

## **A CASE OF CONFLICTING PRIVATE INTERESTS**

The application of Puttalam Cement Ltd.,(PCL) to the Securities and Exchange Commission (SEC) for approval of the draft prospectus of PCL for a public issue of its shares had been refused on October 18, 1994 by the SEC, on the objections raised by its ex-officio member, Deputy Treasury Secretary Daya Liyanage with the then SEC Director –General, Aritta Wikramanayake concurring.

This had been in view of the apparent flaw and/or illegality of the transaction of borrowing Rs. 900 million in the name of PCL and the appropriation of this Rs. 900 million by Thawakkal, to buy shares in PCL. The receipt of Rs. 900 million by PCL and the payment of this Rs. 900 million by PCL to the treasury secretary, on behalf of Thawakkal Group, had apparently not been properly recorded as required in law, in the books of account of PCL. Rs. 507.2 million of the Rs. 900 million paid out had in effect been accounted as ‘ goodwill’ in the balance sheet of PCL and the balance Rs. 392.8 million had been in effect debited to a revaluation reserve that had been created at the same time.

It had been known at that time that Deputy Treasury Secretary, Daya Liyanage, had acted on the advice preferred by former Finance Ministry advisor Nihal Sri Ameresekera, who had been handling the Thawakkal matter at the finance ministry. It is to Ameresekera that Senior Vice President, Vanik Inc. Ltd.,( Vanik), Priyanthi Peiris by her letter dated January 5, 1995 had forwarded the draft statement, that had been suggested to be signed by an appropriate official of the finance ministry. This statement had been prepared and forwarded to Vanik by partner of the law firm, F.J. & De Saram, U.L. Kadurugamuwa, as per their letter dated December 15, 1994. The finance ministry apparently, however, had been unwilling to sign such statement.

### **CALCULATED FRAUD**

Subsequently, on March 23, 1995, the cabinet had made a decision on a cabinet memorandum of February 6, 1995 requiring Thawakkal Group to pay the balance purchase consideration of Rs. 900 million. Themselves, thereby clearing the loan that had been created in the name of PCL, where in fact Thawakkal Group had appropriated the money for themselves; or in the event of Thawakkal Group not agreeing to do so, to cancel the privatisation of PCL and call for fresh bids. Immediately on March 24, 1994, the treasury had nominated the Deputy Treasury Secretary H.A. Abeygunewardene, as its representative, on the board of directors of PCL.

This cabinet decision on March 23, 1995 had been made on the opinion that had been given by Minister Lakshman Kadirgamar on the previous day March 22, 1995. Minister Kadirgamar had described the PCL transaction as a “gross and calculated fraud on the government and the people of this country” and had prefaced his opinion stating that shortly after the cabinet meeting held on March 8,1995, Ameresekere had given him a set of documents in connection with this matter.

This transaction having been considered as a “gross and calculated fraud” by Kadirgamar would not then, any or whatsoever agreement that had been entered into with Thawakkal Group simply stand null and void? Therefore, would it not follow that it was legally possible to cancel this privatisation and call for fresh bids? In such circumstances, how could Minister Prof. G.L Peiris’s statement in parliament that in “ no way could the contract be annulled” be tenable?

To implement the cabinet decision of march 23, 1995, a draft cabinet memorandum of May 18, 1995 had set out the action that had then been recommended by the Public Enterprises Reform Commission ( PERC). The action was that if Thawakkal Group refused to pay the Rs. 900 million to rectify the illegality, then, in such event, the treasury, which had held 10% of the shares of PCL, were to be distributed to the employees and Smith New Court, to whom Thawakkal Group had disposed of 50% of the shares of PCL, were to jointly use company law procedures at a general meeting of the shareholders of PCL, to outvote Thawakkal Group, who were only 40% shareholders, but in control of the management of PCL. An alternative course of action had also been proposed to seek the advice of the attorney general, to re open the privatisation deal with a view to calling for fresh bids.

## **HASTY MEETING**

Four days after this draft cabinet memorandum of May 18, 1995 containing the recommendations that had been made by PERC, there was a meeting on May 22, 1995 at the office of the leading audit firm, Ford, Rhodes, Thornton & Co., of which PERC Chairman, Rajan Asirwathan is a partner. This meeting with Thawakkal Group / Vanik had been attended by Chairman PERC, Rajan Asirwatham and then Secretary, Finance Ministry, A.S Jayawardene. Then Advisor, Finance Ministry, Nihal Sri Ameresekere, who handled this matter at the finance ministry and whose advice had caused the rejection by the SEC of the PCL prospectus precipitating this issue in the first instance, been a notable absentee. Why?

Immediately following this meeting, on May 30, 1995, President and CEO, Vanik Justin meegoda, presumably on the basis of the discussion had, addressed the following letter to Chairman, PERC, Rajan Asirwatham.

“ We seek the concurrence of the government for a resolution of the current issues which have held up the listing of the shares of Puttalam Cement Company Limited (the company) in the Colombo Stock Exchange, on the following basis:

Thawakkal Group of companies will provide a loan to the company in a sum of rupees four hundred and eighty million ( Rs. 480 m). The company will redeem all of its redeemable debentures. The assets of the company will then cease to be encumbered. The government will direct the auditors of the Sri Lanka Cement Corporation (the corporation) to disclose the liability owed to the government at the time of the incorporation of the company in a sum of rupees nine hundred million. Thus on the formation of the company, this liability will be disclosed in the balance sheet of the company. The government to direct the auditors of the company at the time of formation of the company to make the appropriate adjustment in its accounts. The company to obtain the necessary approval from the Colombo Stock Exchange and the Securities Commission to proceed with the necessary action. We will be grateful, if we could have an early reply so that the Thawakkal Group of Companies could be advised to raise the necessary funds and for action to to be initiated with respect to the other matters referred above.”

## REASONABLE AND PRACTICAL

**It is beyond comprehension as to how PERC Chairman Rajan Asirwatham could ever have recommended to cabinet such proposal of Vanik as “reasonable, practical and commercially accepted”**



Rajan Asirwatham

Two weeks thereafter, the cabinet memorandum of June 16, 1995 had been submitted to cabinet on the basis of the above proposal made by Vanik. The cabinet memorandum had stated that “the proposal submitted by Vanik was *reasonable, practical, and commercially accepted*. Minister Kadirgamar, however, on whose opinion the cabinet had made the previous decision March 23, 1995 had not been consulted. Cabinet approval had been obtained on June 21, 1995.

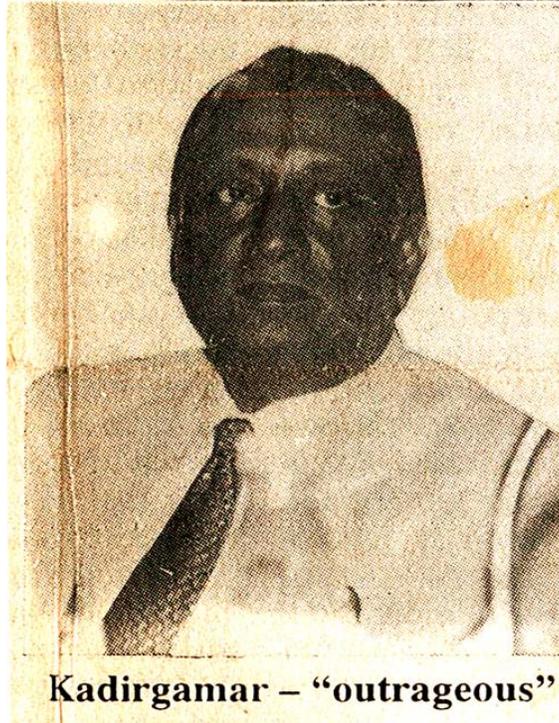
By way of follow up, President and CEO of Vanik, Justin Meegoda, who by his letter of May 30, 1995 to Chairman, PERC, Rajan Asirwatham, had forwarded Thawakkal’s proposal, wrote to the Treasury Secretary, A.S. Jayawardene, on July 18, Secretary Secretary 1995 stating: We understand that the government has approved our proposal. We would be grateful if you could formally communicate the cabinet decision to us in order to proceed accordingly.

In reply, Asirwatham had forwarded the following letter dated August 1, 1995 to Meegoda.

“ Reference is made to your letter of July 18, 1995 addressed to Mr. A.S, Jayawardene, Secretary to the Treasury on the above subject. Your proposal dated 30<sup>th</sup> May 1995 was recommended as a reasonable, practical and commercially acceptable solution to the cabinet of ministers. (a) The proposal has been accepted by the cabinet subject to two conditions; The proposal should be cleared with the Securities and Exchange Commission ( SEC); (b) All dues to the Sri Lanka Cement Corporation should be paid in full as a pre-condition;

The commission has referred this matter to SEC which will be communicating its clearance soon. The commission wishes to request Vanik Incorporation Ltd., to proceed with the proposal in consultation with the treasury after SEC clearance is received”

### **KADIRGAMAR DISAGREES**



Minister Kadirgamar, who in his opinion dated March 22, 1995 had stated “ that this was gross and calculated fraud on the government and the people of this country,” evidently had not been aware of this development. For as late as January 19, 1996, having come to know through F.J. & de Sarams, Partner U.L. Kadurugamuwa, Asirwatham’s letter to Vanik of August 1,1995, Kadirgamar addressed his famous letter to the president, stating, inter-alia, “ I am very deeply troubled. Those of us who wish to see that at least the basic tenets of honest of honest government are observed by this government cannot rest content until this matter is fully investigated On the specific proposal made by Vanik, that Thawakkal Group would give a loan of Rs. 480 million to PCL, Kadirgamar, in his deeply troubled letter had this to say” Thawakkal will provide a loan to the company in a sum of Rs. 480 million, which will not change the position regarding the violation of section 55 of the Companies Act because this is a loan to the company and thereby prohibited, whereas the cabinet wanted the Thawakkal Group themselves to pay the Rs. 900 million..... This proposal by Vanik to PERC is in my opinion outrageous.” It stands to reason that had Vanik’s proposal been referred to Kadirgamar, in the first instance, that it would definitely have been shot down.

This is not a case contemplated by section 55 of the Companies Act, which considers loans by a company to persons to buy shares in the same company. This is a case of Thawakkal Group loaning money to the company, PCL, which money had been taken out from the company, PCL previously, being a part of the Rs. 900 million, that too without a proper record of it. In the new proposal, Thawakkal Group was merely replacing the lenders, who had lent this money to PCL previously. Therefore, Thawakkal Group would get the money back from PCL, since PCL would have to pay back this Rs. 480 million to the Thawakkal Group, instead of to the previous lenders. It is as simple as that.

## **BEYOND COMPREHENSION**

In the background of the above circumstances, it is beyond comprehension as to how PERC Chairman Rajan Asirwatham, a chartered accountant at that and partner of the leading firm of auditors, Ford, Rhodes, Thornton & Co., could ever have recommended to cabinet such proposal of Vanik as reasonable, practical and commercially accepted. Furthermore, what authority had the Asirwatham, or the PERC, itself, for that matter, whether Director General, SEC, Ariththa Wikremanayake was a member of PERC or not, to have stated in the letter dated August 1, 1995 addressed to Vanik: The commission has referred this matter to SEC, which will be communicating its clearance soon.

The SEC members, themselves, as a regulatory authority set up under the law, at a meeting of the commission had to make an autonomous independent decision in such regard. It is at a meeting of the SEC on October 18, 1994, that the SEC had made its previous decision, disapproving the application made by PCL for a public listing of its shares, precipitating this very issue. Pointedly, the Cabinet approval of June 21, 1995 of Vanik's proposal of May 30, 1995, had clearly been conditional only on the basis that such proposal was cleared by the SEC.

Not only Minister Kadiragamar, but it would appear that even the Deputy Treasury Secretary, H.A. Abeygunawardene, who had been appointed a director of PCL, as the treasury representative, on March 24, 1995 immediately following the March 23, 1995 cabinet decision, had been unaware, of the subsequent cabinet decision of June 21, 1995 made on the cabinet memorandum of June 16, 1995. For as late as February 20, 1996 at the shareholders meeting of PCL, Abeygunawardene acting together with Smith New Court, who had 50% of the shares of PCL, had voted against the Thawakkal Group ousting the Thawakkals from the board of directors of PCL, in conformity with the decisions that had been contemplated in the draft cabinet memorandum of May 18, 1995, under the ministry of finance, planning ethnic affairs and national integration.

## **CONFLICTING INTERESTS**

It is apparently clear that the cabinet memorandum of June 16 1995 had not been prepared by the finance ministry, since as published in *The Sunday Observer* of March 24, 1996 it had been under the office of the president of Sri Lanka, whereas the draft cabinet memorandum of May 18, 1995, also published in the same newspaper has been under ministry of finance, planning, ethnic affairs and national integration. *The Sunday Observer* of March 24 1996, in the true spirit of transparency, gave a full disclosure of all relevant documentations.

Minister Kadirgamar's subsequent letter of February 22, 1996 perhaps reveals the persons who had handled this matter in this manner. Kadirgamar in his letter refers to respective observations made by letters dated February 14, 1996 by J.M.R. Britto, February 15, 1996 by Ariththa Wikramanayake, Director General SEC, February 16 1996 by Rajan Asirwatham, Chairman PERC, on Minister Kadirgamar's own letter of January 19, 1996, which he had written to the President as "a very deeply troubled man who could not rest until the basic tenets of honest government are observed by this government," the said letter apparently having been referred to these officials for their observations.

How could J.M.R. Britto, visiting consultant from London to the finance ministry, being a chartered accountant, justify such transaction, on very basic elementary principles of either law or financial accounting? Would it have been permissible in London?

Interestingly, the leading law firm F.J. & G. De Saram, who had given a draft statement in December 1994 to Vanik, acting on behalf of Thawakkal Group, with a view to regularising what they considered was a violation of section 55 of the Companies Act, subsequently, when Thawakkals got ousted from PCL and went to court, appeared against Thawakkals in this case.

Minister Kadirgamar, who had endeavoured to hold a brief to exonerate and distance this law firm, F.J. & G. De Saram, from this transaction in 1995, subsequently wedded this law firm's partner Sugandhi Wijesuriya later in 1996.

Did not the Canadian Code of Ethics for public office holders speak of conflicting private interests?

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