

COURT ORDERS TAWAKKAL REPAY PUTTALAM CEMENT CO.

TAWAKKAL ISSUE SURFACES AGAIN

Extensive controversial exposures had been made on the privatisation transaction carried out by the Public Enterprise Reform Commission (PERC) of Puttalam Cement Co. Ltd, with the Tawakkal Group of Companies of Pakistan.

The privatisation of Puttalam Cement Co. Ltd, had been carried out in terms of the cabinet memorandum dated June 16,1995 submitted by President Chandrika Bandaranaike Kumaratunga based on the recommendations that had been made by PERC, and subsequently approved by the cabinet of ministries on June 21,1995.

Foreign Minister Lakshman Kadirgamar figured prominently in this scandalous and controversial privatisation transaction. His conduct in that regard still haunts the minds of the public of this country.

On January 19,1996 Minister Kadirgamar wrote to President Kumaratunga stating in unambiguous terms, "I repeat that I am deeply troubled. Those of us who wish to see that at least the basic tenets of honest government are observed, cannot rest content until this matter is fully investigated."

ILLEGAL & FRAUDULENT

Previously in March 1995, in his written opinion to the cabinet of ministers, Minister Kadirgamar, a President's Counsel, himself, *inter alia*, had stated, "An illegal transaction does not become lawful because the parties were aware that it was illegal. (Emphasis added.) Since the transaction in question is void and of no effect in law for contravention of Section 55 (2) of the Companies Act, it remains void and of no effect in law, whether the parties were aware or unaware of its illegality." President's Counsel that he is, his legal opinion, has been upheld by court today.

Minister Kadirgamar in March 1995 went on to further state:

"If the Tawakkal group declines or is unable to take over the 900 million rupees loan and other ancillary or connected commitments, there would seem to be no option but to reopen the whole exercise of privatising the company and to call for fresh bids on an open, fair and transparent basis."

In March 1995 Minister Kadirgamar further exhorted his cabinet colleagues thus: "I would strongly press on my colleagues, with respect, the fundamental desirability of making clear to the private sector, both local and foreign, that this government means what it says, that it will not tolerate malpractice in the market and that it will not condone and perpetuate (or to use a colloquial expression 'whitewash') malpractice where it has occurred. What has occurred in the Puttalam Cement affair is a gross and calculated fraud on the government and people of this country."

DISREPUTE TO THE GOVERNMENT

Nevertheless, the cabinet of ministers on June 21, 1995 approved the privatisation transaction of Puttalam Cement Co. Ltd, with the Tawakkal Group of Companies of Pakistan, in terms of the cabinet memorandum of June 16, 1998, that had been submitted by President Kumaratunga on the recommendations made by PERC. The cabinet memorandum, *inter alia*, stated that the proposal submitted for the privatisation of Puttalam Cement Co. Ltd was reasonable practical and commercially acceptable.

Consequently, the then Chairman, PERC, R.N. Asirwatham, accepting Tawakkal's proposal that had been made on May 30, 1995 on behalf of Tawakkal by Vanik Incorporation Ltd, wrote to Vanik on August 1, 1995: "Your proposal dated 30th May 1995 was recommended as a reasonable, practical and commercially acceptable solution to the cabinet of ministries.

(a) The proposal has been accepted by the cabinet subject to two conditions; The proposal should be cleared with the Securities & Exchange Commission (SEC).....The commission has referred this matter to SEC which will be communicating its clearance soon".

Apparently being unaware of such cabinet decision, nearly seven months thereafter, on January 19, 1996, Minister Kadirgamar wrote to President Kumaratunga, *inter alia*, stating:

OUTRAGEOUS PROPOSAL

"This proposal by Vanik to PERC is, in my opinion, outrageous. It is a very serious matter indeed because, Vanik is proposing to PERC that the books of the corporation and the books of the company be falsified, and the respective auditors be directed to do so. If Asirwatham's letter of August 1, 1995 is genuine it creates a problem of immense magnitude for the government and for the cabinet. A problem that is going to be exposed in court with all the attendant publicity and consequent disrepute for the government and cabinet." Minister Kadirgamar's words have indeed turned out to be very prophetic today!

BRIBERY ALLEGATION



Minister Kadirgamar: Startling disclosures

Minister Kadirgamar in his letter dated January 19,1996 to President Kumaratunga, further made startling controversial and scandalous disclosures, that led to a debate on this controversial transaction in parliament. Minister Kadirgamar stated: “(Mr) Kadrugamuwa has also informed me that he listened ot tape-recording of a telephone conversation that his client had with one of the Tawakkal directors in HongKong, in which the Tawakkal director states that he paid a lot of money to have the cabinet decision revoked. He also says in that conversation, that **he is very friendly with several ministers, and high government officials and entertained them during weekends and that he can get anything done by the government of Sri Lanka.**” (Emphasis added.)

In his letter dated January 19, 1996, Minister Kadirgamar went on to further make the following startling disclosure :

“In an earlier conversation that his client had with a Tawakkal director, which is not recorded, a Tawakkal director had told his client that the Tawakkals spent Rs.30 million to get the cabinet decision revoked by paying Rs. 20 million to a minister and Rs.10 million to an official.”

Minister Kadirgamar, no doubt, is a senior responsible cabinet minister. Therefore, ought he not have in the public interest, pursued such a grave and serious matter to its logical conclusion?

CONTRAVENTION OF CARDINAL PRINCIPLES

In essence, what had transpired in the Puttalam Cement / Tawakkal privatisation transaction had simply been this. The fixed assets of Puttalam Cement Co. Ltd., had been revalued and such increase in revaluation had been added onto the value of the fixed assets, and as is the normal practice, such increase on revaluation had been credited to the capital reserve in the balance sheet of Puttalam Cement Co. Ltd. Thus such increase in revaluation, as a part of the capital reserves, rightfully belonged to all the shareholders of Puttalam Cement Co. Ltd.

In contravention of basic cardinal principals of accounting, Rs.900 million had been appropriated from the company by debiting the same to such revaluation reserve. In addition, the Tawakkal group of companies had utilised the Rs.900 million to pay the treasury secretary as part of Tawakkal’s purchase consideration for the 90% share-holding of Puttalam Cement Co. Ltd, that Tawakkal purchased from the treasury secretary. It is in this context that minister Kadirgamar gave his aforesaid opinion, in addition to pointing out that in any case, money of a company cannot be drawn by a shareholder, for such a shareholder to pay for the purchase of share-holdings of the very same company.

HOLDERBANK TAKES CONTROL

In the background of this controversy, it was subsequently reported that Holderbank B.V. of Switzerland had acquired the shareholdings and had taken control of the management of Puttalam Cement Co. Ltd.

Consequently, Puttalam Cement Co. Ltd, on October 31.1997, through M/s F.J. & G. De Saram, Attorneys-at-Law had instituted a Case No. 145/97 (1) in the High Court (Civil) Western Province, against Tawakkal Ltd, of Lakson Square Building, No.1, 265, R.A.Lines, Sarwar Shaheed Road, Karachi 74200, Pakistan. The averments in the plaint are given in the box alongside.

PLAINT

The plaint essentially had stated that the defendant. Tawakkal Ltd's offer of US \$ 41.1 million to purchase 90% of the shareholdings of Puttalam Cement Co. Ltd, from the government of Sri Lanka had been accepted by the government.

The plaint had stated that Tawakkal took control of the board of directors of Puttalm of Cement Co. Ltd, before Tawakkal had paid any part of the purchase consideration for the above shareholdings of Puttalam Cement Co. Ltd to the government, and that having taken control, Tawakkal had raised loans of Rs.900 million in the name of Puttalam Cement Co. Ltd, and paid the Rs.900 million to the government, as part of Tawakkal's purchase consideration for the 90% shareholdings of Puttalm Cement Co. Ltd., that Tawakkal purchased from the government.

The plaint had further stated that Tawakkal had unjustly, wrongfully and illegally benefited by the said wrongful and illegal actions, unjustly enriching themselves to the sum of Rs.900 million to the loss and detriment of Puttalam Cement Co. Ltd. In such circumstances, Tawakkal had been sued for the recovery of the Rs. 900 million, together with interest thereon of Rs.455.2 million, aggregating to a total claim of Rs. 1,355.2 million.

PLAINT FILED BY F.J.& G. DE SARAM:

1. The cause of action hereinafter set forth arose at Colombo within the jurisdiction of this Court.
2. In or about October 1993 the Government of Sri Lanka ["GOSL"] invited offers for the purchase of 90% of the shares ["the said shares"] in the issued share capital comprised of 10,000,000 shares of Rs.10/- each in the Plaintiff by the Secretary to Treasury.
3. In response thereto the Defendant made an offer of US \$ 41.1 Million ["the purchase price"] and the said offer was accepted by GOSL.
4. Before the Defendant paid any part of the purchase price to GOSL, the Defendant took control of the Plaintiff Company on or about 29th of December 1993 by having the Board of Directors of the Plaintiff reconstituted so that the majority of the Directors of the Plaintiff were nominees of the Defendant and the Chairman of the Board of Directors of the Plaintiff was the Chairman of the Board of Directors of the Defendant.
5. Thence forth and during the period material to this Plaint the Defendant was in control of the business and affairs of the Plaintiff.
6. Having thus taken control of the Plaintiff the Defendant caused the Plaintiff to issue to the public, on or about the 29th of December 1993:-
 - (i) Convertible unsecured debentures to the value of Rs.300,000,000/-; and
 - (ii) Redeemable secured debentures to the value of Rs. 600,000,000/- ostensibly to pay an alleged debt due to GOSL from the Plaintiff.

7. The Defendant caused the Plaintiff to raise a sum of Rs.900,000,000/- by the said issue and caused the said sum to be paid to GOSL as part of the purchase price due and owing from the Defendant to GOSL. Thus the Plaintiff did not receive the said sum of money or any part thereof or any purpose use or benefit of its own.
8. Whilst the Defendant unjustly wrongfully and illegally benefited thereby in that the said sum of Rs.900,000,000/- was utilised to pay part of the purchase price due as consideration for the transfer of the said shares, the Plaintiff was unjustly wrongfully and illegally cast in liabilities by the Defendant in that the Plaintiff had to repay to the holders of the debentures the loan of Rs.900,000,000/- raised by the issue of the said debentures together with interest as stipulated therein.
9. The total sum paid and/or payable by the Plaintiff as interest on the said debentures is Rs. 455,200,000/-
10. By reason of the said wrongful and illegal actions of the Defendant, the Defendant has been unjustly enriched in the sum of Rs.900, 000,000/- and loss and detriment has been caused to the Plaintiff by the Defendant in a total sum of :-

(a)	Loan	Rs.	900,000,000/-
(b)	Interest	Rs.	455,200,000/-
			1,355, 200,000/-
			1,355, 200,000/-

11. Thus the Defendant has unjustly enriched itself thereby in the sum of Rs. 900,000,000/- at the expense of and to the loss and detriment of the Plaintiff in the total sum of Rs. 1, 355,200,000/-
12. In the aforementioned circumstances, the said sum of Rs. 900,000,000/- together with the said interest of Rs. 455,200,000/- is due and payable from the Defendant to the Plaintiff.
13. A cause of action has therefore accrued to the Plaintiff to sue the Defendant for judgement in the sum of Rs. 1,355,200,000/- and legal interest thereon from the date of this action.
14. The Plaintiff values this action at Rs. 1,355,200,000/- for purposes of stamp duty.

Where the Plaintiff prays for:-

- (a) judgement in favour of the Plaintiff in a sum of Rs. 1,355,200,000/- together with legal interest thereon from the date of this action until the date of Decree and further legal interest thereon on the decreed amount until payment in full;
- (b) costs; and
- (c) such and further relief as to this Court shall seem meet;

COURT ORDERS TAWAKKAL TO REPAY

Tawakkal had failed to appear in the said case in response to the summons that had been served on them through the Sri Lankan High Commissioner in Pakistan. Accordingly, on July 31, 1998, the case having been taken up for trial *ex-parte*, the high court judge had entered judgment in favour of Puttalam Cement Co. Ltd, as prayed for in the plaint and had accordingly ordered and decreed that Tawakkal do pay Puttalam Cement Co., Ltd. the Rs. 1,355.2 million, together with legal interest thereon from October 31,1997. The registrar of the high court (civil), Western Province had issued a copy of the decree to be served on Tawakkal in terms of section 86(2) of the civil procedure code, through the Sri Lankan high commissioner in Pakistan.

Consequently, pertinent issues have arisen in legal circles. If, as Puttalam Cement Co. Ltd, itself, has pleaded that the transaction is illegal, and as had also been opined by Minister Kadirgamar previously, then would Tawakkal have got good and valid title to the 90% shareholdings that Tawakkal had illegally so acquired from the Treasury Secretary? Furthermore, whether in such circumstances, it would be deemed that Tawakkal held these 90% shareholdings in trust for and on behalf of the Treasury Secretary from whom Tawakkal had acquired such 90% shareholdings or for and on behalf of the Treasury Secretary from whom Tawakkal had acquired such 90% shareholdings or for and on behalf of Puttalam Cement Co. Ltd, whose funds Tawakkal had wrongfully and illegally appropriated to acquire such 90% shareholdings?

Consequently, if the title to Tawakkal's 90% shareholdings of Puttalam Cement Co. Ltd, had been defective and bad in law, then would the question of legality of ownership of such shareholding or any part thereof, if such shareholdings had been acquired by Holderbank B.V., Switzerland be also in issue?

In such circumstances, would not the question also arise as to how Holderbank B.V., Switzerland, legally own and/or control Puttalam Cement Co. Ltd.?

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