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

In the matter of an appeal under Section 154P (6) of the Constitution of the Republic of Sri Lanka, read with High Court of the Provinces (Special Provisions) Act No.19 of 1990.

Galle Festival (Guarantee) Limited,

No.61, Ward Place,

Colombo 07.

Petitioner

Case No: CA(PHC) No:155/2010

P.H.C. Galle Case No:

SP/HCCA/GA WRIT/01/2010

Vs.

1. The Galle Municipal Council
   Town Hall, Galle.
2. Hon. Methsiri De Silva
   Mayor- Galle Municipal Council,
   Town Hall, Galle.
3. Mr. B.M Chandrasiri
   Acting Municipal Commissioner/
   Municipal Commissioner,
   Galle Municipal Council,
   Town Hall, Galle.

Respondents

AND NOW BETWEEN

1. The Galle Municipal Council
   Town House, Galle.
2. Mr. W. Kelum Seneviratne
   Hon. Mayor (Acting),
   Galle Municipal Council,
   Town Hall, Galle.
3. Mr. Ranil Wickramasekera
   Municipal Commissioner,
   Galle Municipal Council,
   Town House, Galle.

3A. Wasana Gooneratna
Municipal Commissioner,
Galle Municipal Council,
Town House, Galle.

Respondents-Appellants

Vs.

Galle Festival (Guarantee) Limited,

No.61, Ward Place,

Colombo 07.

Petitioner-Respondent

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

Asthika Devendra with M. Sarathchandra for Respondents-Appellants

Mohomed Adamaly with Janaka Abeysundera for Petitioner-Respondent

Written Submissions tendered on:

Respondents-Appellants on 04.09.2018

Petitioner-Respondent on 25.09.2018 and 22.10.2018

Argued on: 03.10.2018

Decided on: 01.03.2019

Janak De Silva J.

This is an appeal against the order of the learned High Court Judge of the Civil Appellate High Court of the Southern Province holden in Galle dated 24.11.2010.

The Petitioner-Respondent (Respondent) is a company limited by guarantee and duly incorporated under the Companies Act No. 7 of 2007. The primary activity of the Respondent is to organize and conduct the Galle Literary Festival (GLF) during January/early February each year in the city of Galle generally over a five-day period. It was begun in 2007 and according to the Respondent was soon recognised as a premier literary festival in the world.

The GLF was held in 2007 and 2008 without any payment of entertainment tax in respect of the proceeds from ticket sales to the 1st Respondent-Appellant (1st Appellant). According to the Respondent before the GLF being held in 2009, the officers of the 1st Appellant inquired regarding the payment of entertainment tax under the Entertainment Tax Ordinance No. 12 of 1946 as amended and upon representations being made by the officers of the Respondent, the 1st Appellant issued to the Respondent a certificate of tax exemption marked X8. It was submitted by the Respondent that this was an acknowledgement that GLF is not liable to the Entertainment Tax Ordinance No. 12 of 1946 as amended.

The Respondent submitted that in reliance of the Respondent's legal rights and in the legitimate expectation that the Respondent would be granted a certificate of exemption of entertainment tax as in the previous year, the GLF was organized and planned for January/February 2010. However, by letters marked X10, X12 and X14 the 1st Appellant sought to levy an entertainment tax of 25% on all ticket offered for sale by the Respondent for the GLF.

The Respondent thereafter filed the above styled application in the Civil Appellate High Court of the Southern Province holden in Galle and sought the following relief:

(a) Staying the Appellants and or their agents, servants or representatives from acting on or taking any steps whatsoever in furtherance of or towards enforcing their decisions as contained in documents marked X10, X12 and X14 and or towards obstructing or interfering with and or in any way restraining the conduct of the GLF or in any event in the said festival, until the final determination of this application,

(b) A mandate in the nature of a Writ of Certiorari quashing the decisions contained in the letters of the Respondents marked X10, X12 and X14 respectively,

(c) A mandate in the nature of a writ of Mandamus directing the Appellants to issue to the Respondent a confirmation that the Galle Literary Festival 2010 and or the Galle Literary Festival in general is not liable to 'Entertainment Tax' in terms of the Entertainment Tax Ordinance No. 12 of 1946 as amended

(d) A mandate in the nature of writ of prohibition, prohibiting the Appellants and or their agents, servants or representatives from acting on or taking any steps whatsoever in furtherance of or towards enforcing their decisions as contained in documents marked X10, X12 and x14 and or towards obstructing or interfering with and or in any way restraining the conduct of the Galle Literary Festival, until the final determination of this application

After hearing parties, the learned High Court Judge issued a writ of certiorari quashing the decisions contained in X10, X12 and X14 and an order prohibiting the Respondents-Appellants (Appellants) acting outside the powers given in the Entertainment Tax Ordinance No. 12 of 1946 as amended. Hence this appeal by the Appellants.

Resolution under section 2 of the Entertainment Tax Ordinance No. 12 of 1946 as amended

One ground on which the writ of certiorari was issued was the absence of any resolution passed under section 2 of the Entertainment Tax Ordinance No. 12 of 1946 as amended which reads:

> "(1) Every local authority shall have power, by resolution, to impose and levy a tax (hereinafter referred to as the " entertainment tax ") on payments for admission to entertainments held in the area within the administrative limits of such authority at such rate or rates as may be specified in such resolution. The entertainment tax may be imposed at different rates for different amounts of payments for admission, but so however that the rate applicable in the case of any such amount shall not be less than five per centum or more than twenty-five per centum of the amount.
>
> (2) Every resolution under subsection (1) shall be submitted to the Minister for approval and, if so approved, shall be published in the Gazette and shall come into operation on the date of such publication or on such later date as may be specified in such resolution."

The learned High Court Judge held that the Appellants have failed to adduce any evidence of a resolution been passed and approved by the Minister and published in the Gazette and therefore did not have the power to call upon the Respondent to pay entertainment tax for the GLF 2010.

However, the learned High Court Judge has disregarded the fact that the Respondent had sought and obtained an exemption from entertainment tax as pleaded in paragraph 9 of the petition filed in the High Court and reflected in document marked X8. The letter marked X8 states that permission had been granted to release the tickets of the GLF to be held from 29 to 31 January from tax. Such an exemption or release can only be granted if in the first instance such tickets were liable for the entertainment tax as if it was not there is no question of release or exemption. This was obtained after the officers of the Respondent made representations to the Appellant. The Respondent cannot now be heard to state that the 1st Appellant had not taken steps under section 2 of the Entertainment Tax Ordinance No. 12 of 1946 as amended. The Respondent cannot approbate and reprobate.

In *Ranasinghe v. Premadharma and others* [(1985) 1 Sri.L.R. 63 at 70] Sharvananda C. J. held:

> "In cases where the doctrine of approbation and reprobation applies, the person concerned has a choice of two rights, either of which he is at liberty to adopt, but not both. When the doctrine does apply, if the person to whom the choice belongs irrevocably and with full knowledge accepts the one, he cannot afterwards assert the other; he cannot affirm and disaffirm"

Therefore, I hold that the learned High Court Judge erred in relying on the alleged absence of required procedures under section 2 of the Entertainment Tax Ordinance No. 12 of 1946 as amended as a ground for issuing of the writ of certiorari and order of prohibition.

Legitimate Expectation

The Respondent pleaded that it had a legitimate expectation that it would be granted a certificate of exemption of entertainment tax as in the previous year which the Appellants failed to do. In other words, the Respondent is claiming to have a substantive legitimate expectation to be released from tax which it sought to enforce through the High Court.

In this context it is necessary to ascertain what is meant by legitimate expectation in administrative law and the distinction between procedural and substantive legitimate expectation. In *Council of Civil Service Unions v. Minister for the Civil Service* [(1985) A.C. 374, 408-9] Lord Diplock stated that for a legitimate expectation to arise, the decision:

> "must affect [the] other person ..... by depriving him of some benefit or advantage which either (i) he had in the past been **permitted by the decision maker to enjoy** and which he can legitimately expect to be permitted continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has **received assurance** from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn." (emphasis added)

The terms of the representation by the decision-maker must entitle the party to whom it is addressed to expect, legitimately, one of two things:

(a) That a hearing or other appropriate procedure will be afforded before the decision is made. (Procedural Legitimate Expectation); or

(b) That a benefit of a substantive nature will be granted or, if the person is already in receipt of the benefit, that it will be continued and not be substantially varied. (Substantive Legitimate Expectation)

In Sri Lanka the concept of procedural legitimate expectation has consistently been recognized. [*Sundarkaran v. Bharathi and Others* [1989] 1 Sri. L. R. 46, *Desmond Perera v. Karunaratne, Commissioner of National Housing* [1994] 3 Sri. L. R. 316(CA); [1997] 1 Sri. L. R. 148(SC), *Laub v. Attorney-General* [1995] 2 Sri. L. R. 88, *Multinational Property Development Limited v. Urban Development Authority* [1996] 2 Sri. L. R. 51].

The courts have accepted that procedural protection should be given where an individual has a legitimate expectation of procedural protection such as a hearing or a consultation before a decision is made. It is also accepted that where an individual has a legitimate expectation that a benefit of a substantive nature will be granted, or if already in receipt of the benefit, that it will be continued, then fairness too dictates that expectation of the benefit should give the individual the entitlement to be permitted to argue for its fulfilment. The controversy is whether in such situations the individual has a legitimate expectation that the benefit will be granted or continued. This is the question of substantive legitimate expectation.

The traditional objection to the doctrine of substantive legitimate expectation is twofold:

(a) Ultra Vires by fettering the discretion

(b) The principle of legality

The arguments in favour of permitting substantive legitimate expectation are based on the principle of legal certainty. It is said that where a public body makes a promise it is in the interests of good administration that it should act fairly and should implement its promise.

Prior to the Court of Appeal decision in *R. v. Secretary of State for the Home Department, ex p Hargreaves* [(1997) 1 W.L.R. 906] the weight of authority was in favour of the developing doctrine of substantive legitimate expectations. There was direct support in *R. v. Secretary of State for the Home Department, ex p. Ruddock* [1987] 1 W.L.R. 1482 and *R. v. Ministry for Agriculture, Fisheries and Floods, ex p Hamble (Offshore)* [1995] 2 Al E.R. 714 while indirect support could be found in *R. v. Secretary of State for the Home Department, ex p Khan* [1984] 1 W.L.R. 1337.

However, in *R. v. Secretary of State for the Home Department, ex p Hargreaves* [(1997) 1 W.L.R. 906] the court cast a shadow over the doctrine of substantive legitimate expectation by suggesting that it was not for the court to determine the fairness of a minister's decision not to accommodate a reasonable expectation which a policy would thwart, as this amounted to an intrusion into the merits of the decision. It was suggested that on matters of substance *Wednesbury* is the correct test, and that the doctrine of legitimate expectation, based on fairness, cannot be extended from procedural to substantive matters. It was for the decision-maker to undertake the balancing act: to decide whether the expectation should be protected or whether the public interest is strong enough to override the expectation. The court would only quash the decision to apply the new policy instead of the old, if it could be shown that the decision maker's judgement to do was irrational, Wednesbury unreasonable; it could not be quashed on the basis of fairness. The court in *R. v. Secretary of State for the Home Department, ex p Hargreaves*(supra) overrode *R. v. Ministry for Agriculture, Fisheries and Floods, ex p Hamble (Offshore)* (supra) in so far as court said that a balancing exercise should be undertaken by the court.

In *R. v. North and East Devon Health Authority, ex p. Coughlan* [(2000) 2 W.L.R. 622] the question was considered in detail by the Court of Appeal and it was stated that the starting point is to ask what the individual's legitimate expectation was, and suggested that where there is a dispute as to this it is to be determined by the court, with there being at least three possible outcomes with the court taking a different role in respect of each category.

(a) The court may decide the public body only needs to bear in mind its previous policy or assurances, giving it the weight, it thought fit, but no more, before deciding to change course. The court will then only review the decision on conventional *Wednesbury* grounds.

(b) The court may decide that the representation gives rise to a legitimate expectation of procedural benefit and if so, the court will require the opportunity for consultation to be given unless there is an overriding reason to withdraw from it.

(c) The court will in a proper case, decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Once the legitimacy of the expectation is established, it is for the court to determine whether there is sufficient overriding interest relied upon for the change of policy or to justify departing from the promise. The court is undertaking a balancing exercise between the public interest and the individual's interest. This category is a clear acceptance of the doctrine of substantive legitimate expectation. The court defined the type of case of an enforceable expectation of a substantive benefit as being where the expectation is confined to one person or a few people, giving the promise or representation the character of a contract. Promises rather than policies are more likely to fall within this category.

In Sri Lanka substantive legitimate expectation has been recognized in a few instances. [*Dayaratne and others v. Minister of Health and Indigenous Medicine and Others* [1999] 1 Sri. L. R. 393, *Mowjood v. Pussadeniya* [1987] 2 Sri. L. R. 287].

However, Weerasuriya J. in *Sirimal and others v. Board of Directors of the Co-operative Wholesale Establishment and others* [(2003) 3 Sri.L.R. 23 at 29] set out the position as follows:

> "Therefore, when there is a substantive legitimate expectation in need of protection, it is for the decision maker and not the Court to judge whether that expectation should be protected or whether broader public interest is so strong as to override the expectation. The Court would only intervene if the decision maker's judgment was perverse or

irrational. Thus, the present position is that the substantive protection of legitimate expectation has to be sought on the more traditional approaches of the English Law namely (a) procedural protection and (b) protection in terms of 'Wednesbury' unreasonableness."

This decision appears to shut out the third category discussed in *R. v. North and East Devon Health Authority, ex p. Coughlan* (supra). This court is bound by the Judgment of the Supreme Court unless it is one made *per incuriam* [*Ramanathan Chettiar v. Wickremarachchi and others* (1979) 2 Sri.L.R. 395].

However, in terms of Article 140 of the Constitution, this Court will issue writs "*according to law*" which has consistently been interpreted to mean English Common Law [*Wijesekera v. Assistant Government Agent, Matara* (44 NLR 533 at 538), *Nakuda Ali v. Jayaratne* (51 NLR 457 at 461), *Colombo Commercial Co. Ltd. v. Shanmugalingam* (66 NLR 26 at 32), *Mendis, Fowzie v. Goonewardena, Silva ((1978-79) 2 Sri.L.R. 322 at 356, 363), Mohideen v. Goonawardene* (1986) 2 C.A.L.R. 487 at 493, *Sirisena Cooray v. Tissa Dias Bandaranaike* (1999) 1 Sri. L. R. 1 at 14-15]. To that extent the dicta of Weerasuriya J. in in *Sirimal and others v. Board of Directors of the Co-operative Wholesale Establishment and others* (supra) is *per incuriam* as *R. v. North and East Devon Health Authority, ex p. Coughlan* (supra) was not considered. Accordingly, in my view the third category identified in in *R. v. North and East Devon Health Authority, ex p. Coughlan* (supra) which allows for substantive legitimate expectation to be protected and enforced by court is, subject to the criteria identified therein, part of our law.

In the instant case, the tax exemption has been granted to the Respondent only once. There is an element of public interest involved as the 1st Appellant as a public body should be able to recover taxes lawfully due to enable it to perform its statutory functions. It has been stated that due to the large number of participants at the GLF festival, the 1st Appellant has to perform additional work in order to keep the city clean. Therefore, although the Respondent cannot contend that the Appellants must grant a certificate of exemption of entertainment tax as in the previous year for the GLF 2010, there was a legitimate expectation on the part of the Respondent

that before deciding not to grant a certificate of exemption of entertainment tax for the GLF 2010 the Appellants will give the Respondent a hearing [*R. v. Secretary of State for the Home Department Ex. P. Khan (Asif Mahmood)* (1984) 1 W.L.R. 1337]. This was not granted and I hold that for the aforesaid reason, the writ of certiorari as prayed for by the Respondent should be granted.

The learned High Court Judge granted two reliefs to the Respondent.

Firstly, an order prohibiting the Appellants acting outside the powers given in the Entertainment Tax Ordinance No. 12 of 1946 as amended. However, no such relief was prayed by the Respondent. It is an established principle that Court cannot grant relief not prayed for by a party [*Sirinivasa Thero v. Sudassi Thero* (63 N.L.R. 31), *Wijesuriya v. Senaratne* (1997) 2 Sri.L.R. 323, *Surangi v. Rodrigo* (2003) 3 Sri.L.R. 35, *National Development Bank v. Rupasinghe and others* (2005) 3 Sri.L.R. 92, *Doris Siriwardena et al v. De Silva* (2006) 2 Sri.L.R. 309]. The application of that principle to a writ application is seen in *Dayananda v. Thalwatte* (supra) where Jayasinghe J. (with Jayawickrema J. agreeing) held (at page 80):

> "An aggrieved person who is seeking to set aside an unfavourable decision made against him by a public authority could apply for a prerogative writ of certiorari and if the application is to compel an authority to perform a duty he would ask for a writ of mandamus and similarly if an authority is to be prevented from exceeding its jurisdiction the remedy of prohibition was available. **Therefore, it is necessary for the Petitioner to specify the writ he is seeking supported by specific averment why such relief is sought.** Even though the Petitioner has set out in the caption that "In the matter of an application ... for writ of quo warranto and prohibition" there is no supporting averment specifying the writ and there is no prayer as regards the writ that is being prayed for. **The failure to specify the writ therefore renders the application bad in law.**" (emphasis added)

Therefore, the order of the learned High Court Judge of the Civil Appellate High Court of the Southern Province holden in Galle dated 24.11.2010 in issuing an order prohibiting the Appellants acting outside the powers given in the Entertainment Tax Ordinance No. 12 of 1946 as amended is varied by denying any such relief to the Respondent.

Secondly, the learned High Court Judge issued the writ of certiorari as prayed for by the Respondent in the High Court for reasons which as explained above are not sustainable. However, the writ of certiorari as prayed for by the Respondent must go for the reasons set out earlier in this judgment. Accordingly, the order of the learned High Court Judge of the Civil Appellate High Court of the Southern Province holden in Galle dated 24.11.2010 on that point is varied to the extent set out in this judgment.

Subject to the above variations, I see no reason to interfere with the order of the learned High Court Judge of the Civil Appellate High Court of the Southern Province holden in Galle dated 24.11.2010.

Subject to the above variations, the Appeal dismissed. No costs.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal