

Hilton Hotel & the Government

Brief Synopsis

- ❑ Hilton Hotel, Colombo, Sri Lanka (**Hilton Hotel**), was designed and constructed by a 'Consortium' comprising, Mitsui & Co. Ltd., Taisei Corporation (**Mitsui & Taisei**) and Kanko Kikaku Sekkeisha Yozo Shibata & Associates (**KKS**), Architects, all of Japan, on a 'turn-key fixed price' basis, with Hilton International, US, providing technical assistance services.
- ❑ Hilton Hotel, is owned by a listed public company, Hotel Developers (Lanka) Ltd., (**HDL**), in which the Government of Sri Lanka (**Government**) has a 64% Shareholding, and in addition, the Government has issued Guarantees to Mitsui & Taisei, for the 'turn-key fixed price', which was essentially provided by way of a Loan to HDL by Mitsui & Taisei, on the collateral of such Guarantees issued by the Government.
- ❑ Disclosing that in the construction of the Hilton Hotel, a fraud had been perpetrated on HDL and the Government, as Guarantor, in circumstances of 'wrong-doer control' by Directors of HDL, Nihal Sri Ameresekere, who was a Subscriber, and promoter Director of HDL, as a Shareholder of HDL, who held less than '0.25 % Shareholding' of HDL, instituted the very first derivative action in law in Sri Lanka, in the District Court of Colombo in Case No. 3155/Special, in the right and on behalf of HDL, in its interest and for its benefit.
- ❑ Upon support of the averments in the Complaint in District Court Colombo Case No. 3155/Special, the District Court issued enjoining orders, preventing any payments to Mitsui & Taisei by HDL and/or the Government, as Guarantor, and issued notices of interim injunctions.
- ❑ The then Minister of State for Defence & General Secretary, United National Party, then in Government, concurred with and supported the action taken by Nihal Sri Ameresekere, raising the matter before the Cabinet of Ministers.
- ❑ Present Leader of the Opposition, a then influential Government Minister, endorsed the said action, in that the country's foreign reserves were perilously low at that time, and the demand on the Government Guarantees made by Mitsui & Taisei, was thwarted by such action, preventing the precipitation of an 'international cross-default' on Sri Lanka's foreign borrowings !
- ❑ Then President of Sri Lanka directed then Secretary, Ministry of Finance, to take warranted action, questioning, as to why it was left for a minority Shareholder to take action to prevent public funds being utilised to pay for a fraudulent deal, further asserting, that no Government in Japan would give comfort to Japanese companies involved in frauds abroad.
- ❑ Since the Directors of HDL and its Auditors, acting in concert, endeavoured to adopt the HDL Annual Accounts to a date prior to the institution of the above derivative action in law, but after the issuance of the above enjoining orders by the District Court, Nihal Sri Ameresekere instituted a further derivative action in law, in the District Court of Colombo in Case No. 3231/Special, upon support of the averments of which Complaint, the District Court issued enjoining order, restraining the adoption of the said Annual Accounts of HDL, and issued notice of interim injunction.
- ❑ Thereafter, the District Court, upon Inquiry, issued interim injunctions, preventing any payments to Mitsui & Taisei by HDL and/or the Government, as Guarantor.

- ❑ The District Court in its Order, *inter-alia*, observed that interim injunctions were issued to ‘prevent the devious siphoning out of a large scale of foreign exchange from the country’, and that ‘ordinarily a company which has to make payments, will check and verify the correctness, whereas in this instance, interested influential Directors, had intervened, to prevent the correct examination, and had endeavoured to somehow make payments’.
- ❑ One such party, who so intervened, being a President’s Counsel and a Member of Parliament, and subsequently the Minister of Constitutional Affairs, and later ironically appointed, as the Minister of Finance & Planning of the country, by then Prime Minister, present Leader of the Opposition and Vice Chairman, International Democrat Union !
- ❑ The then Hon. Attorney General, representing HDL, having intimated to Nihal Sri Ameresekere and his Counsel, that he would not oppose the issuance of interim injunctions, subsequently, though present during the Inquiry into the matter of the interim injunctions in the District Court, did not participate therein, as per such assurance given.
- ❑ Hence, one of the interim injunctions, which was against HDL, was issued without any Objection thereto by the Hon. Attorney General, who represented HDL, which was majority owned and controlled by the Government and on behalf of which, the Government had issued Guarantees to Mitsui & Taisei for the construction of the Hilton Hotel.
- ❑ Subsequently, on Applications made by Mitsui & Taisei and KKS Architects, the Court of Appeal granted Leave to Appeal, consequent to, the succeeding Hon. Attorney-General, representing HDL, having taken a ‘diametrically opposite stance’ to the earlier stance, acting in concert with some of the ‘wrong-doer’ Directors, having been permitted, that too, without any papers having been filed in the Court of Appeal, to wrongfully and unlawfully intervene, in the said Leave to Appeal Applications of Mitsui & Taisei and KKS Architects, even though they had not participated in the District Court Inquiry.
- ❑ Court of Appeal, having permitted the participation of the said other parties, who could not have been so permitted to have participated, granted Leave to Appeal on the issue, as to whether there was a right to bring such derivative action in law in Sri Lanka,
- ❑ One of such parties, a Director / Defendant, being a President’s Counsel and a Member of Parliament, subsequently the Minister of Constitutional Affairs, and later ironically appointed, as the Minister of Finance & Planning of the country, by then Prime Minister, present Leader of the Opposition and Vice Chairman, International Democrat Union, having not participated in District Court Inquiry, with deliberate intent to mislead the Court of Appeal, asserted that there was ‘no right to bring such derivative action in law in Sri Lanka’.
- ❑ He thereby acted contrary to the interest of the country, in a futile attempt to have the District Court Colombo Case No. 3155/Special dismissed, to facilitate the full payment in foreign exchange of monies fraudulently claimed by Mitsui & Taisei from the Government.
- ❑ Countering such assertion, Counsel of Nihal Sri Ameresekere, contended that under an in terms of the Civil Law Ordinance, that the English Law was applicable in such an instance.

- ❑ Thereupon, Special Leave to Appeal was sought by Nihal Sri Ameresekere from the Supreme Court, on such perverse Order granting Leave to Appeal by the Court of Appeal, which 'strangely' permitted, without any papers having been filed, other parties who had not participated in the District Court, to have participated in Appeal filed by Mitsui & Taisei and KKS, in the Court of Appeal.
- ❑ Consequently, the Supreme Court having refused to hear the said other parties, i.e. the then Hon. Attorney General, representing HDL, and the Counsel representing the said 'wrong-doer' Directors, delivered a landmark judgment, holding that a derivative action in law could be instituted in Sri Lanka, in terms of the Civil Law Ordinance, whereby English Law was applicable in Sri Lanka, upholding the stand taken by the Counsel of Nihal Sri Ameresekere.
- ❑ Upon Hearing, the Supreme Court upheld the District Court Colombo Case No. 3155/Special, as the very first derivative action in law in Sri Lanka, as a serious *prima-facie* case, with 'real and not fanciful prospects of success, even in the light of the defences', and affirmed the interim injunctions issued by the District Court, preventing any payments to Mitsui & Taisei by HDL and/or the Government, as Guarantor, *inter-alia*, observing that 'in the given circumstances, the Government could not be indifferent'.
- ❑ In the meanwhile, in the District Court Colombo Case No. 3155/Special, HDL, Mitsui & Taisei and the other Defendants having been unable to answer 'interrogatories' served through Court, the District Court consequently ordered that the 'interrogatories' be answered, in terms of Section 100 of the Civil Procedure Code, which were unanswered.
- ❑ Similarly, in District Court Colombo Case No. 3231/Special, HDL having been unable to answer 'interrogatories' served through Court, stating to Court, that only the Auditors of HDL could answer the 'interrogatories', an Application was consequently made to add the Auditors, as Defendants, together with an Application for a similar Order by Court for the answer of the 'interrogatories', which were unanswered.
- ❑ In the face of the said 'interrogatories', then Secretary to the Treasury and then Hon. Attorney General, intervened to bring about a settlement, 'holding out' that it was due to pressures exerted by the Japanese Government, a 'major aid provider' to Sri Lanka.
- ❑ Whereas in actual fact, pressures were exerted by socio-politically influential, interested and affected parties, particularly those, whose wrongful and unlawful conduct actions were exposed in the said two Cases, intervening even through the Presidents of Sri Lanka, spitefully endeavouring to cause jeopardy to the professional practice of Nihal Sri Ameresekere, to pressurise him into withdrawing the said two Cases, instituted in public interest.
- ❑ USAID, which ironically has recently funded an 'Anti - Corruption Plan', with much 'fanfare', was one such party, which succumbed to such undue influences and endeavoured to pressurise Nihal Sri Ameresekere to settle and withdraw the said two Cases, but curiously did not take up the cogent issue of prosecution of the wrong-doers, on a fraud perpetrated on the Government of Sri Lanka !
- ❑ Subsequently, settlement agreements were finalised by the Hon. Attorney General, and the then Secretary to the Treasury, with Mitsui & Taisei, upon the insistence of Nihal Sri Ameresekere, writing off Japanese Yen 17,586 Mn., in June 1995, then equivalent to US \$ 207 Mn. / SL Rs. 10,200 Mn ; and in the given circumstances, for the Government, to own the Land, with the absolute majority ownership of HDL.

- ❑ Consequently, District Court Colombo Cases Nos. 3155/Special and 3231/Special were settled and withdrawn, on the premise of such settlement agreements, with the said two Cases having been transferred to the Commercial High Court, consequent to the High Court of the Provinces (Special Provisions) Act No. 10 of 1996, and Decrees were entered by the Commercial High Court on such premise.
- ❑ The Decrees included an Order, that the Auditors of HDL be removed, and new Auditors be appointed to re-state the Annual Accounts of HDL, which had been 'estopped' in District Court Colombo Case No. 3231/Special.
- ❑ One of the conditions, included in the settlement agreements finalised by the Hon. Attorney General was, that in the circumstances of deliberate neglect of statutory duties, obligations and responsibilities on their part, the Government would take action against the concerned Members of the Securities & Exchange Commission of Sri Lanka (SEC) and the Directors of the Colombo Stock Exchange, in relation to the Complaints, which had been made by Nihal Sri Ameresekere, pertaining to the conduct and actions of HDL, a listed public Company.
- ❑ The said Complaints were mandated to be investigated and acted upon, under and in terms of Sections 46 and 51 of the Securities & Exchange Commission of Sri Lanka Act No. 36 of 1987, amended by Act No. 26 of 1991, which provided for investigations and actions into the professional conduct or activities of listed public companies.
- ❑ The foregoing 'condition' concerning the inaction on the part of the Members of the SEC, affected socio-politically influential persons, which resulted in they deliberately and intentionally, spitefully and maliciously, precipitating a baseless 'perverse controversy'.
- ❑ One of the affected parties, then Minister of Justice & Constitutional Affairs & Deputy Minister of Finance, as a former Member of the SEC, wrongfully and unlawfully intervened to purport to 'suspend' the implementation of the settlement ; 'knowingly making false statements' in the public domain.
- ❑ This also precipitated vexatious litigations, based upon such 'perverse controversy', which was essentially precipitated by him, at the behest of other interested and affected parties, including ironically, a Director General of SEC !
- ❑ In such circumstances, the succeeding Hon. Attorney General and the then Secretary to the Treasury, intervened to 'mitigate', to have the said 'condition excluded', since it personally affected and caused humiliation to their 'immediate superior', the then Minister of Justice & Constitutional Affairs & Deputy Minister of Finance, prior to giving effect to the settlement.
- ❑ The wrongful and unlawful intervention to so 'suspend' the implementation of the settlement, led to Nihal Sri Ameresekere instituting two Cases against the said Minister of Justice & Constitutional Affairs, claiming damages for himself and HDL.
- ❑ The said Minister of Justice & Constitutional Affairs & Deputy Minister of Finance had been unable to give 'discovery' of documents and to answer 'interrogatories' in the said two Cases, where he, having initially asserted in the District Court, that he 'always acted in his official Ministerial capacity', thereafter to avoid giving in the District Court 'discovery' of documents and answering 'interrogatories', he 'in a diametrically opposite stance', stated to the Court of Appeal that - 'no Ministerial functions had been assigned to him, gazetted in terms of the Constitution' !

- ❑ Subsequently, a Special Presidential Commission having been 'warranted' to inquire and investigate into the matter of this fraud perpetrated on the Government, carried out preliminarily investigations conducted by the Criminal Investigation Department, recording Statements of 24 Witnesses and obtaining a Report from a panel of 3 Chartered Architects, nominated by the Sri Lanka Institute of Chartered Architects.
- ❑ Thereafter, upon the advice of the Hon. Attorney General, 'show cause notices' were issued on certain persons including the said President's Counsel and a Member of Parliament, and subsequently the Minister of Constitutional Affairs, and later ironically appointed, as the Minister of Finance & Planning of the country, by then Prime Minister, present Leader of the Opposition and Vice Chairman, International Democrat Union !
- ❑ The 'show cause' notices contained several 'charges' on grounds of misuse or abuse of power and/or corruption and/or the commission of fraudulent acts, detrimental to HDL and the Government, causing financial loss and damage to HDL and the Government.
- ❑ One of the 'charges' in the 'show cause notices' was that the HDL Annual Accounts, which had been enjoined in the District Court Colombo Case No. 3231/Special, had been wrongfully attempted to be approved as authentic, and endeavoured to be adopted, disregarding the discrepancies, shortcomings and irregularities, with the object of suppressing fraudulent acts and omissions.
- ❑ Facts not disclosed in the proceedings in the District Court and the Supreme Court, were discovered thereafter during the proceedings before the Special Presidential Commission, 'revealing' that the 'floor elevations' depicted on the 'floor sheets' of the surreptitiously substituted 'architectural plans' of the Hilton Hotel, described as 'amended plans', and approved by the Urban Development Authority (UDA), were different with and not the same 'floor elevations' given in respect of the corresponding floors, on the 'cross-sectional sheets', forming a part and parcel of the very same 'architectural plans', demonstrated clearly tampered with.
- ❑ The 3rd and 4th Floors were shown to be at the same 'elevation' of 24.5 Meters ! The 19th Floor and the 'Roof Slab' were shown to be at 'elevations' of 72.7 and 72.5 Meters, respectively, indicating that the 'Roof Slab' was below the 19th Floor ! The Special Presidential Commission observed that this was 'an inherent, intrinsic, impossibility', raising the question, as to how the UDA could have, in the first instance, ever approved such an 'architectural plan'?
- ❑ Recently the UDA, in the presence of the Minister of Urban Development Authority, accepted the above position and prepared a set of 'Measured Drawings', in conformity with the actually constructed Hilton Hotel.
- ❑ The Special Presidential Commission investigations were 'scuttled' through 'backdoor' socio-political influences by the said Minister of Justice & Constitutional Affairs and Deputy Minister of Finance, intervening and interceding with the then President of Sri Lanka, on behalf of himself, and on behalf of the said President's Counsel and the former Minister of Constitutional Affairs, and later ironically appointed, as the Minister of Finance & Planning of the country, by the then Prime Minister and present Leader of the Opposition and Vice Chairman International Democrat Union, surreptitiously 'holding out' support for the aborted draft Constitution of 2000.

- ❑ Subsequently, as a result of 'repeated representations', on the advice of the Hon. Attorney General, the 'Criminal Investigation Department' has re-commenced investigations into this 'major fraud' of 'national economic proportions and significance', with the law yet to be enforced, even in the face of the Supreme Court dicta that – 'in the given circumstances the Government could not be indifferent', against those, who perpetrated and attempted to perpetrate such major fraud on the Government.

- ❑ This is the socio-political 'reality' in a third world developing country, and 'speaks volumes' of those, who publicly pontificate on norms of 'good governance', 'democracy' and the 'enforcement' of the 'Rule of Law' !