

IN THE DISTRICT COURT OF COLOMBO

**NIHAL SRI AMERESEKERE of
No.167/4, Sri Vipulasena Mawatha,
Colombo 10.**

PLAINTIFF

No.3231/Sp1.

- VS -

**HOTEL DEVELOPERS (LANKA) LIMITED, formerly known
as LANKA JAPAN HOTELS LIMITED, and of No. 16
Alfred Place, Colombo 3.**

DEFENDANT

WHEREAS by Motion dated 14th February'94 we moved that the Court be pleased to direct the Defendant to answer the Interrogatories as per Section 100 of the Civil Procedure Code and upon being supported, the Court issued Notice on the Defendant and the Defendant having appeared on 28th February'94, the Court fixed the matter for Inquiry on 16th June'94

AND WHEREAS the Defendant on appearance required explanations in respect of the several matters set out in the aforesaid Motion, for the Defendant to take further steps thereafter, and the Plaintiff having agreed to so provide, the Plaintiff sets out hereinbelow the explanations in respect of the aforesaid Motion in reference to the Paragraphs referred to therein as follows;

Paragraph a). *The Answers to the following Interrogatories have been deliberately refused and/or withheld - Nos. 4(iv), 7(iv) (v) (vii) (ix) (x), 8(i) (ii) (iv) (v) (vii), 10(i), 13(i), 16(ii) (iii) (iv), 17(i) (ii) (iii), 18(ix), 19(ii), 20(x) (xi), 24(vii), 25(ii), 26(i), 27(ii), 28(vii) (viii) (x), 30(ii) (iii) (iv) (viii) (ix), 32(v), 47(iv) (v), 48(x), 56(i), 59(iii), 61(ii), 62.*

These questions have been either not answered or answers thereto deliberately withheld on the fiction that the Defendant is "unaware". This cannot be.

- e.g. 1) Interrogatory No.4(iv) relates to Letter dated 19.11.'90 written by the Affirmant, who has sworn the Affidavit in reply to these very Interrogatories himself. His Answer on the matter of his own letter is that he is "unaware" !
- e.g. 2) Interrogatories Nos.7(v),(vii),(ix),(x) refer to the Board Meeting had on 22.11.'90 and having admitted that the Annual Accounts of 31.03.'90 was adopted by the Board of Directors at the said Board Meeting and having admitted Interrogatory No. 7 (vi) that the Defendant's Auditors were present at the said Board Meeting, and further having admitted Interrogatory 7(viii) on the conflicting interest of Mitsui/Taisei, vis-a-vis the Defendant, how could the Affirmant have ever stated that *he was unaware of the other matters*, particularly of the conduct of Director K.N. Choksy, that transpired at the very same Board Meeting, in relation to the very same matter of the said Annual Accounts ? *Additionally Director, K.N. Choksy could file Affidavit.*

- e.g. 3) Interrogatory No.8(iv) - the Affirmant has falsely stated that *he is unaware of the terms and conditions of the Enjoining Order*, that had been previously issued by this Court in Action No. 3155/Sp1, and served on the Defendant. *How could he be unaware and deny the terms and conditions of such Enjoining Order ?*
- e.g. 4) Interrogatories Nos.10(i),(ii) - again the Affirmant states *unawareness* of matters raised by him in his own admitted Letters dated 19.11.'90 and 20.11.'90.
- e.g. 5) Interrogatory No.18(i) - the Affirmant *evades answering* the fact that the Defendant in its Answer filed in D.C. Colombo Action No. 3155/Sp1 had specifically admitted *"that there is no account or reconciled inventory of the furnishings, fittings and equipment supplied by Mitsui."* Why ?
- e.g. 6) Interrogatories Nos.24 (vii),(viii) - the Affirmant falsely states that *he is unaware* of the profitability and cashflow forecasts submitted by Mitsui and tabled at the Board Meetings of the Defendant. *How could it ever be ?* Additionally Mitsui representative Director on the Defendant's Board could file Affidavit to answer.
- e.g. 7) Interrogatories Nos.25(ii),32(v) which refer to K.N. Choksy's Letter dated 08.08.'88 to the Board of Directors of the Defendant, the Affirmant *evades answering* these specific Interrogatories. Why ? Additionally Director, K.N. Choksy could file Affidavit to answer.
- e.g. 8) Interrogatories Nos. 30(viii),(ix) - the Affirmant has avoided answering to the fact that the Defendant had not objected to the issuance of the Interim Injunction against the Defendant in D.C. Colombo Action No. 3155/Sp1 and nor had appealed against it. Why ?
- e.g. 9) Interrogatories Nos.50(i) to (xiv) - the Affirmant has evaded answering these specific Interrogatories, which refer to *the payments made abroad of a large scale of foreign exchange by Mitsui, for obtaining concessions from the Government of Sri Lanka.* Why ? Additionally these Interrogatories could be answered through an Affidavit of the Mitsui representative, who is a Director of the Defendant and an Affidavit of Director, K.N. Choksy, particularly on Interrogatories Nos. 50(xi),(xii).
- e.g. 10) Interrogatory No.56 (i) - the Affirmant has avoided answering this specific Interrogatory in relation to the Japanese Architects' *"Medical Certificates"* type Completion of Final Certificates and the matter of the surreptitiously introduced and suppressed amended Architectural Plans. Why ?
- e.g. 11) Interrogatory No. 62 - the Affirmant states *unawareness* of K.N. Choksy's conduct at the Board of Directors of the Defendant. *How and why ?* The Defendant should answer.

Paragraph b).

The Answers to the following Interrogatories have been vague and/or evasive - Nos. 5(i) (ii), 9(i), 12(i) (ii) (iii), 18(i), 19(i), 20(iv) (v) (vi) (vii) (viii) (ix) (xii) (xiii) (xiv), 22(ii), 25(i) (iii), 32(i), 33(ii) (iii), 34(i) (vii) (viii) (ix), 35(i) (ii) (iii) (iv), 36(i) (ii) (iii) (iv), 42(i) (ii) (iii) (iv) (v) (vi) (vii), 43(i), 44, 47(ii), 48(i) (ii) (ix), 49(iii), 50(i) (ii) (iii) (iv) (v) (vi) (vii) (viii) (ix) (x) (xi) (xii) (xiii) (xiv), 51(i), 55(ii), 60(v).

- e.g. 1) Interrogatories Nos. 20(vi), (vii), (viii), (ix), (xii), (xiv) which refer to the unauthorisedly and surreptitiously introduced Amended Plans; the Affirmant whilst admitting such Amended Plans, states unawareness on matters relating to the authority for its preparation and the violation of the relevant contracts and has avoided answering Interrogatory 20(xiv) on the written admission by Mitsui/Taisei and the Japanese Architects that the Colombo Hilton Hotel had in fact 2 Storeys short.
- e.g. 2) Interrogatories Nos. 51 (ii) and 59 (iii) - the Affirmant has evaded answering on the strictures made by the Learned District Judge of this Court in issuing the Interim Injunctions in Action No. 3155/Spl, on the conduct of the Defendant and the absence of an acceptable basis to make payments to Mitsui/Taisei.
- e.g. 3) Interrogatories Nos. 55(ii) & 60(v) - the Affirmant evades answering the questions in relation to the Owner's copy of the Original Architectural Plans, which is missing and the stipulations made by the Defendant in its Prospectus. Why ?

Paragraph c).

The Answers to the following Interrogatories are insufficient - Nos. 2(i) (ii) (iii), 3(i) (ii), 4(ii) (v), 8(viii) (x), 9(ii), 13(ii) (iii) (iv), 15(i) (iii) (iv) (v) (vi), 16(i), 22(i) (iii) 23(i) (ii), 24(x), 27(i) (v), 28(i) (ii) (iii) (iv) (v), 30(i) (vii), 32(vi) (vii) 33(i), 34(ii) (iii) (v), 48(vi) (vii) (viii), 49(iv), 51(ii) (iii), 56(ii), 57(i) (ii).

- e.g. 1) Interrogatories Nos. 3(i), (ii) - the Affirmant admits Plaintiff's Memorandum but evades admitting the contents therein. Why ?
- e.g. 2) Interrogatories Nos. 8 (viii), (x) - whilst admitting the Plaintiff's Memorandum the Affirmant evades admitting the contents therein. Why ?
- e.g. 3) Interrogatory No. 9(ii) - the Affirmant avoids answering as to whether clarifications and explanations were given by the Board of Directors of the Defendant, on the discrepancies raised by the Plaintiff. Why ?
- e.g. 4) Interrogatories Nos. 15(i), (vi) - the Affirmant avoids answering specific Interrogatories, particularly in relation to the insolvency and bankruptcy of the Defendant. Why ?
- e.g. 5) Interrogatories Nos. 32(vi), (vii) & 33(i) - the Affirmant falsely states that an independent examination has been carried out, whilst in this Court the Defendant's Counsel, Shibly Aziz P.C., the then Deputy Solicitor General opposed an Application by the Plaintiff for a physical inspection and verification, on the grounds that such an inspection and verification would affect the interests of Mitsui/Taisei, whose interests however were in conflict with those of the Defendant. How and why ?
- e.g. 6) Interrogatory No. 56(ii) - the Affirmant has deliberately avoided answering this Interrogatory which specifically refers to Specified Bills of Quantities and Final Measurements. Why?

Paragraph d)

- 1) The Answers to the following Interrogatories could have been answered only by the Board of Directors/relevant Director but have been answered by the said General Manager and accordingly is hearsay - Nos. 6(i) (iii), 8(vi), 15(ii) (vii), 24(i) (vii) (ix), 61(ii).

- ii) **The Answers to the following Interrogatories which could have been answered by the Board of Directors/relevant Director have been deliberately refused and/or withheld - Nos. 11(i) (ii) (iii) (iv) (v) (vi), 19(iii), 21(i) (ii) (iii) (iv), 26(ii) (iii) (iv) (v) (vi), 32(iii) (iv), 34(iv) (vi), 36(v) (vi), 37, 38, 39, 40(i) (ii) (iii) (iv) (v) (vi) (viii), 41, 43(ii), 45(iv) (v) (vi) (vii) (viii) (x), 46(i) (ii) (iii) (iv) (v) (vi), 47(iii) (vi) (vii) (viii) (ix) (x), 48(iii) (iv) (v), 51(ii) (iii) (iv), 52(i) (ii) (iii) (iv) (v) (vi), 53(i) (ii) (iii) (iv), 54(i) (ii), 58(i) (ii) 59(i) (ii), 60(i) (ii) (iii) (iv), 61(iii).**

These Interrogatories should have been answered through Affidavits of the Directors of the Defendant.

- e.g. 1) **Interrogatories Nos.24(i),(vii),(ix) relating to the Profitability & Cashflow Forecast prepared by Mitsui, should have been answered by Mitsui's representative, who is a Director of the Defendant.**
- e.g. 2) **Interrogatory No.41 refers to the admission made by Cornel L. Perera, Chairman/Managing Director of the Defendant to K. Shanmugalingam, the then Addl. Deputy Secretary Treasury and Director of the Defendant, *on the compromises made on the construction of Colombo Hilton Hotel*. The Defendant should have answered through Affidavits of its Chairman & Managing Director and Director, K. Shanmugalingam and similarly also Interrogatories Nos.40(i) - 40 (viii), which refer to the discussions had at the Ministry of Finance by the Defendant and Mitsui/Taisei, should have been answered through an Affidavit of its Director K. Shanmugalingam, who is aware of the same.**
- e.g. 3) **Interrogatory No.34(iv) - the Affirmant conveniently states that he is unaware of discussions and deliberations by the Defendant's Board of Directors, whereas in answer to Interrogatories 34 (vii) to (ix) and 35 (i) & (ii), the Affirmant states that he is aware as to what the Defendant's Board "thought" on the matters referred to in such Interrogatories.**
- e.g. 4) **Interrogatories Nos.26(iii),(iv),(v),(vi) being on the conduct and actions of Government Nominee Director K. Shanmugalingam, then Addl. Deputy Secretary Treasury, the Defendant should have answered such Interrogatories through an Affidavit of its Director K. Shanmugalingam.**

Paragraph e)

- i) **The Answers to the following Interrogatories which relate to the Audited Accounts as at 31.03.'90, being the subject matter of this Action and enjoined by Court, are required to be asked from the Auditors of the Defendant - Nos. 5(ii), 18(iii) (iv) (vi) (vii) (viii), 19(iii), 28(vi) (vii) (viii) (ix), 61(i).**
- ii) **The Answers to the following Interrogatories which relate to the Audited Accounts as at 31.03.'90, being the subject matter of this Action, has however been answered by the said General Manager -Nos. 8(vii),10(ii) 21(i) (ii) (iii) (iv).**

The Defendant is entitled to have and should have had the scope and extent of the Audit programme and verifications carried out by its Auditors and accordingly should have answered these Interrogatories;

- e.g. 1) Interrogatories Nos. 18(ii), (iv), (vi) refer to stipulations under the Companies Act No. 17 of 1982 for the maintenance of proper books and records by the Defendant. The Defendant cannot say that these are matters on which the Defendant cannot answer, and that these are matters for the Auditors.

On the other hand to some Interrogatories, the Affirmant has proffered answers on behalf of the Auditors.

- e.g. 2) In Interrogatory No. 10(ii) the Affirmant states that *he is not aware of the failure* by the Auditors to report on the specific matters required of them by the Affirmant himself by his own Letters dated 19.11.'90 and 20.11.'90, whereas in answer to Interrogatory 2 (i) the Affirmant admits that a report as had been called for from the Auditors had not been received from the Auditors.

- e.g. 3) In Interrogatories 21(i), (ii), (iii), whilst stating that these are matters for the Auditors to answer, the Affirmant has however *falsely denied* the contents of the said Interrogatories. *How?*

reiterate the paragraph in our aforesaid Motion on the incompetence of the Affirmant to answer on behalf of the Defendant. Furthermore, we draw attention to the Affidavit dated 31st May '91 of the Affirmant filed in this Action, particularly to paragraph 8(b) therein, wherein it is affirmed that the Defendant filed Objections against the issuance of the Interim Injunction against it in the connected Action No. 3155/Sp1 of this Court, to deliberately mislead Court, whereas, *the Defendant had not filed any Objections nor had sought to Appeal against the Interim Injunction issued against it in such Action. Accordingly, the Affirmant is unreliable.*

The Supreme Court has now upheld the Interim Injunctions in the said Action No. 3155/Sp1, that had been issued by this Court to prevent the devious syphoning of a large scale of foreign exchange from this country as this Court had observed, further having observed that there was no acceptable basis for making payments to Mitsui/Taisei. The Supreme Court in handing down its Judgment observed that the Plaintiff has established a serious question and a prima-facie case of fraud, not frivolous, vexatious or fanciful, but with real prospect of success even in the light of the defences raised in the objections, pleadings and submissions of the Japanese Defendants. The Supreme Court further observed in its Judgment that the Directors including the Government representatives on the Board will not assist or are helpless to intervene and that it might be pointed out that this matter could not entirely be a matter of indifference to the Government.

The Defendant is a Public Listed Company controlled by the Government, with the Government owning 64% of its Shareholding. The Plaintiff's Action as upheld by the Supreme Court is in the very interest of the Defendant. The State Guarantees injunctioned as a consequence of the Plaintiff's aforesaid Action is of national economic proportions, amounting to about Us \$ 220.0 Mn. i.e. 10.8 Billion.

In the given circumstances of Government's ownership, the Hon. Attorney General is Counsel for the Defendant. In this connection we wish to quote from the Bar Association Law Journal on the Centenary of the institution of the Attorney General; vide 1984 Volume 1 Part IV Pages 1 - 4, and quote therefrom:

" By convention, any citizen is free to complain to the Attorney-General of injustices by administrative officials or neglect of public duties. The Attorney-General is competent to call for reports in such cases and to arrange for redress administratively in appropriate cases so that aggrieved persons will be saved the trouble of litigation which can be both expensive and protracted. This particular role of the Attorney-General is of importance from the point of view of safeguarding the rights of the ordinary citizen as against State officers, exercising authority and powers of the State."

" In civil proceedings also, the Attorney-General's function is to assist the Court to reach the correct decision and not to endeavour to somehow obtain a judgment in favour of the State. When appropriate, it is his duty to promote conciliation of disputes between government departments and citizens if that would meet the ends of justice."

" In advising the government, he has to form his opinion after considering the legal principles as well as the practical effect of his advice. This does not mean that his advice should besides being correct be some-how favourable to the government. Thus where any question in respect of which his advice is sought has arisen out of political controversy or has political overtones, his opinion should be objective and fair to the parties affected. No doubt he must have due regard to the desire of any government to realise its legitimate aspirations and the political problems Ministers have to contend with. However, it is his duty to advise the Government to act within the law in implementing its policies."

" No government will lightly disregard the opinion of the Attorney-General. If it did so, that may lead to wrong decisions which would in turn may bring discredit to the government in the public eye."

It is pertinent to point out, that at the Settlement discussions had, as had been intimated to this Court previously, before the Hon. Attorney General, it was conceded that the Plaintiff's position had been vindicated, and accordingly Settlement Agreements were finalised by the Hon. Attorney General: However these were prevented from being executed due to political pressures and influences by interested and affected parties.

ucidation of honest and truthful answers to these Interrogatories, without suppression and cover-up, is essential to speedily establish the facts of this Case and assist Court in the proper adjudication to reach a correct decision as referred to hereinbefore. The Hon. Attorney General should act to safeguard the interests of the Defendant and the public of this Country.

Colombo, 2nd May 1994

Attorneys-at-law for Plaintiff

N O T I C E

IN THE DISTRICT COURT OF COLOMBO

NIHAL SRI AMERESEKERE of
No.167/4, Sri Vipulasena Mawatha,
Colombo 10.

PLAINTIFF

No.3231/Sp1.

- VS -

HOTEL DEVELOPERS (LANKA) LIMITED, formerly known
as LANKA JAPAN HOTELS LIMITED, and of No. 16 Alfred
Place, Colombo 3 -
PRESENTLY OF 1000, ECHELON SQUARE, COLOMBO 1.

DEFENDANT

TO THE DEFENDANT ABOVENAMED

WHEREAS the Plaintiff abovenamed by his Motion dated the 14th day of February 1994 applied to this Court for an order under Section 100 of the Civil Procedure Code as contained therein

AND WHEREAS this Court by its Order dated 16th February 1994 directed that notice of such application be issued and given to you

AND THEREFORE, you are hereby required to appear before this Court on the 28th day of February 1994 at 8.30 in the forenoon and show cause, if any as to why the application of the Plaintiff should not be allowed.

True Copy of the Plaintiff's said Motion dated 14.02.'94 is annexed hereto

BY ORDER OF COURT

This 21st day of February 1994

REGISTRAR

Prepared by us:



Attorneys-at-Law for Plaintiff-Petitioner