

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

In the matter of an application in the nature of Writs of Prohibition and Certiorari in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Hotel Developers (Lanka) PLC
No. 02, Sir Chittampalam A. Gardiner
Mawatha,
Colombo 02.

Petitioner

Case No. C.A. (Writ) No. 179/2011

Vs.

1. Colombo Municipal Council
Town Hall, Colombo 07.
2. Omar Zuraik Kamil
The Special Commissioner,
Colombo Municipal Council,
Town Hall, Colombo 07.
3. Bhadrani Jayawardene
The Municipal Commissioner,
Colombo Municipal Council,
Town Hall, Colombo 07.
- 3a. V. K. A. Anura
The Municipal Commissioner,
Colombo Municipal Council,
Town Hall, Colombo 07.

4. T. A. Piyadasa
Revenue Inspector,
Colombo Municipal Council,
Town Hall, Colombo 07.

4a. P. Dalugoda
Revenue Inspector,
Colombo Municipal Council,
Town Hall, Colombo 07.

Respondents

5. A. J. M. Muzahmil
Mayor of Colombo Municipal Council,
Colombo Municipal Council,
Town Hall, Colombo 07.

Added Respondent

Before: Janak De Silva J.

Counsel:

Avindra Rodrigo P.C. with M.R. Samarasinghe for the Petitioner

Ranil Samarasooriya for 1st to 5th Respondents

Written Submissions tendered on:

Petitioner on 04.05.2018

1st to 5th Respondents on 01.06.2018

Argued on: 31.01.2019

Decided on: 19.09.2019

Janak De Silva J.

The Petitioner is a duly incorporated public limited company where the Government of Sri Lanka owns 65% of the total shares and is licensed by the Sri Lanka Tourism Development Authority (SLTDA). The Petitioner's hotel is registered as a "Five Star Tourist Hotel" in the register of tourist hotels maintained by the Director of Corporate Services of SLTDA under registration no. HC/064.

The Petitioner was issued trade licenses by the 1st Respondent to operate the Petitioner's hotel at No. 55 Lotus Road, Colombo 1 upon the payment of annual licence duty calculated at the rate of Rs. 5 per occupied room in respect of the years 2002 (P6), 2004 (P7), 2005 (P8) and 2006 (P9). According to the 1st to 5th Respondents this licence duty was levied in terms of section 247A (2) of the Municipal Councils Ordinance which reads:

"247A (2). The duty levied under subsection (1) in respect of any licence issued by the Council authorizing the use of any premises for any of the purposes described in this Ordinance or in any by-law made thereunder shall be determined by the Council according to the annual value of the premises so licensed, and, where such licence authorizes the use of such premises for the purposes of any trade, having regard to

- (a) the annual value of such premises;
- (b) the turnover of business of such trade;
- (c) the profit that is likely to be earned in such trade; and
- (d) the essential nature of the goods or services supplied in the course of such trade:

Provided that where the annual value of such premises falls within the limits of any item in Column I set out below, the maximum duty shall not exceed the sum set out in the corresponding entry in Column II-

Column I	Column II
Where the annual value- does not exceed Rs. 1,500	Rs. 2,000
exceeds Rs. 1,500 but does not exceed Rs. 2,500	3,000
exceeds Rs. 2,500	5,000

Provided further, that where any such premises are used for the purposes of a hotel, restaurant or lodging house, and such hotel, restaurant or lodging house is

registered with or approved or recognized by the Ceylon Tourist Board for the purposes of the Tourist Development Act, the duty so levied shall be according to the takings of the hotel, restaurant or lodging house for the year preceding the year in which the licence duty is levied, and shall not exceed one per centum of such takings. Where such hotel, restaurant or lodging house is in its first year of operation, the licence duty shall be determined and levied according to the annual value of such premises.

For the purposes of this section, " takings " in relation to a hotel, restaurant or lodging house means the total amount received or receivable from transactions entered into in respect of that hotel, restaurant or lodging house or for services performed in carrying on that hotel, restaurant or lodging house"

On or about 27th August 2007 (P10) the 1st Respondent required the Petitioner's hotel to pay a licence duty equivalent to 1% of the previous year earnings. This demand was made in terms of the 2nd proviso to section 247A (2) of the Municipals Councils Ordinance. The Petitioner took up the position that it was not liable to do so and hence the 1st Respondent did not issue trade licences for the years 2008, 2009 and 2010 to the Petitioner's hotel.

Thereafter several criminal proceedings were instituted before the Magistrate's Court of Maligakanda against the Petitioner for operating a restaurant at No. 55 Lotus Road, Colombo 1 without having a trade licence issued for that purpose by the Municipal Commissioner of Colombo.

The Petitioner has sought the following relief:

- (a) Issue an order in the nature of a Writ of Prohibition prohibiting,
 - (i) 1st Respondent and/or 2nd Respondent and/or 3rd Respondent and/or 4th Respondent from levying and/or collecting licence duty equivalent to 1% of the takings and/or restaurant bills of the restaurant operated by the Petitioner at No. 55, Lotus Road, Colombo 01 on the basis of the proviso to Section 247A(2) of the Municipal Ordinance or otherwise, as a precondition to issue the annual trade licence in terms of the By-Law No. 3 of the By-Laws of Colombo Municipal Council relating to Eating Houses

as published in the Government Gazette of No. 13,354 dated 19th October 1962.

- (ii) 1st Respondent and/or 2nd Respondent and/or 3rd Respondent and/or 4th Respondent withholding the issue of the annual trade licence in terms of By-Law No. 3 of the By-Laws of Colombo Municipal Council relating to Eating Houses as published in the Government Gazette of No. 13,354 dated 19th October 1962 unless licence duty equivalent to 1% of the takings or restaurant bills of Petitioner's restaurant at No. 55, Lotus Road, Colombo 01.

(b) Issue an order in the nature of a Writ of Certiorari quashing,

- (i) The basis of calculation of licence duty as set out in item (C) (1) of the Schedule 1 of **P24**.
- (ii) The basis of calculation of licence duty as set out in item (c) (i) of the Schedule 1 of **P25**.
- (iii) The basis of calculation of licence duty as set out in item (c) (i) of the Schedule 1 of **P26**.
- (iv) The decision and/or determination reflected in the letters hereinbefore marked **P10** that for the purpose of issuing the trade licence, the Petitioner's restaurant at No. 55, Lotus Road, Colombo 01 is duly registered with the Sri Lanka Tourist Development Authority under the Tourism Development Act No. 14 of 1968.

In determining whether the 1st Respondent acted intra vires in making the demand for enhanced licence duties, this Court takes cognizance of its decision in *Liyanage and Others v. Gampaha Urban Council and Others* [(1991) 1 Sri.L.R. 1] where it held:

"In construing instruments that confer power what is not permitted should be taken as forbidden. This strict doctrine of ultra vires ought to be reasonably and not unreasonably understood and applied. Whatever may fairly be regarded as incidental to or consequential upon those things which the Legislature has authorised ought not (unless expressly prohibited) to be held by judicial construction, to be ultra vires. Acts of statutory

authorities that go beyond the strict letter of this enabling provision can reasonably be considered as being incidental to or consequential upon that which is permitted, been done with a view to promoting the general legislative purpose in the conferment of power to such authorities. This is in keeping with the purposive approach to statutory interpretation. Anything that is contrary to or inconsistent with such general legislative purpose should not be held as valid by courts in an exercise of statutory interpretation.”

This Court is also mindful of the rule of interpretation that fiscal statutes and statutes imposing penal or pecuniary liabilities must be strictly interpreted and any ambiguity must be constructed in favour of the individual [C.A. *Abraham, Uppotttil, Kottayam v. The Income Tax Officer, Kottayam and Another* (1961) AIR 609, *Perera & Silva Ltd. v. Commissioner General of Inland Revenue* (79) 2 N.L.R. 164, *Sebastian Fernando v. Katana Multi-Purpose Co-Operative Society Ltd. and Others* (1990) 1 Sri.L.R. 342].

The vires of the demand of the 1st Respondent directing the Petitioner to pay licence duty at an enhanced rate compared to earlier years depends on the applicability of the 2nd proviso to section 247A (2) of the Municipals Councils Ordinance.

This proviso is applicable upon the following criteria being fulfilled:

- (a) The premises are used for the purposes of a hotel or restaurant or lodging house, and
- (b) Such hotel, restaurant and lodging house are registered with or approved or recognized by the Ceylon Tourist Board for the purposes of the Tourist Development Act No. 14 of 1968, and
- (c) Where such hotel, restaurant and lodging house are not in its first year of operation.

The divergence between parties is on the fulfilment of requirement (b).

The Petitioner contends that there cannot be any registration of hotels as recognised by the law since:

- (i) The relevant and required rules and regulations have not been promulgated by the Minister,
- (ii) The Tourist Hotel Code was repealed by the Tourism Act No. 38 of 2005 (Tourism Act),

- (iii) The Tourist Hotel Code is not in compliance with the requirements and mechanisms of the Tourism Act,
- (iv) The Ceylon Tourist Board is no longer in force,
- (v) There is no purpose under and in terms of the Tourist Development Act No. 14 of 1968.

Firstly, Court will consider the main contention of the Petitioner which is that there is no Tourist Board or the Tourist Development Act No. 14 of 1968 is not in force as at now and as such (b) above has not been fulfilled.

The 1st Respondent does not dispute the fact that the Ceylon Tourist Board referred to in the 2nd proviso to section 247A (2) of the Municipal Council Ordinance was incorporated in terms of section 2 of the Ceylon Tourist Board Act No. 10 of 1966 as amended by Act No. 14 of 1968. The 1st Respondent admits that the Tourism Act which came into force on 1st October 2007 repealed the Ceylon Tourist Board Act No. 10 of 1966, and by Order dated 24th September 2007, the Minister of Tourism acting in terms of section 67 of the said Act appointed October 1, 2007 as the date on which the repeal of Ceylon Tourist Board Act No. 10 of 1966 shall take effect.

The Ceylon Tourist Board established under the Ceylon Tourist Board Act No. 10 of 1966 was abolished by section 67(1) of the Tourism Act and in terms of section 2(1) of the Tourism Act, SLTDA was established and in terms of section 67(2) of the Tourism Act, all movable assets and immovable property of the Ceylon Tourist Board got vested in the SLTDA.

The Petitioner submits that the effect of the repeal of the Ceylon Tourist Board Act No. 10 of 1966 is to obliterate it completely from the records of Parliament and so that it never existed. Reliance is placed on the decisions in *Mazahim v. The Controller of Prices* (47 N.L.R. 548) and *Surtees and Another, Assignees of the Estate and Effects of a Bankrupt v. Ellison* [(1829) 9 Barnewall and Cresswell 750].

The 1st Respondent relies on section 16(1) of the Interpretation Ordinance and submits that the references in section 247A (2) of the Municipal Council Ordinance to the Tourist Board and the

Tourist Development Act No. 14 of 1968 should now be read as the SLTDA and Tourism Act respectively.

Section 16(1) of the Interpretation Ordinance reads:

“Where in any written law or document reference is made to any written law which is subsequently repealed, such reference shall be deemed to be made to the written law by which the repeal is effected or to the corresponding portion thereof.”

In *Perera v. Siriwardene* (II Srisikantha's Law Reports 53) the interpretation of section 59(4) of the Co-operative Societies Law No. 5 of 1972 arose for consideration. This sub-section made provision for the enforcement of an award in the manner provided for in section 312 of the Criminal Procedure Code which was repealed by the Administration of Justice Law No. 44 of 1973 which in turn was repealed by the Code of Criminal Procedure Act No. 15 of 1979. Court held that in view of section 16 of the Interpretation Ordinance the reference to section 312 of the Criminal Procedure Code must now be read as a reference to section 291 of the Code of Criminal Procedure Act and that there was no need for an amendment of section 59(4) of the Co-operative Societies Law No. 5 of 1972 to be made specifically referring to section 291 of the Code of Criminal Procedure Act.

In this context it is observed that while sections 77 to 82 of the Tourist Development Act No. 14 of 1968 provided for the “regulation, supervision, classification, inspection and control of the establishment, maintenance and operation of tourist service”, section 68(2) of the Tourism Act repealed those provisions while providing for similar provisions in sections 48 to 52 therein.

Hence in view of section 16(1) of the Interpretation Ordinance, the references to Ceylon Tourist Board and the Tourist Development Act No. No. 14 of 1968 in section 247A (2) of the Municipal Councils Ordinance should be read as the Sri Lanka Tourism Development Authority and Tourism Act No. 38 of 2005 respectively. Therefore, the main argument of the Petitioner necessarily fails.

However, the Petitioner further submits that the SLTDA cannot in the absence of compliance with the provisions of the law, register hotels under and for the purpose of the Tourism Act. It

was contended that for a hotel to be registered under the section 48 of the Tourism Act the following criteria should be fulfilled:

- (1) Classification by the Minister of the types of Tourist Hotels;
- (2) Procedure for registration should be prescribed.

The Petitioner submits that as of the period relevant to this application, no rules have been made in terms of either sections 48(1) or 48(3) of the Tourism Act and as such there cannot be any registration.

Court is of the view that the submission of the Petitioner that no provisions has been made in terms of the of the Tourism Act must fail for at least two reasons.

Firstly, on one hand the Petitioner submits that the SLTDA has for the period relevant to this application, utilized the Tourist Hotel Code promulgated under the Tourism Development Act for the purpose of registration of the hotels including the Petitioner [paragraph 34 of the written submissions of the Petitioner]. The relevant registration for 2008 is marked P20. In those circumstances, the Petitioner cannot be allowed to approbate and reprobate.

In *Ranasinghe v. Premadharma and others* [(1985) 1 Sri.L.R. 63 at 70] Sharvananda J. (as he was then) 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”

Secondly, it is trite law that those who would be affected by the outcome of the Writ application should be made Respondents to the application [*Wijeratne (Commissioner of Motor Traffic) v. Ven. Dr. Paragoda Wimalawansa Thero and 4 others* (2011) 2 Sri.L.R. 258]. The SLTDA will be affected if the Court accepts the proposition of the Petitioner that it is not possible to register any hotel under the Tourism Act as the law stands now.

For all of the foregoing reasons, this application is dismissed with costs.

Judge of the Court of Appeal