

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC
OF SRILANKA**

**In the matter of an Application for
mandates in the nature of Writ of
Certiorari and *Mandamus* under and in
terms of Article 140 of the Constitution of
The Democratic Socialist Republic of Sri
Lanka**

Akarawitag Don Dishan Chanaka Dharmasena,
No.762, Romiel Mw,
Panagoda,
Homagama.

Petitioner

CA/ WRIT/ 369/2014

Vs,

1. Commissioner General of Excise,
Excise Department of Sri Lanka,
No.34, W.A.D.Ramanayake Mw,
Colombo 02.
2. District Secretary of Gampaha District,
Gampaha District Secretariat,
Gampaha.
3. Divisional Secretary,
Negombo District Secretariat,
Negombo.
4. R.M. Rathnayake,
Assistant Commissioner of Excise,
Office of Commissioner of Excise of
Gampaha.

5. R.M. S. Rathnayake,
Accountant,
Negombo District Secretariat,
Negombo.
6. N.H.D. Senathilake,
Tavern- Puttalam,
Chilaw Rd,
Puttalam.
7. Secretary,
Ministry of Public Administration and Home
Affairs,
Independence Square,
Colombo 07.

Respondents

Before : **Vijith K. Malalgoda PC J (P/CA) &
H.C.J. Madawala J**

Counsel : **Asthika Devendra for the Petitioner,
M. Jayasinghe SC for the Respondents.**

Written Submissions On : **29.05.2015**

Argued On : **04.06.2015**

Order On : **17.07.2015**

Order

Vijith K. Malalgoda PC J (P/CA)

Petitioner has filed the present application before this court seeking inter alia;

- D. Grant interim order staying the decision and/or implementation thereof and/or taking any further steps of the decision to award the tender of Green- bar tavern for 2015 to the 6th Respondent for year 2015 more fully reflected in P-4 until the final determination of this application.
- E. Writ of *Certiorari* quashing the decision of the one or more or all of the 3rd ,4th ,5th Respondents made under the authority of the 1st Respondent dated 24.09.2014 to award the tender of “Green bar” tavern for the year 2015 to the 6th Respondent which is reflected in P-4
- F. Grant mandate in the nature of *Mandamus* directing the 1st and/or 2nd and/or 3rd and/or 4th and/or 5th Respondents to award/grant the tender of “Green bar” tavern for the year 2015 to the Petitioner

The petitioner was an applicant for the tender of the license for “Green bar” (Foreign liquor) tavern for the year 2015. By Gazette notification No. 1876 dated 05.08.2014 which produced marked P-1 3rd Respondent had called for tenders for 12 tavern licenses for the year 2015 in respect of 12 areas situated in Negombo Divisional Secretariat, including for the “Green bar” tavern which was the only foreign liquor license to be issued.

Petitioner had submitted that he was a joint successful bidder for the same tavern for the year 2014 and submitted duly preferred an application for the same tavern for the year 2015.

When the tenders were opened, the petitioner came to know that there were only two bidders and the tender was awarded to the highest bidder, namely the 6th Respondent. Since the Petitioner has observed several irregularities in the awarding process, he has filed the present application seeking inter alia a Writ of *Certiorari* and *Mandamus* and also supported for interim relief as prayed in paragraph D to his prayer.

This court being satisfied with the material placed on 04.12.2014 issue interim relief as prayed in paragraph D to the prayer.

During the Argument before us Petitioner brought to the notice of this court the following facts,

According to the notification published in Government Gazette calling for the tenders, following conditions were specified by the 3rd Respondent.

- a) Any alteration done by the tenderer on the application, should be confirmed by his signature, any violation will be liable for rejection (rule 3)
- b) The successful tenderer should furnish a cash deposit of more than three months rent value on or before 2.00 pm on the date of the sale of the tender (rule 7)

The annual rent the Petitioner bided for the above tender was Rs. 1272000/- (Rs. 106,000 x12) and since the successful bidder was required to furnish a cash deposit more than three months (rule 7) rent value on the day of the sale, he was compelled to refrain from bidding a higher annual rent value, since strict adherence of conditions in the said notification was required.

On 24.09.2014 when the tenders were opened before 3rd, 4th and 5th Respondents, Petitioner and the 6th Respondent were present. Since there were several alterations in the tender application preferred by the 6th Respondent which was not confirmed by his signature, petitioner brought the same to the notice of the 3rd, 4th and 5th Respondents in the form of an objection and requested the 3rd to 5th Respondents to reject the tender of the 6th Respondent.

However the 3rd Respondent over ruled the objection and announced the 6th Respondent as the successful bidder as he bided Rs. 1300500/- (108,375 x12)

Subsequent to the said award the 3rd Respondent had informed the 6th Respondent to furnish only two months' rent value which is violation of the Rule 7. Petitioner has objected to the above decision too, but that objection too was also overruled by the 3rd Respondent and 6th Respondent was permitted to deposit Rs. 216 750/- being the two months' rent value.

Being aggrieved by the said decisions, Petitioner has complained to the 3rd Respondent in writing on the same day (P-2) and also complained to the Ministry of Public Administration and Home Affairs on 26.09.2014 (P-3)

Since the 3rd Respondent refused to grant any redress the Petitioner has come before this court to invoke Writ Jurisdiction.

Whilst denying the specific allegations against the 3rd to 5th Respondents, the Respondents have taken up the position that the operative Gazette for calling and evaluation of tender for liquor licenses, is not the

Gazette 1876 of 15.08.2014 but the applicable Gazette is Gazette No 207 dated 20. 08.1982. It was further submitted that according to section 10 of the said Gazette, an applicant is only required to deposit an amount corresponds to two months' rent value before 3.00 pm on the day of the sale.

For the reasons set out above the Respondents have submitted that the 3rd to 5th Respondents have not violated any tender condition when granting the tender to the highest bidder, i.e. the 6th Respondents.

Respondents have further denied the fact that there were alterations in the application of the 6th Respondent, but failed to submit the tender application of the 6th Respondent along with the statement of objection.

By Gazette dated 20.08.1982 Commissioner of Excise has published special conditions with regard to sale of liquor licenses applicable after 1.1.1983. According to the said notification, the special conditions referred to in the notification are applicable along with General conditions which are applicable at the time the applications are called. According to Rule 10 of the said special conditions, any successful applicant has to deposit as security an amount decided by the Government Agent which is more than two months rent.

In the present application the Government Agent or his agent when calling for tenders, by Gazette No. 1876 dated 15.08.2014 has decided the amount, any successful tender has to deposit as three months rent value, which is an amount more than two months rent value as decided by Gazette dated 20. 08.1982.

Therefore the argument by the State Counsel, that the applicant is required to deposit only an amount corresponding to two months' rent vale, cannot be accepted.

The Gazette Notification 1876 by which, the tenders were called to the Green bar tavern, does not contain a clause to the effect that the amount to be deposited will be decided at the time the tenders are opened but instead there was a specific condition that the amount to be deposited at the time the tenders were opened is an amount more than three months rent value.

Therefore the position taken by the Respondent as evident by P-4 that, "it was unanimously decided by the tender committee that two months' rent value should be furnished before 2.00 pm on the same day and the said decision was communicated when the tenders were opened was an arbitrary decision by the members of the tender board.

With regard to the complaint, that there were alterations, which was not confirmed by the 6th Respondent, in the tender document submitted by the 6th Respondent, was rejected by the Respondent before this court. However the Respondents have failed to produce the said tender application along with their statement of objection, but subsequently submitted along with a motion dated 6th April 2015, when the Petitioner raised a specific objection with regard to the said failure in their counter objections.

In the Tender Application Produced Marked 1R2, we observe that the alteration made with regard to the tender value had been confirmed by a signature. The Petitioner has challenged 1R2 and by way of another affidavit filed before this court, submitted that “the tender application before this court is not the original tender application of the 6th Respondent which was opened on 24.09.2014 in his presence.”

When the facts are in dispute this court is not going to decide in favor of either party on this issue but, we are mindful of the fact that the petitioner has challenged the tender document on the same basis from the time the tender were opened in his presence.

For the reasons discussed above I conclude that the decision of the 1st to 3rd Respondents to reduce the initial deposit from three months rent value to two months’ rent value was an arbitrary decision and therefore this court decides to grant a mandate in the nature of Writ of *Certiorari* quashing the decision of the 1st and /or 3rd to 5th respondents to award the tender of Green bar tavern to the 6th Respondent for the year 2015, reflected in document P-4.

However I am not inclined to grant a mandate in the nature of Mandamus at this stage since the petitioner has failed to establish that he was the highest bidder for the tender of the license for Green bar tavern for the year 2015.

PRESIDENT OF THE COURT OF APPEAL

H.C.I. Madawala,

I agree,

JUDGE OF THE COURT OF APPEAL