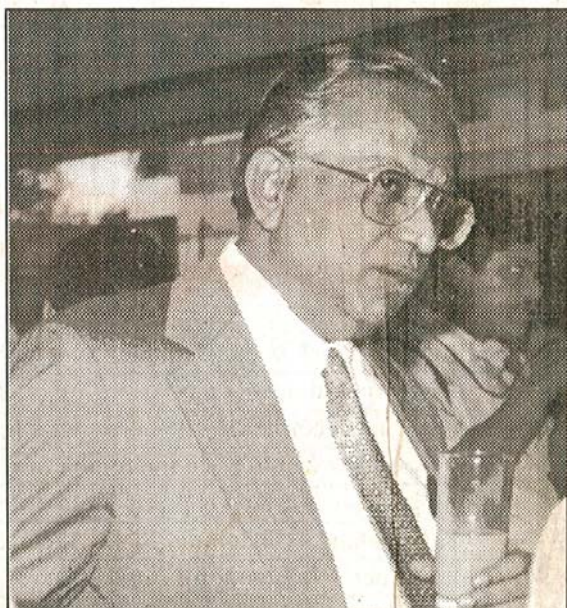


## DID BOI RELAX RULES?

*The Sunday Leader* last week dealt with the acquisition by Lankem Ceylon Ltd., in April 1996, of the shareholdings of George Steuart Management Services (Pvt) Ltd., that owned 51% controlling interest of Kotagala Plantations Ltd., [KPL]. The name of George Steuart Management Services (Pvt) [GSMSP] had been subsequently changed to Lankem Tea & Rubber Plantations (Pvt) Ltd. Accordingly, KPL had been shown, as a subsidiary company of Lankem Ceylon Ltd., and its holding company E.B. Creasy & Co. Ltd., in their Annual Reports for the year ended March 31, 1997.

*The Sunday Leader* also disclosed, that the purchase consideration paid for such acquisition of the shareholdings of GSMSP in April 1996 had been Rs. 400 million, which had included, in addition to the 51% controlling interest of KPL, the payment for the Rs. 120 million mandatorily convertible transferrable debentures in KPL, shown as held by Lankem Plantation Holdings Ltd., in the Annual Report of KPL as at March 31, 1997.

*The Sunday Leader* last week also focused upon a salient and pertinent feature, pertaining to the above transaction, wherein KPL in turn had invested Rs. 200 million in Lankem Plantation Holdings Ltd., shown as a subsidiary of E.B. Creasy & Co. Ltd. and Lankem Ceylon Ltd. The Annual Reports of E.B. Creasy & Co. Ltd., and Lankem Ceylon Ltd., had given a note on such cross-holding of Rs. 200 million, in the context of the provisions of Section 29 of the Companies Act No. 17 of 1982, whilst *The Sunday Leader* also drew attention to Section 55 (1) of the said Act.



Governor, Central Bank, A. S. Jayawardana was finance secretary and a member of PERC when KPL was sold by PERC

## INACTION BY SEC?

*The Sunday Leader* posed the important and cogent question, as to whether, the said funds of Rs. 200 million of KPL, had directly and/or indirectly been utilised, to finance the very purchase of GSMSP owning the 51% controlling interest of KPL itself, and/or the 51% controlling interest of Agarapatana Plantations Ltd., directly and/or indirectly, by one group of shareholders of KPL, in their own interest and for their own benefit, and as to whether, such would not be detrimental to the interest of the other shareholders of KPL?

Another important and pertinent question, that was brought into focus by *The Sunday Leader* was, as to whether such a transaction, would be condoned by the Securities & Exchange Commission [SEC], particularly moreso, the SEC having examined the said several transactions and having taken action against Directors of KPL, for an offence of delay in disclosure of certain information, and also whether, such a transaction would be condoned by Courts of law, in the context of established case law, pertaining to the expropriation of assets of minorities, in addition to the provisions of the Companies Act ? So far, there has been no response, whatsoever, from the SEC. Why?

Would it mean, that the SEC would permit shareholders, who control public listed companies, to so utilise funds of such companies, only for the benefit and interest of such controlling shareholders, in such manner? Quite significantly, the Chairman of the newly constituted Sri Lanka Accounting & Auditing Standards Monitoring Board, the President of the Institute of Chartered Accountants of Sri Lanka and the Registrar of Companies, amongst others, are members of the SEC. Are they not accordingly, statutorily bounden in duty, to examine this matter and consider whether minority interests have been adequately protected and whether, there has been any infringement of law, regulations and standards? If not, how and why?

### **FUNDAMENTAL RIGHT TO EQUALITY?**

Another very important and cogent issue, that would need serious consideration by the SEC, is the questionable formula, under which, the SEC had permitted, the sale of 51% controlling interest of several plantation companies, including KPL, at the lowest price received on the fragmented sale of 20% shareholdings of the said plantation companies on the Colombo Stock Exchange [CSE]? How did such formula ever come to be permitted by the SEC? Significantly, would the SEC today permit, majority shareholders of a listed public company, to sell 51% of its controlling interest, at the lowest price that is received for the fragmented sale of 10-20% of its shareholdings on the CSE? If not, why?

Having permitted several plantation companies to have done so, setting a precedent thereby, would it not tantamount to a breach of fundamental right and right to equality, as enshrined in Article 12 of the Constitution of Sri Lanka, if others were, now not similarly permitted to do so ? In such given circumstances, if the then members of the SEC, had acted in violation of their statutory duties and lawful obligations, what action would the government take against such members in such regard, and if not, why?

*The Sunday Leader* has time and again raised the question previously, as to whether not, the Director-General of the SEC being a member of the Public Enterprise Reform Commission [PERC], executing transactions, would not only result in a conflicting role, but also result, in the comprise of the statutory duties and obligations of the SEC, which is responsible for surveillance and examination of such very transactions, to ensure adherence to the law and regulation and to prosecute where there has been a breach thereof ?

### **EXCHANGE CONTROL FINES**

Nevertheless, unconcerned of such aforesaid circumstances, as had been reported, the Controller of Exchange, with the advice and assistance of the Attorney General, has proceeded to investigate, the alleged Exchange Control violations pertaining to this Kotagala transaction.

Both Annual Reports of E.B. Creasy & Co. Ltd. and Lankem Ceylon Ltd., for the year ended March 31, 1997 in the Chairman's Review has given the following note, as a post balance sheet event - "Following an inquiry by the Exchange Control Department regarding transfer/ issue/sale/purchase of shares of Lankem Tea and Rubber Plantations (Pvt) Ltd. (George Steuarts Management Service Ltd) and Kotagala Plantations Ltd and sale of debentures issued by Kotagala Plantations Ltd., a penalty of Rs. 115,503,000/- has been imposed on Lankem Ceylon Ltd on 21st July 1997 under the provisions of

Section 52(1) of the Exchange Control Act, as amended, on the basis that we have allegedly contravened the provisions of Section 7 of the said Act. The Company has totally denied any contravention of provisions of Section 7 of the Act - In terms of Section 52(7) of the said Act Lankem Ceylon Ltd has filed an appeal to the Hon. Minister of Finance against this penalty on 6th August 1997."

In addition, the Merchant Bank of Sri Lanka Ltd., [MBSL] who had charged fees from George Steuarts for "structuring the deal", by its letter dated July 23, 1997 addressed to Surekha Sellahewa, Manager - Surveillance and Enforcement, CSE, had, inter-alia, stated - "The Controller of Exchange has purported to impose a penalty of Rupees One Hundred and Thirty Nine Million and Eighty Two Thousand Nine Hundred and Twenty Five (Rs, 139,082,925/=) on Merchant Bank of Sri Lanka Ltd. (MBSL) by his letter dated 21st July '97, which was received on 22nd July '97, alleging that MBSL has contravened the provisions of Section 11 (2) of the Exchange Control Act, read with Section 102 of the penal code and claiming that in terms of Section 51 (1) of the Exchange Control Act, such contravention constitutes an offence under the Act - The Controller of Exchange further states that by virtue of the powers conferred by Section 52 (1) of the Act he has imposed a penalty of Rs. 139,082,925/= for the offence of abetment alleged to have been committed and upon the failure to pay the penalty within two weeks that the Controller will be compelled to prosecute MBSL in Court."

The Island of July 23, 1997, inter-alia, had reported that George Steuarts had been fined Rs. 127 million in toto and that the Malaysian conglomerate had been fined a total of Rs. 125 million.

### **IS MBSL EXPOSED TO DAMAGES?**

Subsequently, MBSL by its recent letter dated March 13, 1998, addressed to Surekha Sellahewa, Manager - Surveillance and Enforcement, CSE, had stated - " We write further to our letter of 22nd January 1998 re the imposition of a fine by the Controller of Exchange on MBSL and wish to inform you that the penalty has been reduced to Rs. 4.3 Mn. in terms of Section 52 (8) of the Exchange Control Act, consequent to the determination of the Administrative Appeal."

In such given circumstances, would not MBSL, as a professional merchant banking institution, have exposed itself, to considerable claims for damages, from George Steuarts and from the Malaysian conglomerate, who apparently have acted on the advice of MBSL, who in fact had charged fees for "structuring the deal"? Would not George Steuarts and the Malaysian conglomerate, in the given circumstances, have a right and entitlement to make such claims for such consequential damages caused to them, particularly moreso, the then Chairman, MBSL, Rajan Asirwatham, also having been the then Chairman, PERC, who sold KPL to GSMSPL?

### **EXCHANGE CONTROL VIOLATION?**

In relation to the alleged Exchange Control offences, *The Sunday Leader* draws attention to the Gazette Extra-Ordinary No. 721/4 of June 29, 1992, which had published a Notice under the Exchange Control Act, giving permission in terms of Sections 10, 11, 15 and sub-sections (5) of Section 30 of the Exchange Control Act, inter-alia, stating -

" 1) *Permission* - Permission is hereby granted for the purposes of Sections 10, 11, 15 and Subsection 5 of Section 30 as applicable of the Exchange Control Act (Cap. 423 of the CLE), for the issue and transfer of shares in a company upto 100% of the issued capital of such company, to approved country funds, approved regional funds, corporate bodies incorporated outside Sri Lanka and individuals resident outside Sri Lanka (inclusive of Sri Lankans resident outside Sri Lanka), subject to the exclusions, limitations and conditions hereinafter set out."

"2) *Exclusions* - The permission hereby granted shall not apply in respect of shares of a company proposing to carry on or carrying on any of the following businesses; - (i) Money lending, - (ii) Pawn broking,- (iii) Retail trade with a capital of less than one Million U.S. Dollars, - (iv) Providing personal services other than for the export or tourism sectors, - (v) Coastal fishing "

In terms of the aforesaid Gazette Notification of June 29, 1992, could not the 100% shareholdings of GSMSP, a management agency company, have been sold to a non-resident person and/or to the nominees of any non-resident person, which had not been permitted previously, as per Section 11 (2) of the Exchange Control Act, which reads - "No person shall, except with permission granted by the bank - (a) transfer any registered security, either on his own behalf or on behalf of any other person, to any person resident outside Sri Lanka or to any person acting as the nominee of any person so resident, or - (b) transfer any bearer security, either on his own behalf or on behalf of any other person, unless the bank is satisfied that the person to whom the security is to be transferred and, if the person is a nominee, the person for whom he is to act as nominee, are resident in Sri Lanka."

Would the Controller of Exchange, clarify in the public interest, as to what the permission granted by the aforesaid Gazette Notification of June 29, 1992 under the Exchange Control Act actually means, moreso particularly, during an era of liberalisation of the economy, with the relaxation of Exchange Control and, with the promotion of foreign investments even into the retail trade? In the absence of such clear and unambiguous clarification in categorical terms, would it not send, confusing and mixed signals to foreign investors, putting them into jeopardy?

#### **49% FOREIGN OWNERSHIP IN KPL?**

**Would not the foreign ownership permissible in the plantation companies, including KPL, that has been sold by PERC, have been restricted to 40%, unless the Board of Investment of Sri Lanka (formerly Greater Colombo Economic Commission), had given permission otherwise?**



**Prof. Peiris — "PERC, which had carried out the sale of KPL, comes within the ambit of the finance ministry"**

Significantly, the very same Gazette Notification of June 29, 1992 has restricted the foreign ownership in companies engaged in certain specified businesses stating - "3. *Limitations* - (a) The permission hereby granted shall apply in respect of shares in a company carrying on or proposing to carry on any of the following businesses only upto 40% of the issued capital of such company, or if approval has been granted by the Greater Colombo Economic Commission for a higher percentage of foreign investment in any company, only upto such percentage. ... -(ii) Growing and primary processing of Tea, Rubber, Coconut, Cocoa, Rice, Sugar and Spices"

Accordingly, would not the foreign ownership permissible in the plantation companies, including KPL, that has been sold by PERC, have been restricted to 40%, unless the Board of Investment of Sri Lanka [BOI] (formerly Greater Colombo Economic Commission), had given permission otherwise ? The offer sale document of KPL, that had been caused to be published by PERC, gives the following stipulation on page 12 thereof - "Restrictions on Share Holdings in the Company - 2.25 In terms of Government restrictions placed on share holdings in the Company, approved country funds, approved regional funds, corporate bodies incorporated outside Sri Lanka and individuals resident outside Sri Lanka (inclusive of Sri Lankans resident outside Sri Lanka) may collectively own up to a maximum of 49% of the issued share capital of the Company."

Had the BOI, in terms of the aforesaid Gazette Notification of June 29, 1992, given approval for such 49% foreign shareholdings in KPL, and other plantation companies, that had been so advertised and had been sold by PERC, and if so, ought not such BOI approval have been disclosed in the respective offer sale documents? If such BOI approval, as had been stipulated by such Gazette Notification under the Exchange Control Act, had not been obtained by PERC, then should not the Controller of Exchange, inasmuch as aforesaid, have acted to deal with the then members of PERC, had there been such breach? If not, why? The present Governor, Central Bank, A.S. Jayawardana, under whose purview the Controller of Exchange functions, was at the relevant time Secretary, Ministry of Finance and a member of PERC, when KPL was sold by PERC?

Under the caption "Exchange fraud alleged in Kotagala Plantations sale" - *The Island* of June 13, 1997, inter-alia, reported - "There is evidence of a massive scale foreign exchange fraud in the privatisation of Kotagala Plantations Ltd., Minister of Justice and Constitutional Affairs and Deputy Finance Minister Prof. G.L. Peiris said yesterday. The Exchange Control Department and the Attorney General's Department will determine the credibility of the explanations of the persons, who are alleged in this fraud. Prof. Peiris told a group of Parliamentarians during a discussion on the subject of Finance." PERC, who had carried out the sale of KPL, comes within the ambit of the Ministry of Finance, functioning under the purview of the Deputy Minister of Finance and the Minister of Finance.

*- Published in The Sunday Leader on 22.3.1998 by Nihal Sri Ameresekere under the pseudonym 'Bismark'*