

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 Writ of Certiorari and Mandamus and/or Prohibition under Article 140 of the Constitution of Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No : 0445/2020

Mrs. I. L. Malani de Silva,
No. 586, Galle Road,
Beruwela

PETITIONER

Vs.

1. The Commissioner General of Excise,
Department of Excise,
Rajagiriya.
2. Mrs. Buddhika Ruwani Samarathunga,
Divisional Secretary,
Divisional Secretariat,
Bandaragama.

RESPONDENTS

Before: Arjuna Obeyesekere, J / President of the Court of Appeal
Mayadunne Corea, J

Counsel: Rajiv Amarasooriya with Chanaka Weerasooriya and R. Bandara for
Petitioner
Nayomi Kahawita, State Counsel for the Respondents.

Written Submissions: Petitioner filed on 30th April 2021 and 05th May 2021.

Decided on: 3rd June, 2021

Mayadunne Corea, J.

When this case was taken up on 01st April 2021 all parties agreed to dispense with the arguments and invited Court to deliver the judgment based on Written submissions. Written Submissions of all parties have been filed. The Petitioners filed this Writ application inter alia seeking four categories of reliefs;

- a) **Writ of Prohibition** restraining and/or preventing the Respondents from refusing the application of the Petitioner to relocate the premises from No 114, Kalutara Road, Bandaragama, to No 123, Kalutara Road, Bandaragama;
- b) **Writ of Mandamus** directing the Respondents to grant approval to the application of the Petitioner to relocate the premises from No 114, Kalutara Road, Bandaragama to No 123, Kalutara Road, Bandaragama;
- c) **Writ of Mandamus** directing the Respondents to extend/renew the license bearing No FL22A issued to No 144, Kalutara Road, Bandaragama until such time the Petitioner is permitted to relocate the premises to the alternate location. (*subject to such terms and conditions*); and
- d) **Writ of Certiorari** to quash both the decision marked as P18 and the letter dated 28th October 2020 containing the said decision, issued by the 1st Respondent calling recommendations from the 2nd Respondent as to whether there are any public objections to the proposed place of relocation of the Petitioner's Beer Store.

At this stage it would be pertinent to consider the background to this application. The Petitioner's Counsel submitted that the Petitioner had purchased the license in respect of the License Premises named "Prarthana Beer Store" in 2010 situated at No 144, Kaluthara Road Bandaragama, which was operating on the license FL22A. The Petitioner has been selling Beer, Stout, Wine in terms of the Excise Ordinance. It was further submitted that the original license to carry out this Beer Store had been issued to one Mr. D. P. L. Peiris. License issued for the years 1999,2007,2010,2011,2012,2013-2017 are marked as P4(1)-P4(x). However, in 2017 after a

period of 18 years in operation and after a period of 8 years in operation by the Petitioner there had been an objection taken for the operation of the premises on the basis that it did not have the necessary distance from a place of worship. Accordingly, the Petitioner had received a letter dated 07th December 2017 (P7) which purported to cancel Petitioner's liquor License. Thereafter, the Petitioner filed an application before this Court bearing CA Writ Application No. 23/2018. (case record CA Writ 23/2018 marked as P11) The said Writ application had been settled by the parties. As per the motion filed by the Petitioner dated 25th June 2020 the said motion (P12A) paragraph 3 stipulates the purported settlement which reads as follows,

“AND WHEREAS, subsequently, the Petitioner obtained an appointment to meet the substituted 1st Respondent, and had a meeting with Substituted 1st Respondent to discuss the possibility of a settlement of the matters impugned in the instant Application, and at the said meeting, the Substituted 1st Respondent, being the apex functionary of the Excise Department of Sri Lanka, informed the Petitioner that he is agreeable to issuing the FL-22B license to the licensed outlet named ‘Prarthana Beer Shop’, situated at No. 144, Kaluthara Road Bandaragama, owned and operated by the Petitioner, for an interim period of 6 months, for the said current location, on the basis that the Petitioner is agreeable to relocate the said licensed premises to an alternative location during the said interim period.”

As per the order made by Court dated 2nd February 2020 (P12 B) it is stated as follows;

“Learned State Counsel appearing for the Respondents informs Court that the 1st Respondent, The Commissioner General of Excise, is agreeable to the settlement incorporated in paragraph 3 of the said motion.

Accordingly, the 1st Respondent will issue the FL-22B license to the licensed outlet named ‘Prarthana Beer Shop’ situated at Kaluthara Road Bandaragama, owned and operated by the Petitioner, for an interim period of 6 months for the said current location on the basis that the Petitioner is agreeable to relocating the licensed premises to an alternative location during the interim period.

In view of the above settlement, proceedings are terminated. No costs.”

Subsequent to the said settlement while carrying on the business at the old address the Petitioner had found new premises as per the terms of settlement in CA Writ Application No. 23 / 2018. Thereafter, an application to relocate the business to the premises bearing assessment No 123, Kaluthara Road, Bandaragama had been made. It was submitted that the said location had complied with paragraph 20 (c) of Excise notification No 902 which deals with the limitations of distance from places of worship and schools. Accordingly, the Petitioner has written a letter dated 19th October 2020 requesting the license to relocate to the new premises, as per the settlement entered in CA Writ 23 of 2018. (P15) However, at this stage the Petitioner had been issued with an application which she had duly filled and tendered (P17) and with this she had

sought for a permit under the Excise Ordinance. The said application had been approved by the Excise Inspector and also by the Superintendent of Excise and in their recommendation to the said application they have stated that there are no objections received by the public pertaining to the new premises and has recommended for the grant of license.

The Learned Counsel for the Petitioner alleges subsequent to the said recommendation on 28th October 2020, the 1st Respondent has written to the 2nd Respondent and has requested to report and submit the second Respondent's recommendation as to whether there is any public objection in terms of paragraph 13 (f) of the Excise notice No 902 published in gazette (extraordinary)¹ No 1544/17 dated 10th October 2008, in respect of issuing a license relating to the said location. The Petitioner's main complaint to this Court is as follows;

That he has sought to relocate this premises only on the basis of the settlement that has been entered in case No **CA Writ 0023-2018** and in the said case the Respondents had agreed to grant him the license subsequent to relocation and therefore as this is a relocation, condition no. 13 (f) of Excise notification no. 902 should not be applied in this instance. The Petitioner also complained to the Court that by the said action of the 1st and 2nd Respondents that they have invited/ instigate public protest which is not contemplated by the regulation. Thus, the letter dated 28th October 2020 is ultra vires

- The Petitioner also complains that she has a legitimate expectation of obtaining the license in terms of the settlement entered in the above-mentioned case.

The Parties were not in dispute on the fact that the Petitioner is not a new applicant but an existing applicant who has made the request to relocate the premises of business.

The learned Counsel for the Petitioner submitted that pursuant to the above-mentioned Writ case, the Petitioner had been issued with a license to carry on the Beer Store till she found an alternate premise. Therefore, the Petitioner alleges that she had been carrying on the Beer Store for a long period of 21 years without any public objection.

The Learned Counsel for the Respondent submitted to this Court that pursuant to the document P18, three separate inquiries had been held pertaining to the objections and a final determination has not yet been taken. The parties were not at variance regarding the holding of the inquiry.

This Court will now venture into the merits of this application. The Petitioner has sought a Writ of Prohibition on the basis that the application to relocate should not be refused other than in terms of the provisions of the Excise Ordinance and the notification No. 902. As per the gazette notification (extraordinary) No. 1544/17 dated 10th October 2008 which contains the rules under the Excise notification 902 deals with the issuance of the Excise License. (P8) The Petitioner's

¹ The Letter dated 28th October 2020 marked P18

main contention is that the 1st Respondent has called for observations and recommendations from the 2nd Respondent pertaining to any objections from the public. The Petitioner fears that this act is an attempt to refuse the application for relocation. It is not disputed by the parties that the new location submitted by the Petitioner is in compliance with Excise notification no. 902, as far as the distance from places of worships and schools are concerned. The learned State Counsel for the Respondents submitted that there was no issue pertaining to Rule 20 of the above-mentioned gazette.

Now this Court would advert to consider the provisions of Rule 13. The learned Counsel for the Petitioner quite correctly submitted that by the document P18 the 1st Respondent has sought the observations under Rule no. 13 (f) of the said notification. The said Rule 13 and 13 (f) states as follows;

*“13. The documents and reports required to be submitted with regard to **new applicants**:*

*13 (f). A report from the Officer – in – charge of the Police Station where the licensed premises is situated that the applicant is not convicted of any offense under the Penal Code or the Excise Ordinance during the preceding five (05) years and a Report from the Divisional Secretary where the licensed premises is situated that the applicant is fit and proper person to hold the said license **and there is no objection from the public to the issuance of the license.**” (emphasis by me).*

The Petitioner’s main contention is that the Rule 13 will not apply to his application as he is not a new applicant but he is an existing applicant. It appears on the plain reading of Rule 13 that it specifies the reports that has to be submitted with regards to **new applicants**. ;

Corresponding Sinhala version of the Rule is as follows;

13. අලුත් ඉල්ලුම්කරුවන් සම්බන්ධයෙන් අවශ්‍ය වාර්තා හා ලිපි ලේඛන

13. ඊ. ඉල්ලුම්කරුවන් පසුගිය අවුරුදු 05 ක කාලය තුළදී දණ්ඩ නීති සංග්‍රහය යටතේ හෝ සුරාබදු ආඥාපනත යටතේ වරදකට වරදකරු වී නොමැති බවට බලපත්‍රලත් පරිශ්‍රය පිහිටා ඇති ප්‍රදේශය පොලිස් ස්ථානයේ ස්ථාන භාර නිලධරයාගෙන් ලබාගත් වාර්තාවක් සහ ඉල්ලුම්කරු එම බලපත්‍රය දැරීමට සුදුසු තැනැත්තෙකු බවත් ඒම බලපත්‍රය නිකුත් කිරීම සම්බන්ධයෙන් මහජනයාගේ විරුද්ධත්වයක් නොමැති බවට බලපත්‍ර පරිශ්‍රය පිහිටා ඇති ප්‍රදේශයේ ප්‍රාදේශීය ලේකම්ගෙන් ලබාගත් වාර්තාවක් ඉදිරිපත් කළ යුතුය.

However, the preceding Rule which is Rule no 12 commences as follows:

“The applicants (new and existing) are required to submit the followig documents along with their applications.” The Sinhala text says as follows:

ඉල්ලුම්පත් සමග පහත සඳහන් ලියකියවිලි ඉදිරිපත් කිරීමට නව හා දැනට බලපත්‍ර දරන ඉල්ලුම්කරුවන්ට නියම කරනු ලැබේ.

Accordingly, it is the view of this Court that Rule 12 deals with new and existing applicants but the word “existing” is omitted in Rule 13. The said Rule contemplates only new applicants.

Rule 12 reads as follows:

“The applicants (new and existing) are required to submit the following documents along with their applications. However, the Commissioner General of Excise shall have the right to refer and extract any information pertaining to any applicant from any file available with the Department of Excise or to call upon the applicant to furnish any information required for the consideration of the issue of license applied for including particulars of income tax and other taxes payable by the applicant.”

Though this rule is not exhaustive I am reluctant to accept that it extends to cover the issue before this Court namely of calling for a report and recommendations under Rule 13(f). I come to this conclusion after giving due consideration to rule 18 and 19 and for the reasons set out above in this Judgment..

Rule 18 specifically deals with the new applicants. it reads as follows:

“New Applicants applying for licences for the sale of beer, ale, stout and wines (FL 22 A) are required to submit the documents and reports as referred to under sub paragraphs (a),(b),(c),(d),(f),(g),(i),and (j) of paragraph 13”.

Rule 19 of Excise Notification 902 deals with the documents and reports needed to be submitted by the existing license holders. It reads as follows:

“The documents and reports referred to be submitted for existing license holders (for all categories):

- (a) Documents and reports referred to in sub paragraph (b),(c),(d) and (j),of paragraph 13:
- (b) A report from the Assistant Commissioner of Excise on the detections if any made in the premises during the 03 years immediately preceding the year for which application is made.”

The parties are not in dispute of the fact that the application is not by a new applicant, but by an existing applicant who has made this application to relocate the premises of business. Thus, it is abundantly clear that the requirement contemplated in Rule 13 (f) does not arise, but only requirements contained in subparagraphs (b),(c),(d), and (j) will apply. Accordingly this Court agrees with the submission of the Petitioner and holds, that document marked as P18 issued pursuant to Rule 13 (f) and seeking whether there is public objection and calling for the recommendation is ultra vires, which makes it liable to be quashed by a Writ of Certiorari.

This Court will now consider the rule that deals with relocation.

Rule 27 specifically deals with relocation. It read as follows:

“No approval will be granted to relocate any liquor selling license. However, in the case of a natural disaster or due to a government development activity or due to any other reason with Excise Commissioner General considers as reasonable, change of location of a licensed premises can be considered if the relocation takes place within the same Divisional Secretariat. In order to consider such a request, applicant has to pay Rs. 7500.00 for processing the application and a sum of Rs. 100.00 as fees for shifting premises. The new location should comply with all the requirements in this notification. The condition of not approving the relocation will not apply to liquor manufacturing licenses.”

The parties were not at variance as to complying with the requirement stipulated in rule 27.

The learned State Counsel argued that even if it is a relocation rule 13(f),20(c) and 21 of Excise Notification no. 902 should apply. This Court has already dealt with rule 13(f). As per the survey report both parties agreed that requirements contemplated in rule 20(C) has been complied with (R31).

Thus the Court will now consider rule 21 which states as follows:

“Any objection or protest 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 non-compliance with any requirement of the Excise Ordinance of the Guide lines and conditions here-in contained in regard to the issue or continuance of a license, will be notified by the Commissioner General of Excise to the applicant or the license as the case may be and will thereafter be inquired in to by the Commissioner General of Excise as to the validity there of and action taken after such inquiry on the basis of the finding threat. In such an inquiry, if it is found that the establishment continuing the license at that place may be a threat or likely threat or likely threat to the maintenance of law and order in the area. Commissioner General of Excise can decide to relocate the license premises to a suitable place. This decision will be final.”

The Sinhala text read as follows:

21. බලපත්‍රයක් නිකුත් කිරීමට පෙර හෝ නිකුත් කිරීමෙන් පසුව හෝ යම් මහජන සංවිධානයක සාමාජිකයකු, එම බලපත්‍රය නිකුත් කිරීම සම්බන්ධයෙන් සුරාබදු ආඥාපනතේ විධිවිධාන උල්ලංඝනය හෝ මෙහි ඇති මාර්ගෝපදේශ කොන්දේසි උල්ලංඝනය වී ඇති බවට පැමිණිලි සුරාබදු කොමසාරිස් ජනරාල්වරයා වෙත ලැබුණහොත්, සුරාබදු කොමසාරිස් ජනරාල්වරයා විසින් ඒ බව ඉල්ලුම්කරුට/බලපත්‍රකරුට දන්වා පැමිණිලි සම්බන්ධයෙන් පරීක්ෂණයක් කිරීමෙන් අනතුරුව, පරීක්ෂණයේ ප්‍රතිඵල මත තීරණයක් ගනු ඇත. තවද, බලපත්‍ර ස්ථානය විවෘත කිරීම/ පවත්වාගෙන යෑම නිසා ප්‍රදේශයේ නීතිය හා සාමය පවත්වාගෙන යාමට බාධා ඇති වන බවට එවැනි පරීක්ෂණ දී නිශ්චිතව

අනාවරණය වන්නේ නම් බලපත්‍ර ස්ථානය, ස්ථාන මාරු කිරීම සම්බන්ධයෙන් තීරණයක් ගැනීමට සුරාබදු කොමසාරිස් ජනරාල්ට පුලුවන. සුරාබදු කොමසාරිස් ජනරාල්වරයා විසින් ගනු ලබන තීරණය අවසාන තීරණය වන්නේ ය.

The learned State Counsel argued that as per rule 21 the 1st Respondent has to consider any public objection regarding threat to the maintenance of law and order in the area. However, the learned State Counsel reiterated that a final decision regarding the issuance or non issuance of a license has not been taken. In the decided case ***Daffodils Hotels (Private) Limited and another Vs L.K.G. Gunawardana, Commissioner General of Excise and others – CA Writ /364 / 2016 decided on 16th November 2020 where this Court has held “As per Rule 21 of the Extraordinary Gazette No. 1544/17 dated 10th August 2008 (cited as Excise Notification No 902) marked as P22, upon conducting an inquiry according to the said rule. It is found that the establishment continuing the license at the place may be a threat or likely to be a threat to the maintenance of law and order in the area. The Commissioner General of Excise can decide to relocate the license premises to suitable place and this decision will be final.”***

In considering the said rule and the Judgement cited above this Court agrees with the submission of the learned State Counsel that for the reasons stated in rule 21, the 1st Respondent is entitled to consider the factor of public objections under rule 21.

While stating that this Court does not intend to sit in the decision making process, in view of the above submission this court has considered the documents marked as R14 to R28 and observes that as pointed by the learned Counsel for the Petitioner, the document marked R26, R27, R28 have the same wording but is purported to be submitted by different authors, thus the authorities should take caution to consider whether they are genuine objections and endeavour to exclude the possibility of public protest instigated by interested parties. The documents marked as R18, R20, R22, R24, basically contains objections based on distance. Both Counsels have agreed that as per R31 the compliance with the distance is now settled.

It is also pertinent to note that the Petitioner's submission that Prarthana Beer shop had been in operation in close proximity to the address of the proposed relocation without any objection on the basis of public protest was not denied by the Respondents. It is also pertinent to observe as stated by the Petitioner's Counsel, that prior to the cancellation of the liquor license bearing FL22 the only specific objection against the said beer shop before the year 2020 submitted to this Court was R3 which is based on the distance to schools and place of religious worship.

Legitimate Expectation

Having dealt with the objection of Public protest now this Court will consider the Petitioner's submission on legitimate expectation to relocate to an alternate location and to obtain the license. Requirements for legitimate expectation to exist is discussed in "Administrative law" by HWR Wade and Forsyth (11th Edition - page 452) states as follows; ***"It is not enough that an***

expectation should exist. It must in addition be legitimate. But how is to be determined whether a particular expectation is worthy of protection? This is a difficult area since an expectation reasonable entertained by a person may not be found to be legitimate because of some countervailing consideration of policy or law. A crucial requirement is that the assurance must itself be clear, unequivocal and unambiguous. Many claimants fall at this hurdle after close analysis of the assurance. The test is how on a fair reading of the promise it would have been reasonably understood by those to whom it was made.

In view of the findings of this Court on the applicability of rule 21 to the issue before us and having the above in mind, let me consider the grounds that the Petitioner claims created a legitimate expectation. To substantiate this proposition the learned Counsel for the Petitioner heavily relied on documents marked P10, P12A and P12 B.

P10 is a letter which states as follows:

ඒ අනුව සුරාබදු නිවේදන 902 හි 27 වගන්තියේ සඳහන් කොන්දේසි උල්ලංඝනය නොවන පරිදි දැනට බල පත්‍රය ක්‍රියාත්මක වන, ප්‍රාදේශීය ලේකම් කොට්ඨාශය තුළම වෙනත් ස්ථානයකට බලපත්‍රය ස්ථාන මාරු කිරීමට ඔබ එකඟ වන්නේනම් ඊට අනුමැතිය ලබාදිය හැකි බව කාරුණිකව දන්වා සිටිමි.

Accordingly it clearly states that without violation of rule 27 in circular 902 approval can be granted for a change of location. However, the said rule also states that the new location should comply with all the requirements stipulated in notification No 902.

P12(A) and P12 (B) which has been discussed in this judgment, does not contemplate license being given to the alternative location contrary to the conditions of the notice no. 902. In fact P12(A) only offers to issue the license to the existing premises no. 144, Kalutara Road, Bandaragama for an interim period of six months till relocation to an alternative location. The document P 12 (B) confirms this position. This Court's attention was drawn to the document P17, which is the application made by the Petitioner to obtain the license to the new premises. Under the recommendation column the Excise Inspector had submitted that there are no public objections received as at then, this has been reiterated by the Excise Superintendent and recommended for the issuance of the license. It is clear that the Excise Inspector in recommending has specifically stated there were no public objection "as at then". Further, the said minute is only a recommendation based on the facts as it was then. In the circumstances, this Court is unable to agree with the learned Counsel for the Petitioner that there is a clear, unequivocal and unambiguous promise by the Respondents to grant a license contrary to the requirements of notification no 902. In our view the Petitioner has failed to demonstrate an established practice of consultation to obtain a license contrary to the conditions laid down in notification 902. In the case of,

J.M. Kusumawathi Vs. Minister of Lands and other, CA Writ Application 30/2016 the Court quoting Clive Lewis, Judicial Remedies in Public Law, 5th ED, 248 (South Asian Edition) held,

“Such legitimate expectation may arise where a public authority has made a clear, unqualified and unambiguous representation to a particular individual that it will act in a particular way. The burden is on the individual to demonstrate that an unqualified, unambiguous and unqualified representation was made.”

In the prayer to the petition in prayer (b)(c) the Petitioner specifically pleads in seeking a Writ of prohibition that the application should not be refused except in terms of the provisions of the Excise Ordinance and the Excise notification no 902. In view of this Court's finding on the applicability of rule 21 we hold that the Petitioner has failed to establish that there was a legitimate expectation created to grant a license without due compliance of Excise Notification 902.

Accordingly the Petitioner's submission on legitimate expectation fails.

Both parties submitted to this court that in view of the understanding arrived between the parties reliefs prayed under prayer (f),(g) and (h) need not be considered.

The learned State Counsel for the Respondents submitted that in view of this case the Respondents have not taken a decision pertaining to the Petitioner's application to relocate. The learned State Counsel's explanation on the delay in arriving at a decision is accepted by this Court. In the absence of a refusal an objection was taken on the application for the Writ of mandamus. The parties were not at dispute on the issue that the Respondents have not taken a decision on the application for relocation. It is trite Law that in the absence of a refusal a Writ of mandamus will not be available. It was held in,

In **S.I. Syndicate v. Union of India AIR 1975 SC 460**, the Supreme Court has adopted the following statement of law in this regard.:

*"As a general rule the order will not be granted unless the party complained of has known what it was he was required to do so that he had the means of considering whether or not he should comply and it must be shown by evidence that there was a distinct demand of that which the party seeking the mandamus desires to enforce and that **that demand was met by a refusal.**"*
(emphasized by me)

The learned State Counsel submitted to this Court that the Respondents have not taken any decision on the Petitioner's application to relocate and that was because of this case. In view of this Court's finding on the Document P18 there is no new evidence to establish the need for a Writ of Prohibition.

Availability of a Writ of Prohibition is discussed **by Dr. Sunil Cooray in "Principals of Administrative Law in Sri Lanka" where he states as follows:**

“The Writ of Prohibition is available to prevent a proceeding in a given matter, to exercise a power which it does not have under the law, or act in violation of the rules of natural justice where the law requires such officer or authority to observe them. The Writ of Prohibition is not a remedy to restrain the doing of a purely physical act, to restrain which the proper remedy is an injunction. Further, where it is necessary to restrain an official from purporting to Excise Power which he does not have, it is an order in the nature of a Writ of Prohibition to restrain him that must be sought, and not a mandamus to compel him not to act.” In view of this courts finding on rule 21 this court is not inclined to grant the said relief.

Accordingly this Court upholds the objection of the learned State Counsel and the Petitioner’s application for a Writ of Mandamus and a Writ of Prohibition fails. For the reasons stated above in this Judgment this Court holds that prayers (b),(c),(d)and (e) are prematuer and dismiss the relief prayed for there in.

In the above Circumstances, we are inclined to issue the Writ of Certiorari prayed for in paragraph (i) of the prayer to the petition. The Respondents are directed to consider the application of the Petitioner for relocation in terms of the law and convey their decision to the Petitioner two weeks prior to the expiry of the license already granted to the Petitioner. As the Petitioner has been partially sucessfull in this application, we make no order as to costs.

Judge of the Court of Appeal

Arjuna Obeyesekere, J/ President of the Court of Appeal

I agree.

President of the Court of Appeal