

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

1. Shanthi Munaweera Vithanachchi,
‘Sri Mahal’, Haragama,
Gurudeniya.

PETITIONER

CA No. CA/Writ/050/2019

v.

1. R. Semasinghe,
Commissioner General of Excise,
353, Old Kotte road,
Rajagiriya
- 1a.) N. J. Gunasiri,
Commissioner general of Excise,
Excise Department,
353, Old Kotte road,
Rajagiriya.
- 2). W. M. M. B. Wanasinghe,
Deputy Commissioner of Excise (Revenue),
353, Old Kotte road,
Rajagiriya.

- 2a.) Wasantha Dissanayake,
Deputy Commissioner of Excise (Revenue)
353, Old Kotte road,
Rajagiriya.
3. Upali Wickramaratne,
Assistant Commissioner of Excise,
Central Province.
- 3a.) Upul Seneviratne,
Assistant Commissioner of Excise,
Central Province.
4. M. W. M. M. Madahapola,
Divisional Secretary – Pujapitiya,
Divisional Secretariat - Pujapitiya,
Pujapitiya,
- 4a.) Wathsala Marambage,
Divisional Secretary – Pujapitiya,
Divisional Secretariat - Pujapitiya,
Pujapitiya,
- 5) Ven. Welgale Gnanasiri Thero,
Pirivenadhipathi,
Welgala Pirivena,
Ankumbura.

RESPONDENTS

BEFORE

: M. Sampath K. B. Wijeratne J. &
Wickum A. Kaluarachchi J.

COUNSEL

: Ronald Perera, P.C. with Dinesh
Vidanapathirana for the Petitioner.

V. De Abrew, ASG, P.C. with R. Aluwihare, SC for the 1A, 2A, 3A and 4A Respondents.

ARGUED ON : 24.03.2023

DECIDED ON : 01.06.2023

M. Sampath K. B. Wijeratne J.

Introduction

The Petitioner instituted these proceedings against the Respondents seeking *inter-alia*, a writ of *certiorari* quashing the decision/order of the 1st Respondent contained in the document marked ‘P 16’ and a writ of *mandamus* directing the Respondents to issue a liquor license to premises No.232, Bamunupola, Batugoda, as requested by the Petitioner.

The Respondent filed their statement of objections seeking to dismiss the Petition on the ground that the Petitioner’s application to transfer her license was rejected on the ground the same not being satisfied or complied with the rules and regulations. It was also stated that the Respondents acted within the scope and ambit of the law at all material times. Accordingly, the Respondent’s submitted that Petitioner is not entitled to invoke writ jurisdiction of this Court.

Factual background

The Petitioner is in the business of carrying on a retail liquor shop named ‘*Supreme Wine Stores*’. She was first issued a license to carry on the business in 1999 and continued until 2017 at premises No.89, Pujapitiya, Ankumbura¹. The Petitioner produced copies of licenses issued to her marked as ‘P 2(A)’ to ‘P 2(P)’. The Petitioner had also been granted a license for the year 2017 (‘P4’). However, on or about March 2017, the Petitioner had to close down her business place at No. 89, Pujapitiya, Ankumbura pursuant to an order of the District Court of Kandy made in the Partition action bearing No. P/5283 (‘P 5’). The Petitioner alleges that the title of the aforementioned premises

¹ Paragraph 9 of the Petition.

was vested with a relative of the 5th Respondent priest and the 5th Respondent with several others launched protests demanding the removal of Petitioner's liquor store. Consequently, the 4th Respondent Divisional Secretary called the Petitioner for an inquiry ('P 6'). Thereafter, the 4th Respondent, with the acquiescence of the Petitioner, directed the Petitioner to shift the business to another location ('P 7'). The Petitioner found the place at No.46, Alawathugoda Road, Ankumbura and executed a lease agreement effective from 6th September 2017 to 6th September 2018 at a monthly rental of Rs.15,000.00 ('P 8'). Thereafter, the Petitioner applied for the transfer of the liquor license to the new premises (P 9'). Her application was recommended by all the relevant officials ('P 9(a)'). Subsequently, the 2nd Respondent called for a report from the 4th Respondent Divisional Secretary as to whether there are any objections from the general public and whether the 4th Respondent recommends the Petitioner's application. Subsequently, the 2nd Respondent informed the Petitioner that the 4th Respondent had not recommended the Petitioner's application as there were objections ('P 11'). The Petitioner states that since she has fulfilled all the guidelines and the conditions for the issue of a license, the refusal to transfer the license is unlawful, arbitrary, unreasonable and *ultra-vires*.

Being aggrieved by the said decision, the Petitioner filed writ application No. Writ/ 116/2018 in this Court. Thereafter, on the Respondent's undertaking that a fresh set of applications will be issued to the Petitioner, enabling the Petitioner to make an application in respect of another location, the Petitioner withdrew her writ application ('P 12(a)', 'P 12(b)' and 'P 12(c)'). Thereafter, the Petitioner leased out premises at No. 232, Bamunupola, Batugoda where there are several other liquor shops in the clause proximity, and applied to transfer her license to the said place ('P 13'). As before, the 2nd Respondent called for a report and recommendations from the 4th Respondent Divisional Secretary as to whether there are objections from the general public for the issuance of the license to the Petitioner at her new premises. Subsequently, the 2nd Respondent informed the 3rd Respondent that an objection was received in writing and therefore, to appoint a panel of inquiry to investigate the matter and submit a report ('P 15'). The letter was copied to the 4th Respondent Divisional Secretary to produce the objectors at the inquiry and a copy was sent to the Petitioner as well. The Petitioner states that at the inquiry, a few villagers, some volunteer groups, and the 5th Respondent priest stated that they

oppose the establishment of a liquor store. Further, the Petitioner states that the 5th Respondent is an incumbent priest of a temple about 8 KM away from the proposed premises and there are several other liquor shops in the area. Thus, the Petitioner states that the 5th Respondent's objection is baseless and *malafide*. The Petitioner alleges that the 5th Respondent maliciously and without any justifiable reasons objected to every premise, including the present premise proposed by the Petitioner.

The 1st Respondent, Commissioner General of Excise, informed the Petitioner by his letter dated 16th January 2019 ('P 16') that the panel of inquiry did not recommend the transfer of her license to the premises to which the Petitioner applied for and therefore, to find an alternative premise within the Divisional Secretariat division. The Petitioner state that she has a legitimate expectation to the effect that the liquor license would be granted to the Petitioner since the Petitioner's application to transfer the license to premises at No. 232, Bamunupola, Batugoda fulfils all the regulations and procedure prescribed in the Gazette notification 'P 3'.

The Petitioner contended that the refusal to transfer a license by the Respondent is unlawful, arbitrary, unreasonable, and *ultra-vires*.

Analysis

The Petitioner had been carrying on her business of retail liquor business of liquor shop named '*Supreme Wine Stores*' from 1999 to 2017 at No.89, Pujapitiya, Ankumbura, on a license issued by the Divisional Secretary. The Petitioner had been issued with a license for the year 2017 as well, operative until 31st December 2017. Nevertheless, the Petitioner states that she was compelled to close down her liquor store in March 2017 due to an order made by the District Court of Kandy in case No. P/5293. The Petitioner also states that the 5th Respondent priest and several other residents in the area demanded the removal of the Petitioner's liquor store. Consequently, the 4th Respondent has called the Petitioner for an inquiry. Thereafter, with the acquiescence of the Petitioner, the 4th Respondent informed the Petitioner to find an alternative place. According to the letter of the 2nd Respondent marked 'P 7', the grounds to transfer the Petitioner's liquor store was the objection that were subject of the inquiry. Therefore, even though the Petitioner states that she had to close down her liquor store consequent to an order made by the District Court of

Kandy, the reason for the re-location was the decision of the 2nd Respondent, manifested in ‘P 7’.

Accordingly, the Petitioner has found premises at No. 46, Alawathugoda Road, Ankumbura, and has executed a lease agreement. Thereafter the Petitioner has applied to transfer her liquor license to the above premises. Petitioner’s application had been recommended by all the relevant officials. Yet, in response to the inquiry made by the 2nd Respondent as to whether there are any objections from the general public to the re-location, the 4th Respondent informed that objections were received in this instance as well. As a result, the 4th Respondent did not recommend the Petitioner’s application. Thereafter, the second Respondent informed the Petitioner that her request to transfer cannot be granted. There is no evidence before Court that an inquiry had been held in terms of Rule 21 of Excise Notification No. 902 published in Extra Ordinary Gazette Notification No. 1544/17 dated 10th April 2018, prior to the refusal of Petitioner’s application in this instance. The Petitioner alleged that the refusal to transfer the Petitioner’s license is unlawful, arbitrary, unreasonable, and *ultra-vires*. Accordingly, the Petitioner has filed writ application No. CA. Writ 116/2018 in this Court challenging the decision of the 2nd Respondent but, subsequently withdrawn on the undertaking given by the Respondents to issue a fresh application for the Petitioner to proceed with the transfer of her license. Thereafter, the Petitioner leased out a new premises and applied for the transfer of the license to the said premises. Consequently, the 2nd Respondent called for a report from the 4th Respondent as to whether there are objections from the general public in terms of Rule 13 (e) of Gazette Notification marked ‘P 3’ and for his recommendations (‘P 14’). Thereafter, the 2nd Respondent informed the 3rd Respondent by letter ‘P 15’ to appoint a panel of inquiry to hold an inquiry into the objections received. Subsequently, the 1st Respondent informed the Petitioner that the panel of inquiry did not recommend the change of the license to premises No. 232, Bamunupola, Batugoda, and therefore, to find an alternative location. This was the third occasion the Petitioner was directed to relocate her liquor store based on the objections. In all three instances, the Petitioner’s application had been recommended by all relevant officials but, due to objections from the general public, the 1st and/or 2nd Respondents have rejected the Petitioner’s application and directed the Petitioner to find an alternative place (‘P 7’, ‘P 11’) and P 16’)

In the interest of clarity, I will be re-producing the relevant Rules under Excise Notification No. 902 published in Extra Ordinary Gazette Notification No. 1544/17 dated 10th April 2018.

Rule 27 reads thus;

*‘27. 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 which 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 Division. In order such a request, applicant has to pay Rs. 7,500 for processing the application and sum of Rs. 100,000 as fees for shifting premises. **The new location should comply with all the requirements stipulated in this notification.** The condition of not approving the relocations will not apply to liquor manufacturing licenses.’*

Rule 13 reads as follows;

‘13. The documents and reports required to be submitted with regard to new applicant:

(a) to (d) (...)

*(e) if any complaints are received to the contrary, the Commissioner General of Excise shall **upon an inquiry as set out in paragraph 21 hereof** refuse to issue a license/ cancel the license.*

(f) to (j) (...)’

Rule 21 reads as follows;

*‘21. **Any objection or protest** received 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 or the Guidelines and Conditions** herein 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 licensee as the case may be and will thereafter **be inquired into** by the Commissioner General of Excise as to the validity*

thereof and action taken after such inquiry on the basis of the findings thereat. In such an inquiry, if it is found that the establishment continuing the license at that place may thereat 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.'

(emphasis added)

Accordingly, under Rule 27, the Excise Commissioner General has the power to grant approval to relocate any liquor store for a reason that he considers reasonable. In this instance, the 1st Respondent Excise Commissioner General exercised his authority in favour of the Petitioner and decided to relocate her liquor store. Accordingly, the 1st Respondent informed the Petitioner to find an alternative location ('P 16'). Therefore, it is apparent that the Commissioner General of Excise is satisfied with the reasons for the relocation of the Petitioner's liquor store and the reasonableness of her application.

The ground on which the 1st Respondent directed the Petitioner to find an alternative location is that the panel of inquiry did not recommend the Petitioner's application to transfer her liquor store to No.232, Bamunupola, Batugoda. The panel of inquiry made the above decision at an inquiry held into the objections received by the 4th Respondent.

The manner in which any objection or protest received by the Commissioner General of Excise should be inquired is set out in Rule 21 of Gazette Notification marked 'P 3'. It is important to observe that to initiate an inquiry, the objection or protest should be '*on the ground that there has been a violation or non-compliance with any requirement of the excise ordinance or the guidelines and conditions in regard to the issue or continuance of a license.*'

Furthermore, the Commissioner General must notify the applicant or the licensee of the objections and only thereafter conduct an inquiry as to the *validity thereof*. In such an inquiry if it is found that the establishment, and continuing the license at that 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 licensed premises to a suitable place.

Hence, it is clear that the basis upon which an inquiry could be held by the Commissioner General of Excise on any objection or protest is that there should be a violation or non-compliance of any requirement under the Excise Ordinance or Guidelines or the conditions of the license. Once an inquiry is initiated on that ground, there could be a finding to the effect that there is a threat or likelihood of a threat to the maintenance of law and order in the area by continuing the license at the present place. Then only the Commissioner General could direct to relocate the liquor store to a suitable place.

In this instance, there is no allegation whatsoever that the Petitioner has violated the Excise Ordinance or the Guidelines, or the conditions contained in the license. Therefore, in my view holding the inquiry itself is not in conformity with the Rules. As it is evident from the document marked 'P 13', the Petitioner has complied with all regulations and requirements necessary to obtain a license.

On the other hand, the 1st Respondent Commissioner General of Excise has failed to give any reasons for his decision contained in 'P 16', to relocate the liquor store. The 1st Respondent has failed at least to attach a copy of the findings of the panel of inquiry to the letter 'P 16'. Nevertheless, the Respondents submitted to this Court a copy of the proceedings before the panel of Inquiry, along with their objections, marked as 'R 3'. Even in 'R 3', the inquiring officers merely recite a summary of the evidence given by the witnesses and arrived at the conclusion that there would be serious commotions and destruction of peace in the area. The panel of inquiry has arrived at this conclusion upon the threatening statements made by the witnesses. Therefore, in my view, the decision of the panel of inquiry is influenced by extraneous considerations.

De Smith's *Judicial Review* states²;

'.....the question of what is relevant or material consideration is a question of law, whereas the question of what weight to be given to it is a matter for the decision-maker. However, where undue weight is given to any particular consideration; this may result in the decision being held to be unreasonable, and therefore unlawful, because manifestly excessive or manifestly inadequate weight has been accorded to a relevant consideration....'

² 8th Edition, p. 602.

In the case of *Samaraweera v. People's Bank and others*³ her Ladyship Dr. Shirani Bandaranayake J., (as her Ladyship then was) cited the following extract from Wade⁴; *'a right to reasons is, therefore, an indispensable part of a sound system of judicial review. Natural justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man's sense of justice. It is also a healthy discipline for all who exercise power over others.'*

In *Karunadasa v. Unique Gem Stones Ltd, and others*⁵ Fernando J., observed that;

'To say that Natural Justice entitles a party to a hearing does not mean merely that his evidence and submissions must be heard and recorded; it necessarily means that he is entitled to a reasoned consideration of the case which he presents. And whether or not the parties are also entitled to be told the reasons for the decision, if they are withheld, once judicial review commences, the decision "may be condemned as arbitrary and unreasonable"; certainly, the Court cannot be asked to presume that they were valid reasons, for that would be to surrender its discretion. The 2nd respondent's failure to produce the 3rd respondent's recommendation thus justified the conclusion that there were no valid reasons and that Natural Justice had not been observed.'

The learned Counsel for the Petitioner made submissions on the right to be heard before a decision is taken. However, the documents marked 'R 3' establish the fact that the Petitioner had been present at the inquiry held by the panel of inquiry and had even made a statement. The Petitioner did not deny her presence at the inquiry. Therefore, the above submission is irrelevant to the matters in issue.

In the case of *Peiris v. Commissioner General of Excise and five others*⁶ Arjuna Obesekara J., (sitting in the Court of Appeal), (as His Lordship then was) made the following observations;

'However, in the absence of any schools or place of religious worship in the vicinity, the 6th Respondent ought to exercise caution in considering objections of the public. I say this for two reasons. The first is that a toddy tavern by its nature must be located at a place where there is easy access to the public who

³ [2007] 2 SLR 362.

⁴ Administrative Law, ninth edition, at p. 522.

⁵ (1997) 1 S.L.R. 256.

⁶ CA Writ Application No. 34/2020.

*wish to consume toddy. Locating a tavern at a place where there is no human habitation will not be of any use to the public, the Petitioner, or the government who received part of the revenue. The second reason is **the possibility that a public protest can be instigated by an interested party which I have observed is something that seems to be increasingly happening with regard to the issuance of liquor license.***

Conclusion

In light of the above analysis, I hold that the decision of the 1st Respondent Commissioner General of Excise contained in the letter 'P 16' to relocate the Petitioner's liquor store is unlawful, arbitrary, unreasonable, and *ultra vires*. Accordingly, the writ of *certiorari* prayed for in prayer (c) of the Petition is issued quashing the document marked 'P 16'.

Since the application of the Petitioner to transfer her liquor stores to No. 232, Bamunupola, Batugoda is recommended by all the relevant officials and the issuance of the license to the said premises is rejected only on the ground that the panel of inquiry did not recommend the transfer, I am inclined to issue a direction to the Respondent to transfer the liquor license to the said premises. Accordingly, the writ of *mandamus* prayed for in prayer (d) of the Petition is also granted.

JUDGE OF THE COURT OF APPEAL

Wickum A. Kaluarachchi J.

I Agree.

JUDGE OF THE COURT OF APPEAL