

GOVT. DENIED POWER OF VETO IN ...

Though the debate on the highly controversial Air Lanka privatisation transaction carried out by the Public Enterprise Reform Commission [PERC] blew a lot of hot air in Parliament on Tuesday May 19, 1998, a number of serious, cogent and pertinent questions remain unanswered in the public eye.

Eventhough several senior Ministers of the Cabinet, the front liners of the Government, as it were, vigorously and vociferously participated in the Air Lanka debate, several serious relevant issues of national and public importance were not dealt with and answered, which issues were raised by the younger Members of Parliament of the Opposition, United National Party, who except for the Leader Ranil Wickremasinghe, did not field senior Members to participate in this controversial Air Lanka debate.

QUESTIONS FROM WITHIN ?

The said several issues going unanswered, only adds further intrigue and mystery to the controversy already pervading the Air Lanka privatisation transaction, it having been further speculated that the Chairman of Air Lanka Ltd., a veteran captain of the private sector had indicated his disapproval of this transaction, implying also that he was not involved and/or aware of matters, that pertained to Air Lanka Ltd. itself, of which, ironically he was and is the Chairman. Ought he not make a public pronouncement, as the Chairman of Air Lanka Ltd., to dispel the doubts created and to put a stop to speculation?

It had also been speculated in the media, that Rajan Brito, the part-time visiting Consultant from London had also not been in full favour of the Air Lanka privatisation transaction, having been a Director of Air Lanka Ltd., in addition to his duties as a Consultant to PERC on its privatisation transactions. Rajan Brito has not denied such media speculation to date. The recent scandalous exposures by *The Sunday Leader* on some of the controversial privatisation transactions carried out by PERC, focusing also upon professional public and social accountability and responsibility and the possibilities of public interest litigation by public spirited persons, perhaps caused concern and prompted him to opt out of the Air Lanka privatisation transaction at the eleventh hour. If not, ought he also not make a public statement to dispel doubts created and to put a stop to speculation?

The Sunday Leader focuses upon today on some of the cogent and important issues, that pertained to this Air Lanka privatisation transaction that have not been satisfactorily addressed and clarified and/or answered by PERC and/or by the Government, notwithstanding eight hours of heated debate in Parliament. The first important and material issue, is as to whether PERC was legally empowered under the Public Enterprise Reform Commission Act No. 1 of 1996, [PERC Act No. 1 of 1996] in terms of which Act, PERC was established, to have dealt with a) the sale of shares of Air Lanka Ltd. and b) negotiated and/or enter into agreements on behalf of Air Lanka Ltd.?

ULTRA-VIRES THE LAW ?

PERC Act No. 1 of 1996 Section 5(e) specifically empowers PERC to deal with Companies Registered under the Conversion of Public Corporations and Government Owned Business Undertakings into Public Companies Act No. 23 of 1987 [Conversion Act No. 23 of 1987]. Undisputedly, Air Lanka Ltd. having been a Company registered in 1979 under the Companies Ordinance, later replaced by the Companies Act No. 17 of 1982, was therefore not a Company registered within the meaning of the said Act No. 23 of 1987. Accordingly, the question arises, as to whether the PERC's such act was ultra-vires its own PERC Act No. 1 of 1996?



**Minister G. L. Peiris —
confirms that all these
conditions are acceptable
to the government**

Prof. G.L. Peiris, the Deputy Minister of Finance, under the purview of whose Ministry PERC functions was heard endeavouring to clarify this issue to the Leader of the Opposition Ranil Wickremasinghe, holding out that PERC could and in fact had acted under Section 5(t) of the PERC Act No. 1 of 1996, which stipulated – "To act as the agent of the Government, in Sri Lanka or abroad, for the purposes of any matter or transaction, if so authorised." Prof. G.L. Peiris an alumnus of the prestigious of Oxford University and a Professor of Law so propounded.

Professional legal circles however, *The Sunday Leader* understands, do not subscribe to such view, in that such general and/or incidental power under Section 5(t) of the said PERC Act No.1 of 1996 would necessarily and/or specifically be in relation and/or in incidental to the main powers stipulated under the same Section 5, wherein Sections 5(d), 5(e), 5(f), 5(g), 5(h) all empower PERC to deal only with Companies registered under the said Conversion Act No. 23 of 1987, and that accordingly, PERC could act as an agent of Government in relation to such transactions only, that too, it so authorised by the Government; since Section 5(e) of the said PERC Act No. 1 of 1996 only empowers PERC to make recommendations to the Government on the sale of Shares of Companies registered under the Conversion Act No. 23 of 1987 and not to negotiate and/or conclude such a sale of shares on behalf of the Government and hence such authorised power to act as the agent of the Government under Section 5(t) of the said Act. Hence the Air Lanka privatisation transaction appears to be legally flawed.

Even if the Government had purported to have acted under such Section 5(t), notwithstanding the question of the legality of said act of so authorising PERC to so act, as the agent of the Government in relation to a Company that does not fall within the purview and/or the meaning of the said PERC Act No. 1 of 1996, there ought to have been public disclosure, when the Cabinet of Ministers empowered PERC to so act in such agency capacity on behalf of the Government on the transaction of the sale of shares of Air Lanka Ltd.?

RESPONSIBILITY OF AIR LANKA BOARD?

The second issue is even equally serious as the first. The said provisions of the PERC Act No. 1 of 1996, whether it be Section 5(e) or Section 5(t) would not have empowered PERC to have acted for and on behalf of Air Lanka Ltd., a separate legal entity and/or a corporate person, on whose behalf

negotiations could have been had and/or decisions could have been made only by its Board of Directors, according to express statutory provisions of the Companies Act No. 17 of 1982. The Government could not have empowered PERC to have acted on behalf of the Air Lanka Ltd. and/or as the agent of Air Lanka Ltd under Section 5(t) of the said PERC Act No. 1 of 1996. That is elementary.

Even a student of Company law, let alone those learned in the law, will not dispute that it is only the Air Lanka Board of Directors, and none other, who could have authorised and/or empowered PERC and/or anybody else to have acted for an on behalf of Air Lanka Ltd. and/or as its agent. Therefore, when was PERC so authorised and/or empowered by a decision of the Board of Directors of Air Lanka Ltd., to have so acted on behalf of Air Lanka Ltd., and to have negotiated and/or entered into several serious transactions, including the purchase of 6 Airbus Aircrafts ?

In the absence of such pre-authorisaiton by the Board of Directors of Air Lanka Ltd., with PERC regularly reporting to the Board of Directors of Air Lanka Ltd., on the progress and/or status of such negotiations, Rajan Brito, who functioned as a Director of Air Lanka Ltd., and also at the same time as a Consultant of PERC actively involved and closely associated with the said negotiations and/or transactions from as far back as 1997, would in the given circumstances, be deemed to have held out and/or acted as a Director of Air Lanka Ltd., in carrying out such negotiations and/or transactions and would accordingly be accountable and responsible therefor.

It was his primary fiduciary duty as a Director of Air Lanka Ltd., moreso particularly as a Chartered Accountant, to have kept the Board of Directors of Air Lanka Ltd., closely apprised of such negotiations and/or transactions. Could the Air Lanka Chairman, Harry Jayawardene confirm to the public of this country, that this in fact had happened and if not, what action would he take thereon now, if not, why not ? Would Harry Jayawardene have condoned such conduct and actions, in any one of the companies that he manages?

GOVERNMENT MINORITY SHAREHOLDER

The other even more serious issue, is the holding out to the public of this country, that the Government would be the majority shareholder of Air Lanka Ltd., whilst only 40% shareholding thereof was committed to be sold to Emirates Airlines. In fact Minister Dharmasiri Senanayake, under whose purview and control Air Lanka Ltd. functions was heard responding to the Leader of the Opposition Ranil Wickremasinghe, that the interest shown by one of the airline giants of the United States, namely Continental Airlines, had not been pursued by PERC, because they had required an acquisition of 51% shareholding in Air Lanka Ltd., which was not acceptable, since the Government had to be the majority shareholder.



**Minister Dharmasiri
Senanayake — was he
unaware of the facts?**

If that was to be so, as so held out by Minister Dharmasiri Senanayake, himself, the very Minister in charge of the subject of Air Lanka Ltd., then it is beyond all rational and logical reasoning to understand and/or comprehend, as to why the Memorandum & Articles of Association of Air Lanka Ltd. was amended as a condition precedent, prior to the commitment of acquisition of 40% shareholding of Air Lanka Ltd., by Emirates Airlines, in the following specific terms?

"In relation to the Government, the holding, whether directly or through any government institution or corporation, of not less than 35% of the issued capital (as of any date of determination on or prior to 31 December, 2000) or 21% of the issued share capital (as of any date of determination after 31 December, 2000) and, in relation to Emirates, the holding of not less than 26% of the issued capital (as of any date of determination on or prior to 31 December, 2000) or 30% of the issued share capital (as of any date of determination after 31 December, 2000)."

Is the intention not patently quite clear, that the Government shareholding in Air Lanka Ltd. will not be less than 35% prior to December 31, 2000 and will not be less than 21% after December 31, 2000. If as held out, the intention and/or the commitment of the Government is always be the majority shareholder of Air Lanka Ltd., then ought not Emirates Airlines have agreed to include a clause in the Articles of Association of Air Lanka Ltd., stipulating that the Government shareholding will at all times be never less than 51% of the shareholdings of Air Lanka Ltd.?

Is not the aforesaid amendment to the Articles of Association of Air Lanka Ltd., stipulating minimum shareholding of the Government as a mere 21%, that too in under just two years, a very clear intention that an allotment of 11% shareholding to some other party, that too more likely to a foreign party in liaison with Emirates Airlines, will give Emirates Airlines a majority shareholding of Air Lanka Ltd., within the next two years, thereby ironically making the national Airline of this country, a foreign owned Airline.

The Sunday Leader speculates, that the scenario under which such allotment and/or subscription of a further minimum 11% shareholding of Air Lanka Ltd. is more than likely to be thrust upon Air Lanka Ltd., under borrowing arrangements or commitments, whereby the lender and/or the lending institution would insist upon such minimum shareholding, as a part of a package of financing. If not, could PERC explain, why in the heavens' name, the Articles of Association of Air Lanka Ltd. was amended as aforesaid, relegating and/or derogating the right of the Government of this country to a minimum shareholding of 21% in its own national carrier ?

UNLAWFUL PRACTICE ?

Ought not PERC and/or the Government and/or those specifically responsible for having negotiated and/or executed this Air Lanka privatisation transaction, have in the least provided for a golden shareholding, affording the Government of Sri Lanka, a veto power over matters that would concern national and sovereign interests of this country. It is blatantly clear that such interests and considerations were furtherest from the minds of those, who have been responsible for the privatisation of Air Lanka Ltd., the national Airline of this sovereign country.

On the contrary the Shareholders' Agreement entered into on March 31, 1998 between the Government, Emirates Airlines & Air Lanka Ltd. under Article 2.2.1 defining management powers, control and responsibilities vested with Emirates Airlines, specifically stipulates thus;

"2.2.1 The Investor shall from the date of this Agreement until the Termination Date have, and is hereby vested with, management power, control and authority over, and responsibility for, the business and affairs of the Company in accordance with the terms of this Agreement for the purpose of the implementation of the Business Plan.

In all matters over which the Investor exercises such power, control and authority, the GOSL and the Company agree that the Investor shall not be required to refer such matters to or to seek the approval at a General Meeting of the Company or the Board of Directors and that such matters shall be validly conducted without such reference or consent. For the avoidance of doubt, such power, control and authority is vested in the Investor notwithstanding its status as a minority Shareholder in the Company."

Article 2.2.2 of the said Shareholders' Agreement goes on to further stipulate, that without limiting the generality of the foregoing powers, control and authority of Emirates Airlines, that such powers, control authority shall cover (but not limited to) inter-alia, the -

"(7) direction and control of negotiation and execution of agreements by the Company, including agreements relating to the incurrence by the Company of indebtedness, lease payments and other obligations or acquisition, by purchase or otherwise, of aircraft and related equipment, spare parts and technical and other services;"

It is amply clear, that notwithstanding being a minority shareholder of Air Lanka Ltd. that Emirates Airlines had been empowered and authorised, inter-alia, to make decisions to enter into agreements including to purchase Aircraft and incur indebtedness, without any reference to and/or any approval of the Board of Directors of Air Lanka Ltd. and/or the Shareholders of Air Lanka Ltd. Is this how the legal practices and statutes applicable to corporate governance, let alone the Companies Act No. 17 of 1982, permits and/or allows decision making and/or entering into contractual agreements and/or the incurring of indebtedness in Companies?

Enacted statutes ex-facie and the well established abundance of case law do not permit and/or allow the conferring of such unquestion unilateral powers and/or authority, even to a majority shareholder of Companies, to make decisions and/or enter into agreements and/or incur indebtedness, without the sanction and approval of the Board of Directors, and material decisions without the sanction and approval of the Shareholders of the Company?

BANKRUPTCY & HYPOCRACY ?

The Minister of Justice & Constitutional Affairs propounded in Parliament, that the Hilton Settlement Agreements, that saved this country Rs. 10,200 million in 1995, a much greater value than at which the total value placed on Air Lanka Ltd. in 1998 in selling 40% shareholding thereof to Emirates Airlines, as pointed out during the Air Lanka debate by Rajitha Senaratne M.P., had contained several unacceptable conditions to the Government, which conditions however he failed to substantiate, when challenged to do so by the same Rajitha Senaratne M.P. The Minister of Foreign Affairs Lakshman Kadirgamar blithely concurring then pouted, that there were unsatisfactory features in the said Hilton Settlement Agreements, which he too failed to identify what they were.

Ironically, both Prof. G.L. Peiris, professor of law and Lakshman Kadirgamar, a President's Counsel, both hailia from the University Oxford, have unhesitatingly and unreservedly endorsed and/or approved the above conditions in the Air Lanka Agreements. Can they explain to the country how? If not, why?



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