

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

1. H. R. Gardiye PUNCHIHEWA
2. H. F. S. GUNASIRI FONSEKA

Both of No. 11, Station Road,
Moratuwa.

PETITIONERS

C. A 64/2009 (Writ)

Vs.

1. D. G. M. V. HAPUARACHCHI
Commissioner General of Excise
Excise Department ,
No. 28, Staples Street,
Colombo 02.
2. Divisional Secretary,
Divisional Secretariat
Kalutara.
3. Hon. Attorney-General
Attorney General's Department
Colombo 12.

RESPONDENTS

BEFORE: Anil Gooneratne J. &
Deepali Wijesundera J.

COUNSEL: Romesh de Silva P.C., and Sugath Caldera for Petitioners
Uresha Fernando S.C., for Respondents

ARGUED ON: 05.07.2013

DECIDED ON: 17.09.2013

GOONERATNE J.

The two Petitioners have sought a Writ of Certiorari (as in prayer 'b') and a Writ of Mandamus directing the 1st & 2nd Respondents to issue a liquor licence for the year 2009 and to endorse on license P7 making it applicable till December 2009. The material furnished to this court indicates that the Petitioners were carrying on the business of selling liquor and was running a bar and a restaurant from the year 1980 (P1). The name of the business as pleaded had changed from time to time as in paragraph 6 of the petition (documents tendered not legible). It is stated that on or about 1980 to 31.10.2001, business had been

carrying on under licence, at 37/16 & 16, Galle Road, Kalamulla, Kalutara (P4 not legible).

In the petition the Petitioners plead that the 1st Respondent refused at certain times to issue a licence and had to seek relief from court, and thereby got the licence extended (vide P5 and paragraph 10 of Petition) paragraphs 11 – 14 of the petition deals with the issuance of licence and payments made by Petitioner (P6a & P6b) one of the important points are dealt in paragraphs 14/15 of the petition. By P8(a) & P8(b) the 1st Respondent requested the petitioner to submit a survey report showing distance to schools and places of religious worship. Petitioner objected to same by P8. Letters P10a, P10b are letters objecting to Petitioner's liquor outlet according to the reasons stated therein. Petitioner pleads document P12 the Excise Notification No. 892.

As regards the distance rule the Petitioners state that the licence do not fall into the category of the distance rule for the reasons:

- (a) Gazette 11 – 348/2 of 9.11.79 still remains in force
- (b) S.C F/R 164/96 took note of the situation.
- (c) Licence not governed by Excise Notification 902 of Gazette 1544/17 of 10.4.1979.
- (d) In any event the 1st Respondent is bound to exercise discretion correctly under Notification 902.

I would refer to the points urged by the Respondents as follows which have been gathered from the pleadings.

- (1) P1 has no relevance to the matter in dispute.
- (2) This application pertains to the liquor licence issued to the Petitioner to his business premises No. 59 & 59A Station Road, Kalutara South. Application for the licence for 2006 marked R1, and relocating the licence to the present location (R2).
- (3) Licence not issued beyond 31.1.2009 issued to the premises and to a person in the premises.
- (4) Rules in gazette R3 – uniformly apply to all licencees.
- (5) That in terms clause 29(c) of Schedule III of the said Rules of 10.04.2008, the location of premises for operation of licences in respect of selling liquor for consumption within the premises should maintain a distance of 500 meters from schools and places of public religious worship.
- (6) That the above stated restriction/conditions were also stipulated in the Rules that were promulgated under Schedule III of the Excise Notification 892 bearing gazette of 29.12.2006 and effective from the said date
- (7) That at the time of relocation, the Petitioners had submitted a Surveyor Plan dated 24.04.2006 in support of the application for a license, that did not disclose any schools or places of public religious worship within 500 meters and had thereby sought to suppress a material facts.

(a true copy of the surveyor plan submitted by the Petitioners dated 24.04.2006 is marked as 'R4'.

(8) That several complaints were received by the 1st Respondent alleging that the Petitioners business premises were located in contravention of the aforesaid distance rule.

(true copies of letters dated 24.11.2006 and 14.02.2007 are marked as 'R5(a)' and 'R5(b)'.

(10) That the Petitioners were then advised to furnish a report by the Surveyor General in respect of the aforesaid distance rule and that the Petitioners failed to comply with repeated requests made by the 1st Respondent and therefore the excise licence of the Petitioners were not extended beyond 31.01.2009 until the issue was resolved by ascertaining the veracity of the allegations.

(true copies of letters dated 17.08.2007, 26.10.2008, 28.10.2008, 05.01.2009 and 22.01.2009 are marked as 'R6(a)' 'R6(b)' 'R6(c)', 'R6(d)' and 'R6(e)'.

(11) that the 1st Respondent thereafter proceeded to act in terms of the provisions of clause 13(h) of Schedule III of Excise Notification No. 902 and obtained a report from Government Superintendent of Surveys and that in terms of the plan of the Government Superintendent of Surveys bearing

No. Ka/SGO/09/67 dated 26.02.2009 no less than 07 schools and religious places were discovered within the relevant 500 meters zone, none of which were indicated in the surveyor plan submitted by the Petitioners dated 24.04.2006 marked as 'R4'.

(true copies of letters by the 1st Respondent in respect of the survey dated 16.01.2009 and 12.02.2009 and the Surveyor Plan by the relevant Superintendent of Surveys are marked 'R7(a) ' R7(b) and 'R8'.

We do agree that in terms of the Excise Ordinance a licence is issued to a person in respect of a particular place of business. The position of the Respondents seem to be that the licence relate to premises No. 59, 59A, Station Road, Kalutara South as from 20.12.2006 (vide R2). The excise licence had not been extended beyond 31.01.2009, in view of the requirement in R3 gazette. In terms R3 and Rule 20(c) of Schedule III location for operation of licences in respect of selling liquor for consumption within the premises should maintain a distance of 500 meters from schools and places of worship. If the Petitioners have breached the above, a licence cannot be granted. The question is as to how the authorities arrived at a decision not to grant the licence, is a matter that should have been properly inquired into and given the Petitioners a proper hearing prior

to taking any decision against the Petitioners more particularly as the Petitioners were granted the licence for several years.

Petitioners rely on plan R4. The only complaints appear to be letters marked R5a & R5b. Letter R5a is somewhat a general complaint without much or any details. The signatory is just described as Buddhist population (බෞද්ධ ජනතාව). It appears to be too artificial. The letter R5b is signed by Secretary, Young Buddhist Committee. It is a mere complain, again without much details. Both letters should (R5a & R5b) not be the basis of a decision to cancel a licence in the absence of holding an all inclusive inquiry prior to refusal to grant the licence beyond 31.1.2009, and or a proper hearing afforded to the Petitioner prior to a decision in a case of this nature would be essential.

Documents R7b & R8 are dated 12.2.2009 and 26.2.2009. These are documents obtained subsequent to the Petitioners filling this application in court and obtained for the purpose of this case. If the Respondent rely on same an opportunity should have been afforded to the Petitioners at a proper hearing, to counter the above, in terms of the relevant rule.

The Rule 20(c) reads thus:

(c) The location of premises for operation of licences in respect of sale 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 and in respect of licenses for selling

liquor for consumption within the premises should be 500 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 issuance of licences to such premises.

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

There is an area of discretion left to the Commissioner General of Excise to relax the distance rule. The objection if any appear to be too artificial and had not been inquired into according to the material placed before this court. I have fortified my view as per the judgment of Sripavan J. in the case of Ratnayake Vs. Commissioner General of Excise and Others 2004 (1) SLR 115.

The petitioner had been carrying on the business of a retail liquor shop from 1987. The petitioner made an application for a licence for 2003 and was refused in May 2003 on the basis that a Muslim mosque is situated close to the petitioner's liquor shop.

The petitioner contended that he had a legitimate expectation to have his licence. No hearing was granted to the petitioner prior to making the impugned decision, that the construction of the mosque 10 years after the petitioner commenced his business is not a valid reason for the refusal and the authorities had not considered the relevant circular where it had been laid down that, when a licence has been in continuous operation for 10 years or more at the same location the distance rule will not be adhered to.

Held:

- (i) When refusing the petitioner's licence for 2002, the 1st respondent has failed to give an opportunity to the petitioner to controvert or contradict the report relied upon by the respondent.

"No man can incur a loss of property by judicial or quasi judicial proceedings unless and until he has had a fair opportunity of answering the complaint made against him"

- (ii) The refusal to issue the licence for the year 2003 is arbitrary, capricious and unreasonable, especially where the gazette marked P1 (14.11.2000) is silent as opposed to gazette marked P16 (22.09.2003). The petitioner had no control over the construction of the Muslim mosque 10 years after he commenced his liquor business.

At Pgs. 117/118...

I would like to quote a paragraph from my own judgment in *Gamlathge Ranjith Gamlath V. Commissioner General of Excise* and two others.

"It is one of the fundamental principles in the administration of justice that an administrative body which is to decide must hear both sides and give both an opportunity of hearing before a decision is taken. No man can incur a loss of property by judicial or quasi-judicial proceedings unless and until he has had a fair opportunity of answering the complaint made against him. Thus, objections at public inquiries must be given a fair opportunity to meet adverse evidence, even though the statutory provisions do not cover the case expressly. (Vide

Errington v. Minister of Health). The court would certainly regard any decision as having grave consequences if it affects proprietary rights. In Schmidt v Secretary of State for Home Affairs at 170 Lord Denning M. R. suggested that the ambit of natural justice extended not merely to protect rights but any legitimate expectation of which it would not be fair to deprive a person without hearing what he has to say.

This Court granted interim relief on 30.01.2009 (as per prayer 'd'). As observed above we will conclude this judgment by stating that the ambit of natural justice extend not merely to protect rights but any legitimate expectation of which it would not be fair to deprive a person without hearing what he has to say.

In all the above facts and circumstance of this case we are inclined to grant the relief prayed for in sub paragraph 'b' & 'c' of the prayer to the petition for the issuance of Writ of Certiorari and Mandamus. However this judgment should not be a bar to the Respondents to take the necessary steps according to law in t he future.

Application allowed without costs.

JUDGE OF THE COURT OF APPEAL

Deepali Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL