

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA.

In the matter of an application for Mandates in the nature of Writs of Certiorari and Mandamus, in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

R.M.C.J Ratnayake

Dhammika Wine Stores

Wevathenna

Mathurata.

Petitioner

CA 505/2008

Vs.

1. The Commissioner General of Excise
Department of Excise
No. 28, Staple Street,
Colombo-02.
2. Mr. L.K.P. Gunawardene
Excise Commissioner(Control)
Department of Excise
No. 28, Staple Street
Colombo-02.

3. **Mr.A. Boderagama**
Deputy Excise Commissioner (Income)
Department of Excise
No. 28, Staple Street
Colombo-02.

 4. **Mr. W.M. M.B. Wanasuriya**
The Assistant Excise Commissioner
Central Province
Department of excise
Pradeshiya Saba Road,
Katukal
Kandy.

 5. **Mr. Abeykoon**
The Superintendent of Excise-Nuwara Eliya
The Office of the Superintendent of Excise
Createn Village
Nuwara Eliya.

 6. **Mr. Ramanayake**
Officer-in-charge
Excise Station-Nuwara Eliya
Createn Village
Nuwara Eliya
- And 02 others.**

Respondents

Before: Sathya Hettige PC.J, President of the Court of Appeal

Anil Goonaratne J, Judge of the Court of Appeal.

Counsel: Sanjeewa jayawardane with Rajive Amarasooriya for the petitioner

Janak de Silva with Ms. Yuresha de Silva SC for the 1st to 6th respondents

Manohara de Silva PC for 9th to 19th respondents.

Argued on 10/03/10, 1/02/2011 & 08/02/2011

Written Submissions on 08/03/2011

Decided on 08/06/2011

SATHYA HETTIGE P.C.J. , P/CA

The petitioner is the holder of a FL liquor license for sale of foreign liquor including locally made malt liquor by the name Dhammika Store/Enterprises located and situated at Wevatghanne , Maturata within the Maturata Division Hanguranketha Pradeshiya Sabha limits of Nuwara Eliya District. However, the petitioner's licence does not permit consumption of liquor within the premises.

A true copy of the petitioner's FL licence that was in operation at the time of filing these proceedings for the year 2008 is annexed and marked P 2.

The petitioner had been operating the said Wine Stores at the address given above since 1994 and has been duly granted the renewals of the

license including the consequential Retail Licenses for the sale of Arrack and Bottled Toddy at the same premises and is engaged in the business of selling Foreign liquor and has obtained the necessary valid license for the period from 01/01/2011 to 31/12/2011.

Petitioner states that due to number of earth slips which occurred in the vicinity of the petitioner's licensed premises since mid 2007 and many times thereafter it has become highly dangerous to continue to conduct his liquor sale business at the same premises and consequently, the petitioner made an application by the letter dated 13/06/2007 and sought permission for relocation of the business to a suitable location.

However, the petitioner complains that the 1st respondent issued the document marked P 15 stating that relocation sought by the petitioner was refused on the ground that there had been strong protest by the public to relocate the business premises. The petitioner impugns the said letter marked P 15 refusing the relocation on the following grounds:

- a) 1st and 2nd respondents could not have arrived at the impugned conclusion in as much as all relevant functionaries, as well as inquiry report issued by the 3rd respondent who was the Deputy Commissioner of Excise at the time have all made positive recommendations allowing the petitioner's proposed relocation;
- b) In any event P 15 could not have been made under and in terms of the applicable regulations namely P 6.

It is further submitted that impugned order in P 15 does not withstand the test of reasonableness, and has been made upon collateral and extraneous considerations without proper reasons and liable to be set aside in limine.

The petitioner has sought to relocate the business premises to No. 20, Kandy Road, Walapane. The 4th respondent has confirmed that the petitioner has fulfilled all the requirements for relocation and however he has noted that, in view of the public protest, an inquiry should be held.

The Deputy Commissioner of Excise, the 3rd respondent after inter pate inquiry has held that it was most equitable to permit the petitioner's proposed relocation and the petitioner has annexed the document dated 26/12/2007 issued by the Deputy Commissioner of Excise marked P 12 in support of that position.

The petitioner's application for relocation , despite the recommendations by the 3rd and 4th respondents , was refused by the document marked P 15.

The petitioner in this application is seeking inter alia, a Writ of Certiorari to quash the decision contained in P 15 refusing to relocate the business premises. The petitioner also seeks a Writ of Mandamus on the 1st respondent to allow the relocation. The petitioner contends that the refusal to relocate in the circumstances is wrongful and bad in law.

The 1st to 6th respondents contend that the Rules made by HE the President under section 32 of the Excise Ordinance as amended and read with section 25 of the said Ordinance contained in Extra Ordinary Gazette marked R 1 with the objections will have to be considered by court when determining the issue before court. The Rules relevant to this application were made and published on 04/04/2008 and the petitioner's application was filed on 11/06/2008 after promulgation of the Rules.

The learned Senior State Counsel drew the attention of the court to Regulation 27 of the relevant Gazette marked R1 wherein it is stated that no approval will be granted to relocate any liquor license. However, relocation will be considered by the Commissioner General of Excise on the ground of natural disaster, or due to a government development activity or due to any other reason the Commissioner considers as reasonable if the relocation takes place within the same divisional Secretariat Division.

Regulaytion 27 in R1 reads as follows:

"No approval will be granted to relocate any liquor selling licence . However, in the case of a natural disaster or, due to a government

development activity or due to any other reason which Excise Commissioner General considers as reasonable, change of location of a licensed premises can be considered, if the relocation takes place within the same Divisional Secretariat Division. In order to consider such a request, applicant has to pay Rs.7500 for processing the application

Thus it can be seen that relocation of any business premises (any liquor license) is permitted only on the grounds above referred to and not as of right. The respondents' position is that the refusal of the relocation application was due to serious public protest which is a valid ground for refusal of the relocation.

It is to be noted that the 4th respondent when informing that the petitioner has satisfied the requirements for relocation stated that in view of the public protest a decision should be taken after an inquiry in to the objections.

On perusal of the material placed before the court it seems to me that the petitioner has participated at the said inquiry and he was aware of the public protests . I also observe that the petitioner relies on the said inquiry report marked P 12 wherein it states that relocation of the licensed premises is equitable and justifiable.

The learned SSC has cited the judgment of the Supreme Court in the case of **Samadasa v Wijeratne Commissioner General of Excise and Others 1999 2 Sri.L.R 85** in the written Submissions of the 1st to the 6th respondents in support of the contention that the discretionary power which has to be exercised judicially can and must be exercised only by the authority to whom the power has been conferred.

In the above case the petitioner's application for a liquor license was recommended by the Gramasevake Niladhari , OIC in charge of the area police Station and the excise authorities . It was objected to by the Divisional Secretary on the ground of a possible breach of the peace and

religious and moral considerations. However, on the recommendation of the SLFP organizer for the area , a licence had been granted to one Ariyadasa without weighing such considerations. Besides four other liquor stores had been permitted to operate in Matara in close proximity to one another. The Supreme Court in holding that there was no rational basis for treating the petitioner's application differently specifically held that the 1st respondent Commissioner General of Excise was the person empowered by law to issue or refuse the license and that that he had abdicated his authority by blindly accepting the recommendation of the Divisional Secretary.

I observe that the statutory discretion conferred by the statute upon the functionary must be exercised by the same authority and not by any other officer . The discretion cannot be abdicated to another officer unless the statute expressly authorizes.

The intervenient petitioners strongly objected to this application on the basis that the place the petitioner is seeking a relocation among other reasons, is less than 100 meters away from the Buddha Statue presently located. It was the position of the intervenient-petitioners that Young Men's Buddhist Association has been seeking public contributions for construction of the Buddha statue which is in question as many other places of public religious worship from 2005. It appears that the petitioner's application for relocation marked P10 was made long after the Buddha Statue was built. Further it obvious that present application was for relief was filed by the petitioner only in 2008. It is the contention of the intervenient petitioners also that the new location sought by the petitioner should comply with all the requirements stipulated in the Gazette Notification marked R1 filed by the 1st to 6th respondents .

I will now consider the provisions contained in Rule 20 (c) of the Regulations marked R1 which reads as follows:

“ The location of premises for operation of licences in respect of sales of liquor off the premises should be 100 meters away (as the crow flies from boundary to boundary) from schools and places of public religious worship

Provided however, that in respect of following types of existing licences the relaxation of the distance specified in paragraph (c) of this item may be determined by the Commissioner General of Excise, if he is satisfied that there are no specific objections by the public in respect of the issuances of licences to such premises.

- i) Licences approved by the Tourism Development Authority (Former Tourist Board)
- ii) Licences which have been in continuous operation for 10 years or more at the same location
- iii) Licences remained in force prior to the establishment of such public religious place of worship or school.”

The 1st to 6th respondents have annexed to the statement of objections documents marked R 1 A , R 2, R3, R4, R 5, R6, and R 11 which this court cannot disregard as not relevant and It can be seen that those documents indicate that there had been strong public protests for relocation of the petitioner’s wine stores. I observe on a reading of the written submissions of the respondents that the distance criteria has also not been satisfied by the petitioner as the relocation sought is below 100 meters away of the public religious place of worship in question.

It was submitted that the intervenient petitioners have a genuine concern and legitimate interest in intervening into this application.

On careful consideration of the above reasons It seems to me that the refusal to permit the relocation sought by the petitioner is within the parameters of the regulations (R1) in force and the decision is in compliance with the law.

I agree with the submissions made by the Learned Senior State Counsel and the Learned President's Counsel who appeared for the 9th to the 19th intervenient petitioners and come to the conclusion that the refusal to grant the relocation of the liquor license within the law and on the basis that the 1st and 2nd Respondents have acted within the regulations applicable is and as such the relief sought by the petitioner cannot be granted in the circumstances.

Accordingly, I dismiss the petitioner's application and in the circumstances of this case, we order no costs.

PRESIDENT OF THE COURT OF APPEAL

Anil Goonaratne J ,

I agree.

JUDGE OF THE COURT OF APPEAL.