

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

**Case No.CA/WRIT/364/2016**

In the matter of an application for an Mandate in the nature of a Writ of Mandamus under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Daffodils Hotels (Private) Limited  
No.223A, High Level Road  
Kirulapona  
Colombo 5.

In Business under the name and style the firm  
New Green Inn Restaurant  
No.258/3, Kandy Road  
Jaffna.

2. Hetti Arachchige Gunesh Ganga  
Chaminda Perera  
No.35B, Jaya Mawatha  
Ratmalana.

**Petitioner**

- Vs. -

1. L.K.G. Gunawardana  
Commissioner General of Excise  
Department of Excise Sri Lanka  
No.34, W.A.D. Ramanayake Mawatha  
Colombo 2.

1A. A. Boderagama  
Acting Commissioner General of Excise  
Excise Department of Sri Lanka  
No.353, Old Kotte Road  
Rajagiriya.

2. Malraj Kiriella  
Director General  
Sri Lanka Tourism Development Authority  
No.80, Galle Road  
Colombo 3.

3. N. Vethanayagam  
District Secretary  
District Secretariat  
Jaffna.

4. Alavappillai Sri,  
4A.E. Anton Yoganayakam  
Divisional Secretary  
Divisional Secretariat  
Nallur.

**RESPONDENTS**

**Before:** Janak De Silva J.

&

**N. Bandula Karunarathna J.**

**Counsel:** G. Ananda Silva with Thilini Vidanagamage for the Petitioners.  
Sumathi Dharmarathna, ASG for the Respondents.

**Written Submissions:** By the Petitioners filed on 07.10.2019  
By the Respondent filed on 03.09.2019

**Argued on:** 16/05/2019

**Judgment on:** 16/11/2020

**N. Bandula Karunarathna J.**

The instant application predominantly challenges *inter alia* the decision of the 1<sup>st</sup> Respondent to not to renew liquor license and the decision of the 4<sup>th</sup> Respondent to relocate the business premises. The 1<sup>st</sup> Petitioner Company is the Owner of a hotel know as *New Green Inn Restaurant* (hereinafter sometimes referred to as '*the Petitioners' Hotel*'). The Petitioners' Hotel is a Tourist Board approved B-Grade Tourist Guest House equipped with 7 rooms, a bar and offer facilities required to obtain the B-Grade approval (vide: pg. 7A of P21). The 1<sup>st</sup> Petitioner is a duly incorporated company registered under the Companies Act No. 7 of 2007 and is the owner of the hotel known as "New Green Inn Restaurant" (sometimes hereinafter referred to as the 1<sup>st</sup> Petitioner's hotel), which is situated at No. 258/3, Kandy Road, Jaffna. The 2<sup>nd</sup> Petitioner is a Director of the 1<sup>st</sup> Petitioner Company. The 1<sup>st</sup> Respondent is the Commissioner General of Excise of the Excise Department of Sri Lanka. The 2<sup>nd</sup> Respondent is the Director General of the Sri Lanka Tourism Development Authority. The 3<sup>rd</sup> Respondent is the District Secretary of Jaffna. The 4<sup>th</sup> Respondent is the Divisional Secretary of Nallur

At the outset, the factual setting to this case is as follows;

The Petitioner states that the *New Green Inn Restaurant*, which was previously owned by one *Anthony Durex*, has been in business in the present from since 2009 and obtained the Hotel and Bar License (FL7 & FL8) on 30<sup>th</sup> September 2010. The said *Anthony Durex* had been issued the said License by the 1<sup>st</sup> Respondent. The said License had been issued upon an application made under Excise Notification No. 902 by the said *Anthony Durex*. The Rule 13 of the Excise Notification 902 requires certain documents and reports to be submitted with regard to new applicants. The Petitioner states that such application had been submitted with the Surveyor's report dated 07<sup>th</sup> January 2010 [vide R13], which states that there is no school or religious place within the prescribed distance from the location of New Green Inn 258/3, Kandy Rod, Ariyalai, Jaffna. Further the Petitioner states that According to the Specimen Application form for issue of Liquor License in Schedule II, it is further noted that such licenses had been issued upon observation and overall recommendation of several officers of the 1<sup>st</sup> Respondent Excise Department.

Subsequently, the 1<sup>st</sup> Petitioner company purchased the business on 12<sup>th</sup> March 2014 together with the Hotel and Bar License (FL2, FL8 & AFL1) on being legally transferred to the 1<sup>st</sup> Petitioner company thereafter. The 1<sup>st</sup> Petitioner Company duly renewed the said license annually as required up until the alleged non-renewal in the year 2016.

In or around November 2015, the Petitioner states that the Petitioners have been asked to attend inquiries view of the purported public complaints made against the 1<sup>st</sup> Petitioner's hotel. However, the Respondents have failed to substantiate any such public complaints or a "strong public outcry". The Petitioners verily believe that if at all there was a strong public outcry, it cannot be an outcry suffered in silence leaving no proof. Therefore, the Petitioners vehemently deny of such subjective constructions. In any event, the Surveyor General's report dated 12<sup>th</sup> August 2015, does not give rise to a conclusive determination. In fact, it shows the situation on 11<sup>th</sup> August 2015, and it is unreasonable, irrational and unfair to victimize the Petitioners who run a legitimate business. Therefore, the decisions taken in view of the letter dated 13<sup>th</sup> August 2015 issued by the Governor of the Northern Province marked R20, is unfair, irrational and arbitrary.

In December 2015, the 1<sup>st</sup> Respondent issued the Hotel & Bars license (FL7 & FL8 & AFL1) only for a period of three months from 01-01-2016 to 31-03-2016. On or around 04<sup>th</sup> January 2016, the Petitioners received the letter dated 28<sup>th</sup> December 2015, stating that upon the findings of the inquiry held on 11<sup>th</sup> December 2015 and 18<sup>th</sup> December 2015, the 1<sup>st</sup> Respondent has decided that the Petitioner should shift the license and required the Petitioners to find an alternative premise within the Divisional Secretary Division of Nallur, before 31-03-2016. Such findings are not before Court. Although the 2<sup>nd</sup> Respondent delayed issuing of the Annual Tourist License until the 1<sup>st</sup> Petitioner Company rectified some defects, on 07<sup>th</sup> January 2016, the 2<sup>nd</sup> Respondent issued the Tourist Guest House License together with a letter, recommending the 1<sup>st</sup> Respondent to issue the Hotel and Bars license to the Petitioner for the period of one year from 07-01-2016 to 31-12-2016.

The Petitioners state that subsequently, the Petitioners received a copy of the letter from the 4<sup>th</sup> Respondent Divisional Secretariat dated 29<sup>th</sup> February 2016 (*vide* P12) with regard to the 'shifting of Liquor Bars' and a letter from the 4<sup>th</sup> Respondent dated 10<sup>th</sup> March 2016 requiring the Petitioners to shift the Respondents giving various reasons. Having no other option, the Petitioner requested the 1<sup>st</sup> Respondent to extend the time period of their license stating the grave difficulties faced by them in finding a suitable place to shift a Tourist Board approved B-Grade Hotel and to continue with the license at the same place.

The Petitioners state that the Respondents' decisions are liable for Judicial Review on the grounds of illegality, irrationality and procedural impropriety. The Petitioner states that the 1<sup>st</sup> Respondents or its officers have misunderstood and misapplied the law. (i.e. Excise Regulations No. 902 marked P22) that regulates its decision-making power and thereby, has failed to give effect to it. Therefore, the decisions of the said Respondents not to extend the Hotel and Bar License of the 1<sup>st</sup> Petitioner's Hotel and the decisions taken thereupon in the documents marked P10, P11, P12 and P13 are illegal. In any event, in order to determine whether the said Respondents have or not acted *ultra vires* is a matter to be determined by court. However, the Petitioner claims that the Respondents have failed to submit any such document to substantiate their position that a proper inquiry was held, by way of an inquiry report or any other document to that effect. Thereby, the Respondents have suppressed material from Court by insinuating the fact that there was proper inquiry, when there was no proper inquiry was held.

The Petitioners further state that the 4<sup>th</sup> Respondent's direction to relocate the Petitioners' Hotel in less than 3 months' time [*vide* P10, P11, P12 and P13] is an attainable task considering the specification required for Tourist Board approved B-Grade Guest House [*vide* pg. 7A of P21] and is irrational, which is succinctly referred to as '*Wednesbury unreasonableness*'. The said decisions contained in the documents marked P10, P11, P12 and P13 is so outrageous in its defiance of logic that no sensible person who had applied his mind to the questions to be decided (which includes finding an appropriate location, building a hotel that meet the required standards, cost of capital and loss of income etc.) could have arrived at it.

The Petitioners state that the Respondents have failed to observe procedural rules that are expressly laid down in the Excise Regulations No. 902 marked P22 and the Excise Ordinance by which the jurisdiction is conferred [*vide* *Sudhakaran v. Bharathi and Others* (1989 1 SLR 46)]. In any event, it is submitted that susceptibility to judicial review under procedural impropriety is ensured even where such failure does not involve any denial of natural justice. However, in the present case, it is submitted that the Respondents have failed to make available any such complaints made or any other written statement for the Petitioners to defend. Henceforth, the Respondents have failed to conduct a proper investigation as demanded by the Rules marked P22, and further, the Respondents have failed to submit a report of any such inquiry, if any, to Your Lordships' Court. Thus, violated the rules of Natural Justice. The 1<sup>st</sup> Respondent has abused the discretion to him under the Excise Notifications No. 902 marked P22, and failed to extend the Hotel and Bar License of the 1<sup>st</sup> Petitioner's upon irrelevant considerations and thus, in bad faith.

In contrary to the aforementioned, the Respondent states that the Petitioners were issued a license based on the application they made together with the Surveyor's Report, which stated

that there were no schools or religious places within the prescribed distance from the 1<sup>st</sup> Petitioner's hotel. However, there were several specific public complaints made against the 1<sup>st</sup> Petitioner's hotel regarding the violation of the prescribed distance to schools and religious places from the 1<sup>st</sup> Petitioner's hotel. This strong public outcry was due to the ordinary lifestyle of the neighbouring community being adversely affected. Upon receipt of the public complaints, the 1<sup>st</sup> Respondent, acting under Rule 13(h) of the Schedule III "Excise Notification No. 902" called for a report from the Superintendent of Surveys to clarify and ascertain the actual distance.

The 1<sup>st</sup> Respondent, by letters issued to the Petitioners, dated 30.06.2015 and 16.07.2015, called for a Surveyor's Report informing the reasons for the same. The location of the Petitioner's hotel was in violation of the Excise Notice No. 902 and it was located in close proximity to a school and religious place. Upon a careful examination of the Surveyor General's Report dated 12.08.2015, it is revealed that many schools and religious places are located within the 500-meter radius from the 1<sup>st</sup> Petitioner's hotel.

The Respondent also states that the Secretary to the Government of the Northern Province, acting upon the instructions of the Governor, informed the 3<sup>rd</sup> Respondent by a letter dated 13.08.2015 to take necessary actions to close the illegal liquor shops in the area. Therefore, it was apparent that the 1<sup>st</sup> Petitioner has violated the distance rule and the cancellation of his license under Rule 13(h) is justified. Following the said public objections and on the instructions of the Governor of the Northern Province, the 1<sup>st</sup> Respondent held an inquiry on 11.11.2015 as provided in Rule 21 of Schedule III of "Excise Notification No. 902". It was recommended at the inquiry that the Petitioner's premises have caused nuisance to the public and the objections made by the public were found reasonable to have it relocated. The 1<sup>st</sup> Respondent exercised his powers under Rule 21 and decided to relocate the license premises to a suitable place, within a period of three months, to which the Petitioner's agreed to find another location on 20.12.2015 at the special inquiry.

The Respondent states further, the 1<sup>st</sup> Petitioner by letter dated 03.05.2016 has agreed to relocate his restaurant. The 1<sup>st</sup> Respondent did not respond to the request of further time since the Petitioner has agreed to the given time limit and to effect relocation on or before 31.03.2016 and the same was informed to the Petitioner by letter marked R6 and R7.

Subsequent to a thorough analysis of the facts of the case, it could be noted that the Petitioners have suppressed material facts. The Surveyor's report, which was submitted with the application by the Petitioner to obtain the license, marked R 13, does not disclose the location of schools or religious places within the prescribed distance from the 1<sup>st</sup> Petitioner's hotel. However, upon the receipt of public complaints regarding the violation of the prescribed distance to schools or religious places from the 1<sup>st</sup> Petitioner's hotel, the 1<sup>st</sup> Respondent called for a report from the Superintendent of Surveys to clarify and ascertain the actual distances. The location of the 1<sup>st</sup> Petitioner's hotel was in violation of the Excise Notice No. 902 as it was located in close proximity to schools and religious places. Therefore, the Respondent informed the Petitioners to obtain a report from the Surveyor General by letter marked R18. However, the Petitioners failed to obtain a Report from the Surveyor General and the period to obtain the Report was thus extended to the 30.08.2015.



I further note that upon a careful perusal of the Surveyor General's Report dated 12.08.2015, marked R 21, it is clearly evident that the Kanagarathnam Madhya Maha Vidyalam, Ariyalai Pre School, Little Chute's Montessori, Centre for Child Developments, Kadukkayampathy Gnanaviravar Kovil and the Ceylon Pentacostal Mission are all located within the 500 meter radius from the 1<sup>st</sup> Petitioners hotel.

Therefore, it could be concluded that the Petitioners have suppressed the material facts and have not come to Court with clean hands. By knowing suppressing material facts and failing to recognize the location of schools and religious places within the 500 meter radius contemplated in "Excise Notice No. 902", the Petitioners have acted in bad faith and issuing a Writ of Certiorari and a Writ of Mandamus to carry on business in the same place as prayed by the Petitioners would be contrary on business in the same place as prayed by the Petitioners would be contrary to law.

The Respondents, however, by calling for an inquiry and ordering the relocation of the 1<sup>st</sup> Petitioner's hotel have acted in line with provisions of the law and the rules of natural justice. As per Rule 13(h) of the Extraordinary Gazette No. 1544/17 dated 10.04.2008 (cited as Excise Notification No. 902) marked P22, if any complaints are received of a violation of the prescribed distance to schools / religious places from the license premises, a report from the Government Superintendent of Surveys will be called to clarify and ascertain the actual distance and upon such survey if it is found that the distance rule has been violated the license will be cancelled.

It could be noted that the Respondent have acted in accordance with Rule 13(h) in calling for a report from the Government Superintendent of Surveys pursuant to the many specific public complaints regarding the license premises.

It is also pertinent to note that Rule 13(h) provides for the cancellation of a license in the event of a violation of the distance rule and thereby does not exclusive apply to new license holders but existing license holders as well. Therefore, the Respondents have acted in accordance with the law in calling for a report from the Government Superintendent of Surveys.

As per Rule 20 (c) of the Extraordinary Gazette No. 1544/17 dated 10.04.2008 marked P22, the relaxation of the distance specified may be determined by the Commissioner General of Excise. if he is satisfied that there are no specific objections by the public in respect of the issuance of license to such premises. However, it is submitted that there were in fact several specific public objections to the Petitioner's hotel as demonstrated by the report of the Inquiry held on 11.11.2015 marked R5 and the letter dated 13.08.2015 sent on the instructions of the Governor, Northern Province. The letter sent by the Governor's Secretary on the instructions of the Governor of the Northern Province dated 13.08.2015 informed the 1<sup>st</sup> Respondent that the subject liquor shop in violation of the rules promulgated by the 1<sup>st</sup> Respondent. At the inquiry on 11.11.2015, it was made evident by the statements of the 4<sup>th</sup> Respondent, A. Sri, Divisional Secretary of Nallur and the Chairman of the Community Centre, K. Ravindran, that there is a strong public objection to the 1<sup>st</sup> Petitioner's hotel at that location as it is a hindrance to the local community. In fact, in the affidavit of one A. Jegathees, the Manager of the 1<sup>st</sup> Petitioner's hotel who participated in the above inquiry on 11.11.2015, he states that there were about five

persons present at the Inquiry said to be complaints. The affidavit was marked P8. Thus, it is seen there were in fact specific public objections in respect of the 1<sup>st</sup> Petitioner's hotel. Therefore, the relaxation of the specified distance to be determined by the Commissioner General of Excise promulgated in Rule 20 (c), would not be an option in the instance case. It could therefore be observed that the Petitioners have failed to meet the requirements regarding the location of the business as imposed by Rule 20 (c) of Schedule III of Excise Notification No. 902 and therefore, has clearly violated the law.

As per Rule 21 of the Extraordinary Gazette No. 1544/17 dated 10.04.2008 (cited as Excise Notification No. 902) marked P22. Upon conducting an inquiry according to this rule, if it is found that the establishment continuing the license at the place may threat or likely threat to the maintenance of law and order in the area, the Commissioner General of Excise can decide to relocate the license premises to a suitable place and this decision will be final. It is seen that the Respondents have acted in accordance with Rule 21 by notifying the licensee and holding an inquiry to ascertain the validity of the objection or protest. As it was clearly revealed at the inquiries on 11.11.2015 and 20.12.2015, the continuation of selling of liquor by the license, at the subject place is definite threat to the maintenance of law and order in the area and the 1<sup>st</sup> Respondent exercising his powers specifically granted under rule 21 of the Schedule III of 'Excise Notification No.902', deciding to relocate the licensed premises was done according to law. Therefore, I note that in view of the public objections against the 1<sup>st</sup> Petitioner's hotel, and the disturbance of the peace that the 1<sup>st</sup> Petitioner's hotel has caused to those in the vicinity, the Respondents have acted accordingly to law and in accordance with the rules of natural justice, in conducting an inquiry and ordering the relocation of the 1<sup>st</sup> Petitioner's hotel.

Due to the aforementioned reasons, I believe that the petition should be dismissed with cost.

**Judge of the Court of Appeal**

**Janak De Silva , J**

**I agree.**

**Judge of the Court of Appeal**