

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

1. Don. Gregory Ajith Udugama,
No. 11
Bandaranayaka Place,
Pussellawa.

Petitioner

CA (WRIT) Application No:
WRT 219/2020

Vs.

1. A. Bodaragama,
The Commissioner General of Excise,
Department of Excise,
No. 353, Kotte Road,
Rajagiriya.
2. M.B. Wansooriya,
Commissioner of Excise- Revenue and
License,
Department of Excise,
No. 353, Kotte Road,
Rajagiriya.
3. D.M.W.K. Dissanayaka,

Commissioner of Excise-Law
Enforcement,
Department of Excise,
No. 353, Kotte Road,
Rajagiriya.

4. Hon. Mahinda Rajapaksha,
Hon. Prime Minister and the Minister
of Finance, Economic Policy
Development,
Ministry of Finance, Economics and
Policy Development,
The Secretariat,
Lotus Road, Colombo 01.

5. S.R.Athygalle,
Secretary of the Treasury and Ministry
of Finance,
Ministry of Finance, Economics and
Policy Development,
The Secretariat,
Lotus Road, Colombo 01

6. Heineken Lanka Limited,
No. 260, Nawala Road,
Rajagiriya
(Previously Known as Asia Pacific
Brewery (Lanka) Limited)

Respondents

Before: D.N. Samarakoon, J.
B. Sasi Mahendran, J.

Counsel: Sanjeewa Jayawardena, PC with Rukshan Senadheera for the Petitioner
Chaya Sri Nammuni DSG for the 1st-5th Respondents
Faizer Musthapha, PC with Shaheeda Barrie for the 6th Respondent

Argued On : 09.02.2023

Written 13.02.2023(by the Petitioner)

Submissions: 14.02.2023 (by the 1st, 2nd, 3rd, 4th and 5th Respondents)

On 13.02.2023(by the 6th Respondent)

Order On : 27.02.2023

B. Sasi Mahendran, J.

The instant application is instituted by the Petitioner acting in the public interest to have the provisions of the Excise Ordinance and the regulations promulgated thereunder strictly enforced by the responsible Respondent authorities against the alleged infractions of the law committed at the hands of the 6th Respondent (Heineken Lanka Limited).

When this matter was fixed for argument on the 9th of February 2023, the learned President's Counsel for the 6th Respondent raised certain preliminary objections, on the strength of which he sought to have this application dismissed in *limine*. These objections are based on the futile nature of this application. This order is to determine the viability of the preliminary objections.

Prior to delving into the objections, it is pertinent to set out, in brief, the genesis of this application.

The 6th Respondent (Heineken Lanka Limited), as manufacturers of malt liquor, had been bestowed the privilege of a 'wholesale license for the sale of malt liquor by the bottles/cans/kegs (not to be consumed on the premises)' under and in terms of Excise Notifications Nos. 796 and 849 (published in Gazette Notification dated 26th December

1990 “P3” and Gazette Notification dated 6th November 2002 “P4”, respectively) so as to facilitate the sale of liquor manufactured by it, by wholesale. These licenses are subject to general conditions set out in Excise Notification 666 (published in Gazette Notification dated 31st December 1979 “P5”) which are relevant to all licenses issued under the Excise Ordinance. One such condition is clause 12(a). This Clause reads:

“No Privilege of manufacture, supply or sale or any interest therein shall be sold, transferred, or sub-rented without the previous permission of the Government Agent or the Excise Commissioner; nor shall any agent or attorney be appointed for the management of any such privilege or for signing the counterpart agreement of any Excise licence without the previous approval of the Government Agent or the Excise Commissioner. Such agent or attorney shall, in every case, be a citizen of Sri Lanka and such approval shall be given only in exceptional circumstances at the discretion of the Government Agent or the Excise Commissioner.”

The Petitioner, as narrated in the Petition, became aware that the 6th Respondent had allegedly contravened this condition by entering into contracts with distributors for the purpose of distributing its products and that such distributors operated, stored, and distributed liquor to the retail sellers without a valid liquor license; a violation of Section 18 of the Excise Ordinance which outlaws the sale of excisable items without a license. The Petitioner claims this circumvention of the law is a “ruse, devise and subterfuge and deception” to deprive the State coffers of due revenue in the form of license fees. Despite several communications sent to the Respondent authorities to bring their attention to this apparent circumvention of the law, there was no response (“P8” and “P9”). The Petitioner is now before this Court, primarily seeking a Writ of Certiorari to quash the ‘Manufacturers wholesale License for the sale of Malt Liquor by the Bottles/cans/Kegs(Not to be consumed on the premises)’, issued to the 6th Respondent and Writs of Mandamus, *inter alia*, to compel the relevant Respondent authorities (the 1st to 3rd Respondents) to take immediate and expeditious action to prevent the 6th Respondent from misusing the wholesale license issued to it; to compel them to take action against the 6th Respondent for violating the provisions of the Excise Ordinance and the Regulations promulgated thereunder; to strictly and forthwith implement and enforce the provisions contained in the Excise Ordinance, as amended, as well as the Excise Regulations, Notifications and Orders, without any demur.

The objection of futility has two aspects to it. It is contended that proceeding with this application is futile, firstly, because the license sought to be cancelled is the license issued for the year 2020 (and that the 6th Respondent has already been granted a license for the year 2023) and, secondly, because the relief prayed for, in a sense, has been granted by the undertaking of the Respondent authority to conduct an inquiry.

The first contention was raised in response to the issuance of certiorari. It was contended that, it is futile for us to quash a license that was issued in 2020 and expired at the end of 2020, as such licenses are legally valid only for a period of one year (vide condition (b) of Excise Notification 849). However, as the learned President's Counsel for the Petitioner declared in Court that the Petitioner would not be pursuing certiorari, there is no necessity for us to address that objection. Our focus will be only on the second aspect of the futility argument.

It is argued that the relief that is claimed has in substance already been granted because the Respondent authorities have commenced an inquiry into the alleged infractions of the law. The State has undertaken to do so as well as evident in the proceedings dated 31st January 2023 and 9th February 2023 in CA/WRT 415/2020 where similar relief was sought against the 6th Respondent and Lion Brewery PLC. The application in CA/WRT 415/2020 was withdrawn subject to the Commissioner General's undertaking to conduct the inquiry into the alleged infractions.

However, as evident from the documents in the Brief, this inquiry commenced after the present application was instituted. Meaning, the Respondent authorities began to take steps to investigate the matter only after the present application was instituted. This delay on their part is attributed to the Covid- pandemic and the consequent lockdowns.

In the instant application, the Petitioner is continuing with his battle for mandamus because the end result of this alleged infraction concerns a loss to the state, which if it is true must be investigated. We are also mindful that this application is filed in the public interest.

Therefore, we are of the view, that this Court will be better able to determine whether the criteria for the issuance of the writs of mandamus prayed for has been made out once it has the benefit of hearing the parties in the argument stage.

The objection is overruled.

We direct the inquiry relating to this matter conducted at present by the relevant officials at the Excise Department to be halted until this Court makes its final determination.

JUDGE OF THE COURT OF APPEAL

D. N. SAMARAKOON, J.

I AGREE

JUDGE OF THE COURT OF APPEAL