

**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.*

C A (Writ) Application

No. 113 / 2013

Amaradasa Hiththatiyage,  
Dharshana Restaurant,  
Koratuwa Watta,  
Makandura West,  
Matara.

**PETITIONER**

-Vs-

1. The Commissioner of Excise,  
Excise Commissioner's Department  
(Head office) No. 28,  
Staple Street,  
Colombo 02.
2. The Commissioner of Excise-  
Revenue,  
Excise Commissioner's Department  
(Head office) No. 28,  
Staple street,  
Colombo 02.
3. The Assistant Commissioner  
of Excise,  
Southern Province,  
Matara.
4. The Commissioner of Excise,  
Matara Division,  
Matara.

5. Officer in Charge of Excise Matara,  
Matara.
6. Divisional Secretary,  
Mulatiyana,  
Matara.

**RESPONDENTS**

**Before:      Vijith K. Malalgoda PC J (P/CA)**

**P. Padman Surasena J**

Counsel:    Dr. Sunil Cooray with Nevil Abeyratne for the Petitioner.

Suranga Wimalasena, Senior State Counsel for the  
Respondents.

Decided on: 2016 - 11 - 29

## JUDGMENT

### **P Padman Surasena J**

The Petitioner is the sole proprietor of the restaurant named "Dharshana Restaurant" which is a restaurant approved by the Sri Lanka Tourism Development Authority. He has applied for liquor licenses from the Excise Department under the category of "Licenses issued to Tourist Board approved restaurants". This application has been made with a view of obtaining 'F L 7', 'F L 8' and Arrack licenses for the said restaurant.

The complaint made to this court by the Petitioner is that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents cancelled his long standing existing license by the issuance of the letter marked **X 27**

It was the submission of the learned counsel for the Petitioner that there was no objection by public for his restaurant in the past and that therefore the Respondents, without holding an inquiry could not have cancelled his license as his license was an existing license. Learned counsel for the

Petitioner relied on regulation 21 contained in the Gazette Extraordinary No 1544/ 17 dated 2008-04-10 (marked **X 8**) to base his argument.

Learned counsel for the Petitioner further submitted that the Respondents have failed to hold an inquiry in order to ascertain whether there is material to their satisfaction to exercise their discretion to vary the minimum distance of 500 meters, as provided for, in the Provision to regulation 20 (c).

On this basis the petitioner seeks inter alia from this court;

- i. a Writ of Certiorari to quash the decision/ determination contained in the letter dated 2012-10-18 issued by the 1<sup>st</sup> Respondent as reflected in "**X 27**";
- ii. a Writ of Mandamus compelling the 1<sup>st</sup> and or any one or more Respondents to grant 'FL 7 TB' and 'FL 8' Hotel Bar Licenses to the Petitioner;
- iii. a Writ of Mandamus compelling the 1<sup>st</sup> and or any one or more Respondents to hold an inquiry with regard to Petitioner's grievances

as per the Regulations stipulated under the Excise Notification No. 902 published under the Gazette extraordinary No. 1544/ 17 dated 10<sup>th</sup> April 2008;

- iv. a Writ of Mandamus compelling the 1<sup>st</sup> and or any one or more Respondents to relax the distance as per the Regulations stipulated under the Excise Notification No. 902 published under the Gazette extraordinary No. 1544/17 dated 10<sup>th</sup> April 2008.

It would be appropriate at this juncture to examine the relevant provisions in the rules pertaining to issuing and cancelling liquor licenses.

These rules are contained in the Gazette Extraordinary of the Democratic Socialist Republic of Sri Lanka bearing No. 1544/ 17 dated 2008.04.10.

(hereinafter referred to as the 'Rules')

Regulation 2 requires all persons wishing to obtain a license of whatever category in terms of the Excise Ordinance to forward an application to the Commissioner General of Excise in the form specified in Schedule II to the Rules.

Regulation 3 states that the Commissioner General shall satisfy himself that the applications are in conformity to the guidelines and conditions which are specified in Schedule III to the Rules and that this guidelines and conditions shall be applicable in respect of any financial year.

In Schedule III there are 29 clauses. It would be relevant to refer to few of them at this juncture.

Clause 1 (a) states that the present holders of licenses will not be entitled to automatic renewal on termination of the validity of their licenses and that if the licensee wishes to redeem his license, an application should be forwarded for the consideration of the Commissioner General of Excise in terms of the conditions and guidelines.

According to clause 12, new applicants are required to submit along with their applications a survey plan from a licensed surveyor or indicating the distance (as the crow flies from boundary to boundary) from the proposed building to nearest places of public religious worship and to schools.

However according to clause 19, the existing license holders are not required to submit such a survey plan.

It is clause 20 (c) of Schedule III that the learned counsel for the Petitioner relied upon. Hence it would be of assistance to reproduce the relevant portion of that clause.

Relevant extract from clause 20

"20. Requirements regarding location and description of type of premises ;

(a) .....

(b) .....

(c) The location of premises for operation of licenses 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 for 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 licenses, 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 licenses 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 and school. ...."

" 21. Any objection or protest received by the Commissioner General of Excise from a member of organization of the public either before or after the issue of a license, on the ground that there has been a violation or no compliance with any requirement of the Excise Ordinance or the Guidelines and Conditions herein contained with regard to the issue or continuance of a license, will be notified by the Commissioner General of Excise to the applicant or the licensee as the case may be and will thereafter be inquired into by the Commissioner General of Excise as to the validity thereof and action taken after such inquiry on the basis of the findings thereat. In such an inquiry, if it is found that the

establishment continuing the license at that place may threat or likely threat the maintenance of law and order in the area, Commissioner General of Excise can decide to relocate the licensed premises to a suitable place. This decision will be final. "

Relying on Clause 21, it was the contention of the learned counsel for the Petitioner that the Respondents are duty bound to hold an inquiry to ascertain whether they could be satisfied that there are no specific objection by the public in respect of issuances of licenses in favour of the Petitioner relaxing the specified distance of 500 meters on the basis that the Petitioner's restaurant holds a license approved by the Tourism Development Authority.

Learned Senior State Counsel drew the attention of this court to the application submitted by the Petitioner to obtain the liquor license. It is marked as **R 2**.

It is interesting to note that it is a fresh application to obtain a liquor license which the Petitioner has made. Therefore the Position of the Petitioner that he has submitted an existing license for the renewal,

becomes false. These facts are manifest from the fact that the Petitioner himself has submitted a survey plan from a licensed surveyor which indicates that the distances to close by school and a temple are both exceeding 500 meters. It is relevant to recall that submission of a survey plan is only required when a new application is made (in terms of Clause 13) and not a requirement for renewal of the existing licenses (in terms of Clause 19).

Further, the argument of the Petitioner that his application is an application for renewal of an existing license is not factually correct. Thus the Petitioner is guilty of attempting to mislead this court by suppression of material facts. It would be appropriate to reproduce here the following extract from a judgment of Jayasuriya J in the case of Blanca Diamonds (Pvt) Ltd. Vs. Wilfred Van Els and two others<sup>1</sup>.

" .... In filing the present application for discretionary relief in the Court of Appeal Registry, the petitioner company was under a duty to disclose uberrima fides and disclose all material facts to this court for the purpose of this court arriving at correct adjudication on the

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<sup>1</sup> 1997 (1) SLR 360.

issues arising upon this application. In the decision in Alphonso Appuhamy Vs. Hettiarachchi<sup>2</sup>, Justice Pathirana, in an erudite judgment, considered the landmark decisions on this province in English law and cited the decisions which laid down the principle that when a party is seeking discretionary relief from this Court upon an application for a writ of certiorari, he enters into a contractual obligation with the Court when he files in the Registry and in terms of that contractual obligation he is required to disclose uberrima fides and disclose all material facts fully and frankly to this Court.<sup>3</sup> ..."

As learned Senior State Counsel pointed out the document marked **R 4-2** and **R (9) (h)** are written objections by the public.

According to the survey plan marked **R 3** the Petitioner is well within the stipulated 500 meters of distance both to the close by temple and school. This is manifestly clear from the document marked **X 23** which is a survey plan issued by the Surveyor General.

Petitioner in his petition has not made any attempt to attack this survey plan.

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<sup>2</sup> 77 NLR 121.

<sup>3</sup> at page 362.

Indeed Perusal of the remarks made by an Excise official on the application of the Petitioner marked **R 2** it is apparent that the restaurant of the Petitioner is situated within 500 meters to the closest school and temple.

Respondents by the letter marked **X 22** has requested the Petitioner to produce a survey plan from the Survey Department.

The Petitioner has placed his side of the story through a lawyer to the Respondents by the document marked **X 25**. It was only there after that the Respondents have issued the letter marked **X 27** cancelling his liquor license.

All these aspects have formed part of an inquiry although the Respondents had not mentioned in their letters that they were conducting an inquiry'.

Petitioners sought to argue that he is a person holding an existing license by referring to documents marked **X 17 (a)** and **X 17 (b)**.

However **X 17 (a)** has been issued for a six month period commencing from 2011-12-05 to 2011-12-31 and had thereafter been extended up to 2012-06-30. It is the observation of this court that this is a case in which the Petitioner had mislead the

Respondents by producing a survey plan marked **R 3** to secure the liquor license. It is just that the distances mentioned in **R 3** were thereafter found to be incorrect by the authorities.

Writ jurisdiction of this court would be exercised at the discretion of court. One main requisite condition is that the Petitioner must come to court with clean hands. Secondly the right that such Petitioner asks Court to protect in writ proceeding must be a legally protectable right.

During the course of the argument before this court , learned Senior State Counsel drew our attention to the document marked **R 2**. We observed that the document marked **R 2** which is the application made by the Petitioner is missing from the docket as well as the other brief. On being asked by court learned Senior State Counsel identifies his hand writing in markings that he had given to the documents by a normal pen. However new markings have been inserted with a thicker pen on these documents and in particular placing the marking "**R 2**" on the document which was earlier marked as **R 2 (a)**. Learned Senior State Counsel stated to court that these markings were not made by him. With regard to the removal of

the document marked **R 2** from the briefs and introducing new markings into the briefs, the observation of this Court is that these acts could be deliberate acts. If such acts are deliberate, it would be reasonable to infer that those acts have been committed by an interested party. This document is a document that has not been produced by the Petitioner and the contents of that document is against him, it would be the petitioner who would benefit, if this court by any chance missed it. Learned Senior State Counsel had later tendered a copy of this document to Court along with his written submissions.

There is no doubt that Courts must frown upon these kinds of acts, if they had been done deliberately. Hence we decide to direct the Registrar to make a formal complaint to Police so that this matter could be investigated into, in order to find out as to whether there is any misconduct and if so, as to who is responsible for such acts of misconduct. Registrar is directed to keep the docket and the briefs in his safe custody until the law enforcement authorities could have access to them.

In these circumstances we refuse these applications with costs fixed at Rs. 50,000/=.

Application is dismissed with costs fixed at Rs. 50,000/=.

**JUDGE OF THE COURT OF APPEAL**

**Vijith K. Malalgoda PC J**

I agree,

**PRESIDENT OF THE COURT OF APPEAL**