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

In the matter of an application for Writs of Certiorari, Prohibition and Mandamus under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. Case No.WRT/91/2020

Sesame Senhora Tea Company (Pvt) Ltd.,
Kirimetitenne, Balangoda.
PETITIONER

-Vs-

1. **Sri Lanka Tea Board,**
   No.574, Galle Road,
   Colombo 03.
2. **Jayampathy Molligoda,**
   Chairman,
   Sri Lanka Tea Board,
   No.574, Galle Road,
   Colombo 03.
3. **Anura Siriwardena,**
   Director General,
   Sri Lanka Tea Board,
   No.574, Galle Road,
   Colombo 03.
4. **E.A.J.K. Edirisinghe,**
   Tea Commissioner,
   Sri Lanka Tea Board,

No.574, Galle Road,

Colombo 03.

RESPONDENTS

BEFORE	:	A.H.M.D. Nawaz, J. (P/CA) & Sobhitha Rajakaruna, J.
COUNSEL	:	Romesh de Silva, PC with Lakshman Perera, PC, Thishya Weragoda and Niran Anketel for Petitioner
		Milinda Gunatilake, SDSG with Sachinda Dias for Respondents
Argued on	:	22.09.2020
Decided on	:	25.11.2020

A.H.M.D. Nawaz, J (P/CA)

This application for judicial review seeks to impugn by *certiorari* two documents namely **P7** dated 16th January 2020 and **P9** dated 26th February 2020. The document marked **P7** is titled "Sri Lanka Tea Board Circular No. CIR/BR/1/2020" and directed at all Licensed Produce Brokers of Tea. The gist of **P7** is that with effect from 1st February 2020, no licensed Tea Broker or licensed Tea Brokers collectively shall accept teas from registered factories, exceeding its approved maximum production capacity of made tea. The prohibition is on the acceptance of tea from a registered tea factory, which exceeds its approved maximum production capacity of made tea. It is averred in the petition that the Respondents were well aware and had full knowledge that the Petitioner was manufacturing over the purported maximum production capacity. Therefore the argument was made on behalf of the Petitioner that the Respondents are estopped from preventing the Petitioners from manufacturing 260,000 kg of made tea. In other words the Petitioners must be permitted to produce

260,000 kg of made tea over and above the approved maximum that was permitted namely 170,000 kg-this was the pith and substance of the argument of the Petitioner.

By **P9** dated 26th February 2020 which was issued one month after **P7**, the 4th Respondent Tea Commissioner again instructed the licensed Produce Brokers of Tea that subsequent to the recommendations of an *ad hoc* Committee appointed for the purpose of considering the appeals made by some manufacturers of tea, the Tea Commissioner had granted approval to increase production capacity of those factories but certain conditions were imposed namely:-

1. The manufacturer has to maintain Good leaf percentage of 60% as per the *Gazette* No.1684/48 dated 10th December 2010.
2. The manufacturer has to maintain GMP score at 80% or above according to the Circular No. TC/CIR(204)-1-2019 and in addition should obtained HACCP or equivalent certification.
3. Payments for green leaf should be paid on the due date and no arrears payment should be reported.
4. The Registered Tea Manufacturer should not contravene the provisions of Tea Control Act No.51 of 1957 under any circumstances.

The instruction contained in **P9** also tabulated the amended approved maximum production capacities for made tea manufacturers, who had made appeals. The list at item 97 gives the increased maximum production capacity of made tea prescribed for the Petitioner at 170,000 kg.

It has to be noted that although both **P7** and **P9** were directed to licensed Produce Tea Brokers, none of them are before this Court challenging **P7** and **P9** on the recognized ground of judicial review.

Those Tea Brokers who stand as intermediaries between tea manufacturers and buyers have been told not to accept tea from several manufacturers who produce over and above their approved maximum production capacity of made tea. This shows that

the tea industry is quite regulated and **P7** and **P9** show the notices that the tea brokers have been put under namely they are not to accept tea from those manufacturers who exceed their permitted cap. In the case of the Petitioner the permitted cap is 170,000 kg of tea. If one looks at the table appended to **P9**, one could see several manufacturers who have been imposed with limitation on production caps. None of those manufacturers of tea are before this Court challenging this prohibition on tea brokers. It is only this tea manufacturer (the Petitioner Company) which is before this Court challenging **P7** and **P9**.

In respect of this Petitioner, the last increase on its maximum production capacity, as could be seen from the list appended to **P9**, is 170,000 kg of manufactured tea as opposed to the previous 140,000 kg and the Petitioner has been explicitly informed that it should adhere to the approved maximum capacity and that any excess production will fall foul of the relevant regulations-*vide* **R11A** and **R11B**. Even though **P7** and **P9** instruct the tea brokers, the manufacturers of tea such as the Petitioner have also been made aware of these limitations but these documents have not been brought to the attention of this Court along with the petition giving rise to a complaint by the Respondents that the Petitioner is guilty of suppression of material facts.

As I listed it above, one of the impugned documents **P9** imposes a requirement among many that the manufacturer has to maintain good leaf percentage of 60% per cent. In other words a tea manufacturer is told not only to adhere to his maximum capacity but also to maintain this green leaf requirement-*vide Gazette* No.1684/48 dated 17th December 2010 **(R12)**. In fact **Regulation 3** of **R12** specifically instructs all registered manufacturers of tea and suppliers of green leaf as raw materials to registered tea factories.

Regulation 3 specifically instructs the manufactures who operate a tea factory for the production of made tea to ensure the procurement of a minimum of sixty per centum (60%) of green leaf in conformity with the quality standard determined by the Sri

Lanka Tea Board for use in manufacture of tea. The same regulation states in **3(b)** that every such manufacturers such as the Petitioner must ensure that the green leaf so procured for manufacture should not be damaged due to past harvest operations of suppliers of such green leaf.

A corresponding duty to endeavor to supply a minimum of sixty per centum (60%) of green leaf in conformity with the quality standard determined by the board is imposed on every supplier of green leaf as well. These regulatory controls, as one could see, have been imposed as far back as 17th December 2010 on all manufactures of tea and supplier of green leaf, with the laudable objective of maintaining the standard of Ceylon Tea (*see* **R-12**) and when the Petitioner seeks to impugn **P9** (direction given to tea brokers) it passes strange that he also impugns this imperative condition of minimum green leaf standard of 60%-a requirement that he has been aware of for almost 10 years if I were to go by the *gazette*.

Having acquainted all tea manufacturers with the imperative requirement of 60% of minimum green leaf standard in 2010, the 4th Respondent incorporated it in his instructions dated 26th February 2020 (**P9**) but the Petitioner seeks a quashing of **P9**. It is too late to quash **P9**, as the Petitioner chose not to challenge the *gazette* notification which is dated 17th December 2010. The Petitioner was already bound by his conditions of registration which principally imposed a cap on his production and the Petitioner was, like the other tea manufacturers, put on notice of this condition of the cap. Therefore, when the directive is given in **P9** to continue to maintain the quality of made Sri Lankan Tea as well as the cap on production, it cannot give rise to a complaint before this Court.

By way of their Petition dated 19th May 2020, the Petitioner avers that since its incorporation in or around 2003/2004 and re-registered in 2009, it has been in the continuous manufacture of high quality tea since its inception. It is by acquisition of a factory called New Hopewell Tea Factory in *Balangoda* that the Petitioner states that it commenced its operation of manufacturing tea. The document marked **P1(c)**

connotes a registration certificate dated 17th September 2004. It is the contention of the Petitioner that the Tea Commissioner sets up a "monthly approved maximum production capacity" in the registration certificates that are issued to manufacturers. In paragraph 8 of the Petition the Petitioner states that many a manufacturer, including the Petitioner, exceed the cap imposed by the Tea Commissioner but qualifies it by stating that the excess in manufacture over the approved cap is with the Respondent's knowledge and approval.

In opposition to this averment stated in paragraph 8 of the Petition, the paragraph XVII of the statement of objections filed by the 1st to 4th Respondents controvert this assertion by averring that the Petitioner had not obtained prior approval for the installation of any machinery to increase the approved capacity for manufacturing made tea, in contravention of the conditions in the registration certificate. In regard to this important question of the approved maximum capacity that the Petitioner's tea factory could manufacture, it has been asserted in the objections that the 4th Respondent Tea Commissioner has from time to time revised the monthly approved maximum capacity of the Petitioner's tea factory subsequent to inspection of the factory. Such revisions are said to be as follows:-

a) Increased from 57,200 kg on 17th January 2000 to 67,000 kg on 17th September 2004 (**R2(c)** and **R2(d)**);

b) Increased from 67,000 kg to 140,000 kg on 15th December 2015 (**R2(a)**);

c) Retained at 140,000 kg on 08th March 2019 (**R2(b)**);

d) Increased from 140,000 kg to 170,000 kg from 22nd February 2020.

Thus the fact that the Tea Commissioner had increased the production limit of the Petitioner's tea factory multiple times is demonstrated by the registration certificates marked **R2(a)**, **R2(b)**, **R2(c)** and **R2(d)**. These are documents that have been appended to the Respondent's statement of objections. Further, it would appear that the Respondents have explicitly informed the Petitioner that as a tea manufacturer he should adhere to the approved maximum capacity on tea production. This salient

factor is evidenced by the letters marked **R11(a)** and **R11(b)** that have been appended to the Respondent's statement of objections.

Thus it becomes clear that any excess of production has always been with the written approval granted to the Petitioner and it cannot be contended that the Respondents have acquiesced in the violation or infringement of the maximum production capacity. It has to be pinpointed at this stage that the documents marked **R11(a)** and **R11(b)** by which the Respondents directed the Petitioner to adhere to the limits on production on multiple occasions have not been disclosed to this court and the learned Senior Deputy Solicitor General contended that this amounts to a suppression of material facts.

In fact the document marked **R11(a)** reveals that the required minimum green leaf standard to manufacture made tea of good quality is 60%. The letter makes it clear that the leaf quality of the Petitioner is below the required standard and the document marked **R11(a)** instructs the Petitioner to improve the leaf standards and therefore his request for increase in capacity cannot be acceded to. As I said before, it is the Sri Lanka Tea Board (Quality Standard of Green Leaf) Regulation, No. 2 of 2010 that imposes a minimum cap of green leaf standard to manufacture made tea of good quality at 60% and the Regulation and the Leaf Quality Inspection Report pertaining to the Petitioner's factory dated 09th October 2019 have been annexed to the statement of objection as **R11** and **R13**.

It is quite clear that it is the Sri Lanka Tea Board (SLTB) which is vested with the authority to regulate the tea industry and towards this end, the authority is responsible for setting in motion measures to ensure the supply of good quality green leaf to all existing factories with the view to promoting high quality manufacturing of tea. In the course of the argument, this court heard arguments on the challenges facing the tea industry, namely, the severe shortage of green leaf. It was brought to the notice of this Court that green leaf supplies to factories (registered tea manufactures) such as the Petitioner have been dwindling over the years and this has impacted on

the volume of exports of Ceylon Tea resulting in difficulties to maintain high prices for Ceylon Tea which has always maintained its synonymous reputation.

We have taken cognizance of these arguments and the crux of the issue before us is the lawfulness of the directions given in **P7** and **P9**. What the Tea Brokers have been told to do by way of **P7** and **P9** has been well known to the Petitioner. From the time of its registration the Petitioner is aware of the one of the conditions of his registration namely he cannot go beyond a particular quota of production if I may put it simply. The Petitioner sought an enhancement. He was given this increase namely 170,000 kg of manufactured tea. He had been periodically given the enhancements. None of those enhancements had been challenged before. So in accordance with the latest increase, the Tea Brokers were to told not to accept manufactured tea from not only from this Petitioner but also from others if they exceeded their quota. There is no mismatch between the directions in **P7** and **P9** and the conditions of registrations as well as the quota the Petitioner has to produce. If **P7** and **P9** had told the Tea Brokers not to accept manufactured tea from a manufacturer contravening his permitted cap, they are in conformity with the conditions of registration of a licensed Tea Manufacturer and no illegality or *Wednesbury* unreasonableness arises in the case.

If **P7** and **P9** are sought to be quashed, the other tea manufacturers who are not before this Court will seek similar privileges of contravening their own caps on production and a Court cannot and should not act in vain as Lord Wilberforce said in the case of ***Malloch v. Aberdeen Corporation*** (No.1) (1971) 1 WLR 1578.

In the circumstances we proceed to refuse this application.

PRESIDENT OF THE COURT OF APPEAL

Sobhitha Rajakaruna, J.

I agree.

JUDGE OF THE COURT OF APPEAL