

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

In the matter of an
application for orders 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.

CA. (Writ) Application No. 105/2018

La Fortresse (Pvt) Limited,
Level 27, East Tower, WTC,
Echelon Square, Colombo 1.

PETITIONER

V.

1. Habaraduwa Pradeshiya
Sabha, Habaraduwa.
2. S.D.De C. Dasanayaka,
Secretary, Habaraduwa
Pradeshiya Sabha,
Habaraduwa.

RESPONDENTS

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : Faisz Mustapha P.C with Mehran Careem for the
Petitioner
Chandana Wijesooriya with Wathsala Dulanjani for
the Respondent

Decided on : 20.12.2019

A.H.M.D. Nawaz, J.

The Petitioner seeks principally a writ of certiorari that would quash the decision contained in the Gazette notification marked P26 to this application. The notification P26 dated 21.II.2016 that was published by the Secretary to the Habaraduwa Pradeshiya Sabha (the 2nd Respondent to the application) declares that acting in pursuance of the powers vested in him/her by virtue of Section 9 (3) of Pradeshiya Sabha Act No 15 of 1979 he has made a decision to implement a recommendation made by the Finance and Policy Making Committee of the Pradeshiya Sabha to impose a trade licence levy. The notification further goes on to state that he has entered the recommendation as a decision as item No 61 on 21.10.2016 in his minute book.

Having thus traced his decision to the recommendation made by the said Committee, he determines that certain institutions including a hotel such as the Petitioner must pay a levy of 1 *per cent* of their takings for the trade licence. The learned President's Counsel submitted that the 2nd Respondent had no power to impose a levy, inasmuch as the Pradeshiya Sabha had long ceased to exist on 15.05.2015.

The power to impose taxes and levies is bestowed on the Pradeshiya Sabha by virtue of Sections 147, 149 and 152 of the Pradeshiya Sabha Act No 15 of 1979. In the event that a Pradeshiya Sabha is in existence, the aforesaid provisions mandate a resolution to be passed for the purpose of imposing any levying taxes and licence duties. For instance the competence to impose levies on hotel is specifically referred to in the second proviso to Section 149 of the Pradeshiya Sabha Act No 15 of 1979. A leviable cap of 1 *per cent* is also provided for in the proviso as follows:

“.....Provided further, that where a any such premises are used for the purpose of a hotel, restaurant or lodging house is registered with or approved or recognized by the Sri Lanka Tourist Board for the purposes of the Tourist Development Act, No 14 of 1968, the duties so levied shall be according to the takings of the hotel or the 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.....”

All the three sections namely 147, 149 and 152 contemplate the passage of a resolution for the imposition of taxes and licence duties. The power to impose a levy is thus a legislative function of the Pradeshiya Sabha and the Indian case of *Assistant Collector of Central Excise v National Tobacco Co of India Ltd* 1973 Tax LR 1607; 1973 (1) SCR 822 states thus:

“The term ‘levy’ is wider in its import than the term ‘assessment’. It may include both imposition of a tax as well as ‘assessment’, the term ‘imposition’ generally used for the ‘levy’ of tax or duty by legislative provision indicating the subject matter of the tax and the dates at which it has to be taxed.”

Thus it is quite clear that the taxing power must be legislatively bestowed and from the foregoing any levy or Pradeshiya Sabha must be authorized by a resolution passed by its members.

What happens when the Pradeshiya Sabha goes out of office or becomes defunct? When the 2nd Respondent imposed the tax levy as he did in the gazette notification marked P26, the Pradeshiya Sabha had long gone out of office. Could the 2nd Respondent have imposed the tax on the Petitioner as he claims to have done under section 9 (3) of the Pradeshiya Sabha Act?

Whilst Mr. Mustapha the learned Counsel for the Petitioner argued that section 9 (3) does not give the 2nd Respondent any such legislative power, Mr.Chandana Wijesooriya the learned Counsel for the 2nd Respondent

contended to the contrary. The argument on behalf of the Petitioner is that P26 should be quashed for illegality, as it emanated from a person who was not vested with legislative functions. Mr Chandana Wijesooriya submitted that when a Pradeshiya Sabha ceases to exist, section 9 (3) vests him with all the powers of the Pradeshiya Sabha. In order to appraise the merit of these submissions, it is befitting that one bears in mind the content of Section 9 (3) vis a vis the legislative scheme.

Section 9 (3) goes as follows:

Where a Pradeshiya Sabha is unable to discharge its functions by reason of the Chairman and Vice Chairman ceasing to hold office, the Secretary shall, during any period that elapses between the occurrence of the vacancies in respect of those offices and the filling of those vacancies in accordance with the provisions of the Local Authorities Elections Ordinance have, exercise, perform and discharge all the rights, privileges, powers, duties and functions vested in or conferred or imposed on the Pradeshiya Sabha, the Chairman or Vice Chairman by this Act or by any other written law.

In my view this provision has not eroded the legislative functions or powers conferred by section 147, 149 and 152 of the Pradeshiya Sabha Act. The Secretary of a Pradeshiya Sabha who is described as the Chief Administrative Officer in Section 9 (2) has to be authorized with legislative power specifically and sans such authorization sections 147, 149 and 152 cannot be said to have been diluted or eroded. In any event I am of the view that the legislative provisions contemplate an additional element of members of the PS participating in a legislative process and I do not hold the view that in the absence of a Pradeshiya Sabha section 9 (2) enables the Secretary to step into the shoes of the members of the Pradeshiya Sabha to impose taxes or levies. In my view sections 147, 149 and 152 of the Pradeshiya Sabha Act are standalone provisions and the powers immanent in these provisions are not transferred to the Secretary by virtue

of Section 9 (3). What is transferred by virtue of section 9 (2) are functions of the Pradeshiya Sabha, which are specifically referred to in Section 3 of the Pradeshiya Sabha Act. Section 3 lays down:

The Pradeshiya Sabha constituted for each Pradeshiya Sabha shall be the local authority within such area and be charged with the regulation, control and administration of all matters relating to public health, public utility services and public thoroughfares and generally with the protection and promotion of the comfort, convenience and welfare of the people and all amenities within such area.

These functions are spelt out in separate chapters which contain specific sections delineating those functions-see for instance Sections 21 and 98. So the transference of powers in the interim period is limited to Section 3 functions and I take the view that powers in Section 147, 149 and 152 never vest in the Secretary when the local authority ceases to hold office.

In the circumstances I take the view that P26 is *ultra vires* the Secretary.

Abdication of Power

Assuming without conceding that he possesses these powers, it is quite evident that he has abdicated these powers. Though the 2nd Respondent states in his statement of objections that he made the decision, that assertion is contradicted by the Gazette notification P26. P26 which uses both words "recommendation" and "decision" goes on to state that the Secretary publishes the recommendation for the purpose of giving efficacy to it. It is as plain as a pikestaff that the Secretary has adopted the recommendation without any independent analysis on his own. There is no material on record that the 2nd Respondent brought to bear on his mind the merits and demerits of a committee that advised him. In such a situation he cannot claim to be the decision maker but rather it is the committee that has acted as the decision maker. Wade & Forsyth in their Administrative Law (11th Edition, p269) states that clearly akin to

delegation, and scarcely distinguishable from it in some cases, is any arrangement by which a power conferred upon one authority is in substance exercised by another.... The effect then is that the discretion conferred by Parliament's exercised, at least in part, by the wrong authority, and the resulting decision is ultra vires and avoid.

There is also another vitiating element to which I would advert. The advice has been preferred by a Finance and Policy Making Committee which was appointed by the Secretary on the recommendation made by the Commissioner of Local Authorities. There is no legislative sanction for this course of action. Sections 12 (1) and (2) are quite clear. This committee is appointed by the Pradeshia Sabha itself and it must comprise members of the Sabha and non-members. It is thereafter that the Finance and Policy Making Committee could advise on the legislative function of imposing taxes.

In this particular instance, the committee was appointed by the Secretary and it consisted of officials who are not authorised to sit in that committee. In the circumstances the composition of the committee was illegally constituted and the advice that flowed from it was a nullity. When the Secretary adopted it, he approbated a nullity. One cannot put something on nothing. It collapses like Humpty Dumpty.

It was Lord Denning who pertinently made this observation in Macfoy v. United Africa Co. Ltd. [1961] 3 ALL ER 1169 at 1172 thus:

If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void. Without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.

This passage was quoted with approval by G.P.S. de Silva J. (as His Lordship then was) in Rajakulendran v. Wijesundera [1982] 1 Sri Kantha LR 164 at 168-169.

In the circumstances I proceed to quash P26 by way of a writ of certiorari allow this application for judicial review.


JUDGE OF THE COURT OF APPEAL