

**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 under and in terms of Article 140  
of the Constitution of the Democratic Socialist  
Republic of Sri Lanka.*

Herath Mudiyanseelage Mangalike Herath  
No. 510, Kokawewa, Getalewa,  
Dutuwewa.

**Court of Appeal Case No:  
CA/WRIT/204/2015**

**PETITIONER**

**Vs.**

1. Commissioner General of Excise,  
Department of Excise,  
No. 34, W. A. D. Ramanayake Mawatha,  
Colombo 02.
  
2. Deputy Commissioner of Excise (Human  
Resources),  
Department of Excise,  
No. 34, W. A. D. Ramanayake Mawatha,  
Colombo 02.

3. Deputy Commissioner of Excise (Crimes),  
Department of Excise,  
No. 34, W. A. D. Ramanayake Mawatha,  
Colombo 02.
  
4. Assistant Commissioner of Excise (North  
Central Province),  
Assistant Commissioner of Excise Office,  
Anuradhapura
  
5. Superintendent of Excise (Anuradhapura)  
Assistant Commissioner of Excise Office,  
Anuradhapura
  
6. Officer-in-charge of Excise,  
Excise Office,  
Kebithogollewa
  
7. Divisional Secretariat,  
Divisional Secretariat Office,  
Galenbindunuwewa.
  
8. Officer-in-charge  
Police station  
Galenbindunuwewa.

9. Pradeshiya Sabhawa  
Galenbindunuwewa.

10. Assistant Commissioner of Excise  
(Western Province III),  
Assistant Commissioner of Excise Office,  
Walauwatta road,  
Gampaha.

**RESPONDENTS**

**Before:** C.P Kirtisinghe, J  
Mayadunne Corea, J

**Counsel:** Saliya Peris P.C. with T. Nandasiri attorney-at-law for the Petitioner  
Yuresha Fernando DSG with Shiloma David SC for 1<sup>st</sup> – 8<sup>th</sup> and 10<sup>th</sup>

Respondents

**Argued on** 21.09.2022

**Written** Tendered by the Petitioner on 23.10.2020

**Submissions:** Tendered by 1<sup>st</sup> - 8<sup>th</sup> and 10<sup>th</sup> Respondent on 02.09.2019

**Decided on:** 27.10.2022

**Mayadunne Corea J**

**The facts of the case briefly are as follows;**

The Petitioner commenced a business under the name of “Rasanjana Beer Shop” from 1999. She alleges that she had obtained an FL/22A license which is valid for a period of one year and had been carrying on business till August 2014 after annually renewing her license. Thereafter she had been informed of a public objection to the continuation of the business which prompted her to seek permission to shift the premises. It is the contention of the Petitioner that the said request to shift the business premises was done at the behest of the 3<sup>rd</sup> Respondent without any inquiry. Subsequently, an inquiry was held which resulted in her license being suspended. This was due to the Petitioner failing to find a new location, her liquor shop had been closed with effect from 31.07.14. Hence this application.

**The complaint of the Petitioner.**

The Petitioner alleges that the decision to suspend her license and the refusal of her application to shift the business to a new place is unreasonable, unfair arbitrary, and *ultra vires*.

The Petitioner had sought the following reliefs from this Court,

- f) Grant a mandate in the nature of a Writ of Certiorari quashing the decision of the 3<sup>rd</sup> Respondent in the letter marked as P-5
- b) Grant a mandate in the nature of a Writ of Certiorari quashing the decisions of the 1<sup>st</sup> Respondent in the letter marked as P-8A
- c) Grant a mandate in the nature of a Writ of Certiorari quashing the decisions of the 7<sup>th</sup> Respondent in the letter marked as P-8B
- d) Grant a mandate in the nature of a Writ of Certiorari quashing the decisions of the 1<sup>st</sup> Respondent in the letter marked as P-11B
- e) Grant a mandate in the nature of a Writ of Mandamus on one or more or all of the 1<sup>st</sup> and 4<sup>th</sup> Respondents to 8<sup>th</sup> Respondents directing them to allow the Petitioner to renew her license from 1<sup>st</sup> January 2015 to 31<sup>st</sup> December 2015 and either allow her to continue her business at the venue at No. 81B, Dutuwewa or at the proposed venue at Ellawea Road, Kokawewa, Gatalewa.

It is common ground that the Petitioner was holding an FI/22A liquor license which had to be renewed annually. It is also common ground that the Petitioner had made an application to shift the location of the business.

The Respondents raised several preliminary objections pertaining to the maintainability of this application. They are as follows,

- The Petitioner is guilty of suppression and misrepresentation of facts.
- The Petitioner has acquiesced with the impugned decision and therefore cannot now be heard to complain.
- The entire application is misconceived in law.
- Undue delay.

This Court will consider the said objections.

The Petitioner had originally obtained the license to operate the business for the year April 1999 to 31<sup>st</sup> December 1999 (P3). It is the contention of the Petitioner that she had continued with the said business till the year 2014. However, the Petitioner submits that the 3<sup>rd</sup> Respondent had

informed her to shift her present business place due to public protests in the year 2012. It was further submitted by the Petitioner, that for 13 long years the Petitioner had carried out the business without any objection from the people of the Dutuwewa area. It was contended that she had received 6 months' time to shift her business by letter dated 10.01.2012 (P5). It was further argued by the Petitioner, that there had been no hearing given to her before the decision in P5 had been reached. Thus, making the said decision bad in law.

It was the contention of the Petitioner, that she has continued with her business without any disturbance up to the year 2014 and submitted that in the said year, a group of people had staged a protest against her liquor shop, and submitted that the protest had been organized against the Petitioner only after 13 years of opening her shop.

In response, the Respondents submitted to Court, that there had been several objections presented by "Ekabadda Swechcha Balamandalaya" in the year 2011. Written objections had been submitted to the District Secretary of Anuradhapura and to the Hon. President of Sri Lanka (R1, R2). In the said complaints, it is stated that the school children had got used to consuming beer and the parents are compelled to clean the school grounds of the empty beer cans. Further, a public protest had been organized on the 4<sup>th</sup> of July 2011, against the Petitioner's liquor shop. The said protest had gathered a large number of people and had been reported in a daily newspaper on 06<sup>th</sup> July 2011 (R3). As a result of the protest, the Divisional Secretary of Galenbindunuwewa called for an inquiry in the year 2011(R4). The said letter had been addressed to the objectors as well as to the Petitioner. The said report of the inquiry was marked as R5. As per the report, an agent of the Petitioner had taken part in the inquiry. According to the recommendations of the report, the inquiring officer had come to the finding that the protest was a result of neglect and failure to give due consideration to the issues that had arisen as a result of the existence of the beer shop for a long time. At the said inquiry, the permit holder had given her consent to use her employees to clear the environment surrounding her shop by collecting and disposing of empty beer bottles and cans. Thus, admitting that there had been consumption of liquor in the vicinity of the shop.

However, as the Petitioner had been having the beer shop for years in the present location despite the objection of the community, it had been recommended to shift the said business to a suitable location. This resulted in the Petitioner receiving the letter dated 10.01.12 (P5), whereby the Petitioner had been given 6 months to find an alternative location. This Court also observes, the Petitioner has failed to demonstrate to this Court that she had objected to the decision marked in P5 at the time it was made, as she has failed to demonstrate of such objection or of any documentary proof of such an objection. The Petitioner had not challenged this decision and for the first time has sought to challenge this decision in this application by seeking a writ of certiorari to quash the said decision. It is observed by this Court, that the Petitioner had finally sought to quash this decision only after a lapse of two years and three months. This clearly demonstrates laches on the part of the Petitioner. Thus, in our view, prayer (f) of the Petitioner has to fail due to undue delay.

The Petitioner had subsequently sent a letter dated 23.05.12 (R3) where it is apparent that, subject to her being asked to shift the location of the beer shop, she had been given the license only for a period of six months for the year 2012. By the said letter, the Petitioner had requested for her to be given the license for the remaining six months of the year as she had failed to find a suitable site for relocation. As contended by the Respondents, this letter demonstrates that the Petitioner had acquiesced to the decision in P5 as she had attempted to find a suitable place for relocation. This letter does not demonstrate that she had made the request for shifting the premises under protest. This request of the Petitioner had been accommodated by the 1<sup>st</sup> Respondent by letter dated 21.06.12 (R7) where her license had been extended till 30.09.12. As per the documents tendered to this Court, it appears that the Petitioner had failed to relocate but had been continuing with her business in the same location till the year 2013 despite the public protest. This resulted in the Respondents sending the letter dated 27.06.13 (P6), whereby the 1<sup>st</sup> Respondent had informed that the Petitioner's permit would not be extended any further. The Petitioner had failed to challenge this letter too. The sequence of these events clearly demonstrates that the decision to request the Petitioner to shift her premises had not been taken suddenly and arbitrarily as contemplated by the Petitioner. Due to the public protest, there had been an inquiry, to which all relevant parties including the Petitioner had been summoned and the Petitioner's representative had been present. Further as stated earlier, the Petitioner without

challenging the decision to relocate had acquiesced to the decision and requested time to relocate.

However, it appears that the Petitioner had carried on her business at the same location till the year 2014 despite the ongoing protest as evident by the letters dated 07.06.14 (R8) and 10.06.14 (P7) which had resulted in another protest being staged by the public. This resulted in another inquiry being held as evident by letter 18.6.14 (P7A) where all relevant stakeholders had been summoned once again. The said inquiry had been held on 02.07.14 (R10). At the said inquiry, the Petitioner's statement had been recorded and in the said statement she had once again voluntarily agreed to shift the said premises. Her statement reads as follows,

“අද දින උතුරු මැද පළාත භාර සහකාර සුරාබදු කොමසාරිස්තුමාගේ සහභාගිත්වයෙන් ප්‍රාදේශීය ලේකම්තුමිය හා ප්‍රාදේශීය සභාවේ සභාපතිතුමා ඇතුලු ඉතා විශාල ජනකායක් එක්රැස්වී සිටි ගලෙන්බිඳුනු වැව ප්‍රාදේශීය ප්‍රාදේශීය ලේකම් කාර්යාලයේ ශ්‍රවණාගාරයේදී අනුරාධපුර සුරාබදු අධිකාරීතුමා විසින් සිදු කරන ලද පරීක්ෂණයේදී ඇති වූ විරෝධතාවය ඉතා උග්‍ර බව මා වටහා ගත්තා. එ් අනුව මා 2014 වර්ෂයේ දෙසැම්බර් 31 වනදා පමණක් මෙම ව්‍යාපාරය පවත්වාගෙන යාමට ඉඩ දෙන ලෙසට නිලධාරී මහතුන්ගෙන් ඉල්ලා සිටියා. එහෙත් විද්‍යුත් මාධ්‍ය යොදාගෙන රැස්වීම කාලා වට ඇසෙන පරිදි ඉතා විවෘතව පැවති මෙම පරීක්ෂණයට එක්රැස්වී සිටි ස්වේච්ඡා සංවිධාන නියෝජිතයින් හා සියළුම ප්‍රදේශවිසින් එක හඬින් කියා සිටියේ මෙම බියර් හල මෙතැනින් වහාම ඉවත් කිරීමට කටයුතු කරන ලෙසයි. තවද ඔවුන් එක හෙලා කියා සිටියා මෙම ඉල්ලීම ප්‍රදේශවාසීන්ගෙන් මීට වසර හතරකට පමණ පෙර සිට කරනු ලබන්නක් බව. තවදුරටත් ඔවුන් කියා සිටියේ මෙම බියර් කල ස්ථාන මාරු කිරීමට විරුද්ධව කරනු ලබන්නක් නොව දුටු වැව ග්‍රාමයට අයත් ග්‍රාම නිලධාරී කොට්ඨාශ හතරින් ඉවත් කර ගන්නා ලෙසටයි. මෙම ඉල්ලීමේ ඇති ප්‍රසලතාවය මා හට වැටහී ගියා. ඒ අනුව අඩුම ගනනේ අගෝස්තු 31 වන දින වන තෙක් වත් මාස දෙකක කාලයකට බලපත්‍ර ස්ථානය ස්ථානගත කිරීමට සුදුසු ස්ථානයක් සොයා ගන්නා තෙක් පවත්වාගෙන යාමට ඉල්ලා සිටියා . අවසානයේදී සියළුදෙනාගේම එකඟතාවය වූයේ 2014.07.31 දින වන තුරු පමණක් මෙම බලපත්‍රය මෙම ස්ථානයේ පවත්වාගෙන යාමට එකවන බවයි. පවතින තත්වය අනුව මා ද එම ඉල්ලීමට එකඟ වූනා. එහෙත් මා තවදුරත් ඉල්ලා සිටිනවා යම හෙයකින් එදින වන විට මා හට සුදුසු ස්ථානයෙන් සොයා ගත නොහැකි වුවහොත් එසේ සුදුසු ස්ථානයක් සොයා ගන්නා තුරු මෙම බලපත්‍රයේ හිමිකාරත්වය මාගෙන් ඉවත් කිරීමට කටයුතු නොකර තාවකාලිකව වසා තැබීමට අවසරය ඉල්ලා සිටිමි.”



The Petitioner has not challenged the authenticity or the circumstances of giving this statement. Subsequent to this inquiry, the inquiring officer has submitted his report dated 03.07.14 (R11), where he had observed,

- (a) පසුව ප්‍රදේශයේ සියළුම ස්වේච්ඡා සංවිධාන විසින් සාමුහිකව සාකච්ඡා කර **2014.07.31** දිනකට පමණක් මෙම ස්ථානයේම බලපත්‍රය ක්‍රියාත්මක කිරීමට අවසර ලබා දෙන බව පරීක්ෂණ මණ්ඩලයට දැනුම් දෙන ලදී. එ අනුව බලපත්‍රධාරිණිය ද **2014.07.31** දින වන විට බලපත්‍ර ලත් ස්ථානය දුටුවැව ගමමානගෙන් ඉවත් කර ගැනීමට එකඟතාවය පලකරන ලදී. ඇය විසින් එසේ එකඟතාවය පල කරන ලද ප්‍රකාශය සටහන් කල ලිපිය ලිපිගොනුවේ අංක **24** වශයෙන් අංකනය කර ඇත. ඉන්පසුව ගමේ ස්වේච්ඡා සංවිධාන මගින් ප්‍රකාශ සටහන් කිරීම සඳහා ඉදිරිපත් කරන ලද **05** දෙනෙකුගේ ප්‍රකාශ සටහන් කර ගන්නා ලදී. එම ප්‍රකාශය මෙම ගොනුවේ අංක **23,25,26,27,28** යනුවෙන් අංකනය කර අමුණා ඇත.
- (b) බලපත්‍රධාරිණිය මත්පැන්හලේ බියර් ටින් හා බෝතල් මහින් පාරිසරික හානියක් සිදුවන බවට කී කාරණය පිළිබඳව අවධානය යොමු කර සේවකයන් යොදවා අවට ඇති හිස් බියර් ටින් හා බෝතල් එකතු කර නිසි පරිදි බැහැර කිරීමට පියවර නොගැනීම නිසාද ප්‍රදේශයේ තැන් තැන් වල හිස් බියර් කැන් විසිරී ඇති බව මා විසින් පොද්ගලිකව ප්‍රදේශයේ ඇවිද කරන ලද නිරීක්ෂණයේදී දැකගත හැකි විය.

Once again, the inquiring officer had recommended shifting the premises of the business. At the end of the inquiry report, there is a handwritten endorsement by the Superintendent of Excise where it says the Petitioner had agreed to shift the business premises before 31.07.14. The said endorsement reads as follows;

**2014.07.02** වන දින සු. අධිකාරී, අනුරාධපුර විසින් ගලෙන්බිදුනු වැව ප්‍රාදේශීය ලේකම් කාර්යාලයේ විරෝධතා පරීක්ෂණයක් පවත්වා ඇත. නො **81/B , 40** - කොටස , දුටුවැව,ගලෙන්බිදුනු වැව ස්ථානයේ ක්‍රියාත්මක වන රසායන බියර් (ර.බි.22 ඒ)බලපත්‍රය , බලපත්‍රධාරිණිය විසින් **2014 .07.31** දිනට පෙර ස්ථානමාරු කිරීමට කැමැත්ත ප්‍රකාශ කර ඇත. ඒ අනුව පරීක්ෂණ කෙටියෙන් පවත්වා අවසන් කර ඇත.

All these documents clearly establish that the Petitioner not only has acquiesced with the original decision to relocate but had subsequently on her own made an application to shift her business and relocate it to a suitable location. This is a clear contradiction to the arguments made, whereby it was submitted that the Petitioner had been forced to relocate her premises without giving her a hearing. In this instance, this Court finds that the Petitioner has after acquiescing the decision to shift and subsequently giving an undertaking on her own to shift the premises, sought to challenge the same decision she had agreed upon.

This Court also observes that the Petitioner had not submitted any material to demonstrate that she had taken part in the inquiry under protest. The Petitioner has also not explained to the satisfaction of this Court, as to her own undertaking to shift the premises to which the license was issued. In the absence of such, this Court holds that Respondents' objection on acquiescence succeeds.

In this instance, we take the guidance of the court's decisions in the case of **Collettes Limited V. Bank of Ceylon (1984) 2 SLR 288**, *"If a man, either by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he has so sanctioned, to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct . . . I am of the opinion that, generally speaking, if a party having an interest to prevent an act being done has full notice of its having been done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice, than he would have had if it had been done by his previous license"* Per Lord Campbell, L.C. in *Cairncross v. Lorimer*. This passage was quoted with approval by the Privy Council in *Sarat Chunder Dey v. Gopal Chunder Laha*.

In the case of **Darley, Butler & Co v. Saheed NLR vol 12 pg 367** *“Waiver, like acquiescence, pre-supposes that the person sought to be bound is fully cognizant of the facts when he does the act by which he is to be affected.”*

It was the contention of the Respondents that as the public protest was gathering momentum, for the preservation of peace, in agreement with all parties, the 1<sup>st</sup> Respondent had instructed the 7<sup>th</sup> Respondent to allow the existing license given to the Petitioner to be allowed to be used only till 31.07.14 in the current premises and thereafter to close the said liquor store. Respondents further contended that the said letter had been issued to preserve the peace with the consent of all stakeholders as agreed at the inquiry held on 02.07.14 (P8A). The Divisional Secretary has communicated this instruction he received to the Petitioner by the letter dated 21.07.14 (P8B). As the suspension of the business had taken effect, the Petitioner on 2014. 10.30 had submitted a fresh application to obtain a new license (P10A). It is pertinent to note that in the said application, there is an entry that states, the Petitioner had voluntarily closed her business due to a public protest and until it is shifted to another location.

The learned Counsel for the Respondents also brought to the attention of this Court, that as this is an annual license, the Petitioner’s license which was suspended in 2015, is now expired as per the Regulations. As per the submissions we observe, that the Petitioner’s existing license anyway has expired and if the Petitioner wishes to obtain a license she will have to apply for a new license.

### **Suppression of Facts**

At this stage, this Court will consider the objection raised on suppression of material fact and misrepresentation.

The Petitioner has failed to disclose to this Court, the existence of objections and the protest that had taken place in the year 2011 until the Respondents submitted the same with documentary evidence through their objections. In fact, the Petitioner’s main contention was that they had carried on with this business till the year 2014 without any disturbance.

Para 10 of the Petitioners' affidavit states as follows;

"I state that for approximately more than 13 years I continued my business without any objection from the people of Dutuwewa area and especially the religious community of the area". At the argument, it was submitted that till she received the letter on 10<sup>th</sup> January 2012 (P5) there was no public protest against her business.

In view of the documents R1, R2 & R3 this is a serious misrepresentation and suppression of facts by the Petitioner. The Petitioner's main contention before this Court is that she had been asked to shift her premises of business without any public protest but at the behest of the Divisional Secretary Galenbindunuwewa. For the reasons best known to the Petitioner, she had suppressed a material fact, that there had been objections by the public against her beer shop and that there have been demonstrations as reflected in R3. The Petitioner has failed to submit that she had participated in the inquiry and also there had been decisions taken. In our view, this is a serious suppression of material facts.

It is also pertinent to note that the Petitioner's entire argument based on not giving a fair hearing before asking to shift the premises fails, in view of non-disclosed facts namely the existence of documents R1, R2, R3, and R11. Thus, in view of these documents, this Court agrees with the Respondent's objection on misrepresentation too.

In **Biso Menika Vs Cyril De Alwis & others 1982 (1) SLR 368** it was held "*A person who applies for the extra-ordinary remedy of writ must come with clean hands and must not suppress any relevant facts from Court. He must refrain from making any misleading statements to Court*". The importance of coming to court with clean hands was recently stressed in **Orient Pearl Hotels vs Cey Nor-Foundation Limited & others CA Writ 226/2018 decided on 02.08.2021** where it was held "*It is settled law that a party seeking prerogative relief should come to court with clean hands. The expression is derived from one of equity's maxims – He who comes to Equity must come with clean hands.*"

In our judicial history, there are a plethora of judgments stating from **Alphonsu Appuhami Vs. Hettiarachchi 77 NLR 131, Dahanayaka and others vs. Sri Lanka Insurance Corporation LTD and others (2005) 1 SLR 67, Fonseka Vs. Lt. General Jagath Jayasuriya (2011) 2 SLR 372** where our Courts have constantly held that if there was suppression, misrepresentation and

the lack of *uberrima fides* would warrant the dismissal of a writ application without hearing on the merits of the case.

**In *Namunukula Plantation Limited vs. Minister of Land and Others* SC Appeal No. 46/2008, decided on 13/03/2012 it was held as follows; “*if any party invoking the discretionary jurisdiction of a Court of law is found wanting in the discharge of its duty to disclose all material facts, or is shown to have attempted to pollute the pure stream of justice, the Court not only has the right but a duty to deny relief to such person.*”**

It is trite law that the Petitioner who seeks a remedy in equity should come to court with clean hands. The failure would result in her own actions disqualifying her of the relief she is seeking by way of prerogative writs. In view of the above finding, on suppression alone, this Court need not go into the merits of this case.

Accordingly, for the aforesaid reasons, this Court is not inclined to grant the reliefs prayed by the Petitioner and this application stands dismissed without costs. However, this determination will not be a bar for the Petitioner to apply for a fresh license and for the 1<sup>st</sup> Respondent to give a determination according to law.

**Judge of the Court of Appeal**

**C.P Kirtisinghe, J**

I agree

**Judge of the Court of Appeal**