of Nalin Enterprises Pvt. Ltd. benefited from the facilities made available to the said company by the petitioner bank, and to that extent they cannot claim the mortgages which secured the said facilities fall within the category of " third party mortgages" as contemplated in the majority judgments of this court in Ramachandra v. Hatton National Bank. The 1st and 2nd Plaintiffs are integrated to Nalin Enterprises Ltd. and when Nalin Enterprises sought to obtain facilities from the petitioner bank, the borrowers are in fact the said Nalin Enterprises and 1st and 2nd Plaintiffs. It would be an exercise totally illogical to seek to differentiate the 1st and

2nd Plaintiffs as 3rd party mortgages within the meaning of Ramachandra v. Hatton National Bank.."

Considering the analysis by Hon. Justice A.H.M.D. Nawaz and the observations by Hon. Justice E.A.G.R. Amarasekara, our conclusion should be that even in instances where the directors of a company are the third party mortgagors they will not be able to seek redress under the case of Ramachandran and Others v Hatton National Bank [2006] 1 Sri L.R. 393 as the impact of our judgement is that any third party borrower is liable for *parate* execution under the provisions of the Act, regardless of him being a director of the company or not and as such the veil of incorporation is automatically lifted.

Based on both draft judgements, I am of the view that Hon. Justice A.H.M.D. Nawaz has made a rather thorough analysis of the law and addressed all 4 questions of law on which leave has been granted comprehensively, whilst Hon. Justice Samayawardhena has considered that the 2nd question of law and concluded that it does not arise. I believe that the 2nd question of law should be addressed in order avoid confusion, owing to which I am more inclined to agree with the draft of Hon. Justice A.H.M.D. Nawaz, subject to the above mentioned observations.

Judge of the Supreme Court