

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

H.D.J.D.A Samaranayake
40, Singhapura Road,
Chilaw.

PETITIONER

C.A 237/2013 (Writ)

Vs.

1. D.G.M.V. Hapuarachchi
Commissioner General of Excise
Excise Department
No. 34, W.A.D, Ramanayake Mawatha,
Colombo 2.
2. A. Bodaragama
Deputy Commissioner of Excise
(Revenue)
Excise Department
No. 34, W.A.D. Ramanayake Mawatha,
Colombo 2.
3. H. S. S. Lusena
Divisional Secretary,
Divisional Secretariat,
Arachchikattuwa.
4. Kapila Kumarasinghe
Assistant Commissioner of Excise (North
Western Province II),
Office of the Assistant Commissioner of
Excise, Waikkal.

5. Hon. Attorney General
Attorney General's Department,
Colombo 12.

RESPONDENTS

BEFORE: Anil Gooneratne J. &

COUNSEL: Romesh de Silva P.C with Sugath Caldera for Petitioners

Vikum de Abrew D.S.G., for Respondents

ARGUED ON: 22.11.2013

DECIDED ON: 06.02.2014

GOONERANTE J.

This is an application for a Writ of Certiorari and Mandamus in a liquor case where the Petitioner is challenging the refusal to issue a licence, to the change of location of outlet as described in sub paragraphs (b) & (c) of the prayer to the petition. The Petitioner ran a business selling beer at the premises

situated at Dematapitiya, Kumarakattuwa. In the manner pleaded in paragraphs 7/8 of the petition, licence was owned by one Chandika and same was transferred on 30.11.2012 to the Petitioner. The premises where the liquor was sold was not owned by the Petitioner and as such Petitioner as pleaded in the body of the petition identified another premises at 85, Mile Post, Puttalam within the Rajakadaluwa, Divisional Secretariat Division. It is also pleaded that in the hone of obtaining a liquor licence the Petitioner spent a large sum of money to purchase, renovate and build the premises in dispute. Petitioner made an application to shift to the building to carry on his liquor business (P3 – P3(F)) and for its renewal (P4 to P4(B)).

The learned President's Counsel in his submission emphasized as regards the material contained in the last paragraph and the last page of document P3 and emphasis that the necessary approvals had been obtained. Therefore the officials requested for a report from the 3rd Respondent, as to whether there were any public protest (P5). Subsequently steps were taken to call for reports as regards public protests which ultimately resulted in authorities contemplating to hold an inquiry. I would very briefly refer to protests divulged to this court and several other aspects of the case, as follows.

- (a) By P6, 3rd Respondent states the Grama Niladari in his report informs that there were persons objecting. (however Grama Niladari's report not made available even to court).
- (b) Petitioners inquiries reveal that (P7) in fact the persons named in P6 have no objection.
- (c) Letter P10 indicates (sent by 3rd Respondent) person referred to in P6 had not objected in writing. The last paragraph of P10 indicates that over 100 person have protested but such letter of all of them cannot be sent
- (d) By P11, 4th Respondent directed to cause an inquiry into public protest.
- (e) P12 – calling for an inquiry with all the protestors in the office of the Excise Commissioner on 09.5.2013.
- (f) P13 & P14 only one person named in (para 30) was present for an inquiry and that person's statement was recorded. No other protester present. As such all others to appear on 16.5.2013.
- (g) P15, since the Grama Niladari was not present inquiry re-fixed for 23.8.2013.
- (h) Letter P17 issued by M.P. and Minister, to Commissioner of Excise to recommend and issue the licence to Petitioner. P18 letter by Arachchikattuwa Pradeshiya Sabha indicates that there are no protest by the public. P19 supports P18 with several signatories indicating that there are no objections.

There is also an allegation of Mala fides against the 3rd Respondent and such allegation, seems to be supported in view of the material contained in paragraphs 38, 39 & 40 of the petition. However by P25 Petitioner's request had

been turned down, mainly for the reason that the 3rd Respondent had not recommended the issue of the licence to the Petitioner. Learned President's Counsel for Petitioner demonstrate to court that the decision in P25 is illegal/unreasonable/ultra vires etc. and inter alia referred to the contents of documents 43 – 48 & 52 of the petition and the corresponding paragraphs of the affidavit.

The learned Deputy Solicitor General on behalf of the Respondents resisted and challenged the case of the Petitioner more particularly based on documents 3R1, 3R2 & 3R3. Learned Deputy Solicitor General also referred to the regulation at P28. What was emphasized is the fact of intimidation by the Petitioner to obtain signatures of persons to show a favourable result for the Petitioner. It was also submitted on behalf of the Respondents that by reference to 3R1 – 3R3 several persons had objected, and thereby it was submitted that the facts are in dispute. It was the contention of the learned Deputy Solicitor General that when facts are in dispute one cannot resort to the available review procedure. The learned D.S.G very correctly referred to one of the latest cases on the subject C.A 1384/05 which was decided by the Court of Appeal and S.C Case No. 59/2008 which affirmed the Court of Appeal (1384/05) case and dismissed the appeal of the Appellant. I am very much thankful to learned D.S.G since

having perused the above judgment I am able to distinguish those cases from the case in hand.

C.A. Application 1384/05 and S.C. 59/2008 are considered by this court, since it relates to the identical and same subject matter, dealt by the Supreme Court from a judgment of the Court of Appeal. In the said application a property was purchased and built at a certain point of time and the owner when he decided to sell the property, it was found that another persons' name had been entered as owner in the relevant folios maintained in the Land Registry. Registrar of Lands presented his case according to the relevant folios maintained in the Land Registry, and material placed before Court in the usual way by way of an affidavit. As such the Appellate Court cannot in such a case and in a Writ Application call for oral evidence since the procedure prohibits such course of action. There were major facts that were in dispute and not well suited at all to be decided by a review procedure. In brief the truth of the matter need to be decided and examined in a Original Court or at an inquiry held within the administrative process, or at an inquiry as the case in hand to be held by the Commissioner of Excise or by an office delegated with power in terms of the provisions of the Excise Ordinance. As such the case in hand is no comparison to the above mentioned applications since in those cases the facts were in dispute

from the outset which could not have been verified by the Court of Appeal, at all. In the case in hand the authorities concerned relied upon an inquiry process to enable parties to test each others' truthful position. However this court is of the view that the inquiry held has not been properly conducted in compliance with the rules of natural justice and the decision contained in document P25 is an unreasonable, irrational decision.

In considering all the facts and circumstances of this case, it appears to this court that a proper all inclusive inquiry had not been held by the authorities concerned. If the Respondent rely on document 3R1 to 3R3, the Petitioner should have been confronted or called upon to explain the contents of 3R1 – 3R3 in the best possible way and to his best of knowledge. If there was any intimidation by the Petitioner, did the authorities concerned verify that aspect or did the persons who were intimidated seek police assistance? If democracy prevails and the law is properly enforced in a civil society, people have a legitimate right to complain of any kind of intimidation to the law enforcement Agencies, and also to be protected by law. If this aspect was properly inquired and if the authorities found that one section of the public oppose the Petitioners and others support, the inquiring officer would be entitled to act according to his conscience and deliver an order to the best of his ability even assuming it is

erroneous. That would be the point at which one could rely on the premise that major facts are in dispute and as such the review procedure is not available. Merely expressing a view that facts are in dispute would not suffice specially when a dispute is referred for inquiry, and the truth of it not being verified at the initial stage of the administrative process. Further I note that the statements recorded at the inquiry inclusive of the petitioner and the protestors (if any) are not made available to court, in the usual manner. What was the order of the inquiring officer? Is it only document P25, from which the decisions of the inquiring officer emanated? Was documents 3R1 to 3R3 ever placed before the inquiry and was there any opportunity to have it tested? This court is unable to find the answers to any one or more of the above questions based on the material made available to this court.

In all the facts and circumstances of this application this court is of the view that a proper inquiry had not been held to decide on the suitability of the Petitioner's application. Documents P4, P10, P12, P13, P14, P15, P16, P17, P18 & P19 appears to be favourable documentation or somewhat favourable documents submitted on behalf of the Petitioner. The manner in which documents 3R1 to 3R3 surfaced or whether it was produced at the so called inquiry held by the authorities concerned has not been properly and precisely

explained. In the light of all material placed before court it is not possible to arrive at a decision as regards the maintainability of letter P25 in the context of this case. This court is of the view that the decision if any contained in P25 is unsupported with material which should in the normal circumstances emanate from a due inquiry. As such P25 is an unreasonable and an irrational view expressed by the 1st & 2nd Respondents. As such I allow the application only as regards the later part of sub-paragraph (b) of the prayer to the petition. i.e in the alternative to quash the decision referred to in letter marked P25.

As regards the Writ of Mandamus, I am of the view that such relief cannot be granted in the context of this case and in the absence of a proper all inclusive inquiry being held by the authorities. On that aspect no proper material has been placed before court to establish a statutory and or a public duty on the part of the Respondents. Therefore I allow this application only as regards the later part or the 2nd limb of sub-paragraph (b) of the prayer to the petition without costs.

Application allowed as above.


JUDGE OF THE COURT OF APPEAL