

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

G. W. Amarapala,  
(deceased)

1. Kalyani Irine Chandralatha Withanage  
nee Liyanage,
2. Gintota Withanage Nilusha Jayamali,
3. Gintota Withanage Janith Kumara,
4. Gintota Withanage Nalin Prasad,  
All of No. 44/16, Ragala,  
Halgran-Oya.  
Petitioners

**CASE NO: CA/WRIT/236/2017**

Vs.

1. A. Bodaragama,  
The Commissioner General of  
Excise,  
No. 353, Kotte Road,  
Rajagiriya.
- 1A. K. H. A. Meegasmulla,  
The Commissioner General of  
Excise,  
No. 353, Kotte Road,  
Rajagiriya.

- 1B. H. G. Sumanasinghe,  
The Commissioner General of  
Excise,  
No. 353, Kotte Road,  
Rajagiriya.
2. T. B. Sarup,  
Head of Excise Special Operations  
Bureau-Central Province,  
No. 26/10,  
Bodiyangana Mawatha,  
Kandy.
3. Tissa Gunarathne,  
Former Head of Excise Special  
Operations Bureau-Central  
Province,  
Acting Superintendent of Excise,  
Excise Superintendent's Office,  
Ratnapura.
4. P. N. Hemantha,  
Officer-in-charge,  
Head of Excise Special Operations  
Bureau-Western Province,  
No. 211/A, Nawala Road,  
Nugegoda.
5. M. R. Weerathunga,  
Inspector,  
Excise Special Operations Bureau,  
No. 211/A, Nawala Road,  
Nugegoda.

6. K. M. G. Bandara,  
Deputy Excise Commissioner-Legal  
(Acting),  
No. 353, Kotte Road,  
Rajagiriya.
- 6A. A. M. G. Adhikari,  
Deputy Excise Commissioner-Legal,  
No. 353, Kotte Road,  
Rajagiriya.
7. W. M. M. B. Wanasuriya,  
Deputy Excise Commissioner-Crimes,  
No. 353, Kotte Road,  
Rajagiriya.
- 7A. Mr. Kapila Kumarasinghe,  
Deputy Excise Commissioner-Crimes,  
No. 353, Kotte Road,  
Rajagiriya.
8. Hon. Managala Samaraweera,  
Minister of Finance and Mass Media,  
Ministry of Finance,  
The Secretariat,  
Colombo 01.
9. D. G. A. Udugama,  
The President,  
Sri Lanka Liquor Licensees  
Association,  
No. 194/1 Colombo Road,  
Peradeniya.

10. Chaminda Kuruppuarachchi,  
 The Secretary,  
 Sri Lanka Liquor Licensees  
 Association,  
 No. 194/1 Colombo Road,  
 Peradeniya.  
Respondents

Before: Mahinda Samayawardhena, J.  
 Counsel: Sanjeewa Jayawardhena, P.C., with Lakmini  
 Warusevitane for the Petitioner.  
 Nayomi Kahawita, S.C., for the 1<sup>st</sup> to 8<sup>th</sup> Respondents.  
 Saliya Peiris, P.C., with Anjana Rathnasiri for the 9<sup>th</sup>  
 Respondent.  
 Nilshantha Sirimanne with M. Dissanayake and  
 Uween Jayasinghe for the 10<sup>th</sup> Respondent.  
 Argued on: 07.02.2020  
 Decided on: 14.02.2020

Mahinda Samayawardhena, J.

Although the prayer to the petition runs into 3 ½ pages (having sub-paragraphs A-U), the petitioner essentially seeks to quash P12 by certiorari (thereby invalidating the subsequent actions taken on it).

The complaint of the petitioner based on P12 is that the Commissioner General of Excise had set up Special Operations Units to carry out

raids, which is (a) *ultra vires* the enabling statute—the Excise Ordinance, No.8 of 1912, as amended, and (b) a usurpation of the powers of the Minister in charge of the subject of finance.

The Minister, who is the 8<sup>th</sup> respondent, and the Commissioner General of Excise, who is the 1<sup>st</sup> respondent, deny this.

It is the contention of the petitioner that Special Operations Units can only be established by the Minister, and the Commissioner General of Excise has no power to do so.

It is the position of the Commissioner General of Excise that no such Special Operations Units with perpetual succession were established, and P12 was only an internal administrative measure taken by the then Commissioner General of Excise to effectively carry out raids, and that is all.

I am inclined to accept the explanation of the respondent given the facts and circumstances of the application.

According to paragraph 3 of the petition, the raids which triggered the filing of this application were conducted when Mr. L.K.G. Gunawardena (who issued P12) was functioning as the Commissioner General of Excise. When this application was filed in September 2017, Mr. A. Bodaragama was the (Acting) Commissioner General of Excise, and the petitioner has no complaint against him. Following Mr. Gunawardena's tenure, it appears several others including Mrs. K.H.A. Meegasmulla, Mr. H.G. Sumanasinghe, and Mr. R. Semasinghe held this position. Mr. Bodaragama has now been appointed as the Commissioner General of Excise on a permanent basis. Based on what was elicited during the argument, Special Operations Units have

ceased to be in operation after Mr. Gunawardena's tenure. This goes to show that P12 was a temporary internal administrative arrangement, made by the then Commissioner General of Excise Mr. Gunawardena, which ended with his retirement or transfer.

As learned State Counsel points out, P12 issued by Mr. Gunawardena in his capacity as Commissioner General of Excise, is addressed to Assistant Excise Commissioners, Excise Superintendents and Excise Officers-in-Charge. As Head of the Department, that is how he thought successful raids could be carried out to bring the culprits to book. His predecessors would have adopted different methods, and his successors adopted and will adopt their own. I see no illegality in his actions.

For instance, by the document marked CA-4 tendered by the petitioner with his counter affidavit to fortify his case, it is seen that when Mr. R. Semasinghe was functioning as Excise Commissioner, he instructed the Assistant Excise Commissioners to deploy Excise Officers of one area of authority to different areas, as temporary measures to effect successful raids. This, in my view, is akin to what Mr. Gunawardena did in a rigorous manner. But the petitioner has no complaint against the directive in CA-4 issued in 2018. Learned President's Counsel for the petitioner stated at the argument that the Special Units in question are no longer in operation (i.e. after the filing of this application in 2017).

It is further seen by the document marked CA-5 that Mr. Semasinghe had also set targets to be achieved by Excise Officers with respect to conducting raids. The petitioner is critical of this approach, saying it induces Excise Officers to conduct raids with collateral or extraneous

considerations. I cannot agree. Targets are set to increase productivity and efficiency. It is a standard concept adopted by the private sector to yield results. Why should it be taboo in the Government sector?

By the document marked 10R-3 with the “Statement of the 10<sup>th</sup> respondent” (not a statement of objections), it is seen that when Mrs. Meegasmulla functioned as Commissioner General of Excise, she adopted different methods to achieve these same objectives.

Hence, it is clear that such methods adopted with the aim of enhancing the efficiency of the Excise Department are provisional in nature and need not attract the writ jurisdiction of this Court.

According to sections 2 and 7 of the Excise Ordinance, (subject to the control of the Minister) the Excise Commissioner (later the Commissioner General of Excise) is the Chief Administrative Officer of the Excise Department, and the collector of excise revenue.

P4 is a central document to the petitioner’s case. This document relates to a raid conducted by a team led by Mr. Tissa Gunaratne, Officer-in-Charge of the Kandy Excise Special Operations Unit, on 08.07.2016, on a liquor shop owned by the petitioner. The alleged offence is the sale of liquor in excess of the regulated price.

Learned President’s Counsel for the petitioner, drawing attention to Excise Notification 509 published in the Government Gazette dated 22.02.1963 marked P13 (which the Minister issued under section 8 of the Excise Ordinance), submits that there is no provision which empowers the Commissioner General of Excise to create such Special Operations Units or to create the post of Excise Officer-in-Charge. In

the hierarchy of the Excise Department, learned President's Counsel submits that there are no Excise Officers-in-Charge created by the Minister.

This argument is in contradiction with paragraph 9(A) of the counter affidavit of the petitioner, which recognises the legitimacy of Excise Officers-in-Charge. This paragraph reads as follows:

*At provincial level an Assistant Commissioner of Excise has been appointed to supervise and overlook the functions and activities of each province. Under each such Assistant Commissioner, at District level Superintendents of Excise are appointed and thereafter, covering all areas of the country, Excise Stations are established which are headed by an Excise Officers-in-charge, who administer and regulate the activities in the respective areas of authority. This is the general administrative arrangement that has been subsisting for years in the Excise Department, until the establishment of the purported Special Operations Bureaus;*

Learned President's Counsel for the petitioner laid emphasis on section 8(b) and (c) of the Excise Ordinance in support of the petitioner's case. Let me quote:

8. *The Minister may by notification applicable to the whole of Sri Lanka or to any district or local area in which this Ordinance is in force—*

- (b) appoint officers or persons to perform the acts and duties mentioned in sections 33, 35, and 48(a);*
- (c) set out the designations, powers and duties of officers of the Excise Department under the Ordinance;*



This is to say that only the Minister (and not the Commissioner General of Excise) has the authority to create designations and confer powers and duties. I think there is no issue about the Minister's powers.

In my view, the existing structure allows the Commissioner General of Excise to act as he did by P12.

By item 2(4) of Excise Notification marked P13, the Minister has given the following powers to the Officers set out therein:

*Assistant Commissioners, Superintendents, Chief Inspectors and Inspectors, subject to the control of their superior officers, to exercise the powers referred to in sections 33, 35, 37 and 48(a) of the Excise Ordinance throughout the Island;*

P12, as I said earlier, is addressed to the Assistant Excise Commissioners, Excise Superintendents and Excise Officers-in-Charge. The petitioner has accepted the rightfulness of Excise Officers-in-Charge.

Broadly speaking, section 33 of the Excise Ordinance deals with the power to enter and inspect places of manufacture, bottling and sale. Section 35 deals with cases where offenders may be arrested, and contraband liquor and articles seized without warrant. Section 37 deals with the powers of excise officers to search without a warrant. Section 48 deals with misconduct by licensees.

The offence disclosed in P4 is covered by item 2(4) of P13. P4 has been signed by the Assistant Commissioner in charge of the Central Province. This, in my view, is in order.

Learned President's Counsel for the petitioner complains that the identity of these Special Units is unknown, and that there is no accountability etc. I am unable to agree. By P4, identity is clearly given. If I may repeat, the raid was conducted by a team led by Tissa Gunaratne, Officer-in-Charge of the Excise Special Operations Unit of Kandy. The raid was conducted under the supervision of the Assistant Excise Commissioner, who has taken responsibility for it by issuing P4 under his hand.

This was not a "Ghost Unit" as suggested by the petitioner. This Unit or Units, which are no more in existence, had carried out similar raids, as seen from P3 and P11 (the documents tendered by the petitioner himself) in a transparent manner. P3 and P11 go to show that when raids had been carried out by this Unit, the Excise Officers entered a detailed account of how the said raids were carried out in the Information Books maintained at the licensed premises. Details of the description/identity of the Excise Officers are all disclosed.

Learned State Counsel for the respondents stressed item 4(1) of P13 to justify P12. I am in agreement with this justification.

By item 4(1) of P13 the Minister has delegated to the Excise Commissioner "*The power to assign to officers of the Excise Department and Excise Striking Force their respective duties insofar as they are not specifically provided for by the Excise Ordinance or by rules made thereunder*".

By item 2(4) of P13 quoted above, the Minister conferred powers on the Assistant Commissioners, Superintendents, Chief Inspectors and Inspectors referred to in sections 33, 35, 37 and 48(a) of the Excise Ordinance throughout the Island.

By item 4(1) of P13, the Minister has given the authority to the Excise Commissioner to assign duties to the Officers of the Excise Department if they have not been specifically provided for.

The Excise Officers to whom P12 was addressed had already been given powers by the Minister to conduct raids. By P12, the Commissioner General of Excise only allocated duties to such Officers as a temporary measure. This is in consonance with the scheme of the Excise Ordinance. There is no usurpation of the powers of the Minister.

Learned President's Counsel drew the attention of the Court to the references made in P13 in relation to the Excise Striking Force, to emphasise that a similar procedure shall be followed in setting up such Units as well as in conferring powers and duties on such Units.

However, as can be gathered from P13, the Excise Striking Force, which is no more in existence, did not fully comprise Officers of the Excise Department. This is clear by reading *inter alia* items 2(6), 2(7), 4(1) of P13. But the Special Operations Units challenged by the petitioner comprised only Officers of the Excise Department.

The petitioner tendered a copy of the petition filed in Case No. SC (FR) 219/2016 marked P2 in support of this application, stating that the case was settled among those petitioners, the former Commissioner General of Excise Mr. Gunawardena, and the former Minister of Finance. In the said case, the petitioners challenged the establishment of a Unit headed by a retired officer of the Sri Lanka Air Force by the Minister of Finance for the prevention of production and distribution of illicit liquor, bypassing the Department of Excise. Although the petitioner in the instant case states in the petition that

SC (FR) 219/2016 was settled, he has not tendered a copy of the settlement. However, the respondents tendered a copy of the said settlement with their statement of objections marked R2. In my view, the petitioner did not tender a copy of the settlement because it runs counter to his argument in this case. Let me only quote the 1<sup>st</sup> and 2<sup>nd</sup> conditions upon which the said case was settled.

- 1. The unit established for the prevention of production and distribution of illegal liquor, forming the subject matter of this FR application bearing No.219/2016, shall at all times, function under the direct control and supervision of the 1<sup>st</sup> respondent, i.e., the Commissioner General of Excise.*
- 2. Furthermore, the unit established for the prevention of production and distribution of illegal liquor shall exclusively consist of Excise Officers of the Department of Excise, including a Superintendent of Excise or an officer holding a post superior to the post of Superintendent of Excise and of no others.*

As evinced from the above, the establishment of such Units to conduct raids under the direct control and supervision of the Commissioner General of Excise to curb the sale of illicit liquor has been recognised, so long as such Units consist of Excise Officers of the Department of Excise.

It is not the complaint of the petitioner that the Special Units recognised by P12 consisted of persons other than Excise Officers. As seen from P3 and P11, the Special Units recognised by P12 consisted of Excise Officers, not outsiders.

After a copy of the settlement in SC (FR) 219/2016 was tendered by the respondents, the petitioner in the counter affidavit attempted to disassociate himself with the said case by stating he was not a party to that case.

The petitioner has not acted with *uberrima fides*.

At the argument, the position taken on behalf of the petitioner was that only the Minister has the authority to set up such Special Units under section 32 of the Excise Ordinance.

I find myself unable to agree with this argument. It is my considered view that section 32 has no application in this instance. Section 32 empowers the Minister to make Rules in relation to “excise revenue”.

Section 32(1) reads as follows:

*The Minister may make rules for the purpose of carrying out the provisions of this Ordinance or other law for the time being in force relating to excise revenue; and all such rules shall be laid as soon as conveniently may be before Parliament, and upon being confirmed, with or without modification, by a resolution of Parliament, and upon such confirmation being notified in the Gazette, shall have the force of law from the date of such notification, or upon such date as may be therein fixed:*

*Provided that in any case of urgency the Minister may by notification declare any such rules to be in force from a date named therein, and such rules shall thereupon come in force on such date; but if within forty days of the date upon which such rules are laid before Parliament a resolution be passed by Parliament praying that all or any of such rules be modified or*

*annulled, such rules or rule shall thenceforth be modified or annulled accordingly, but without prejudice to anything done there under.*

“Excise revenue” is defined in section 2:

*“excise revenue” means revenue derived or derivable from any duty, fee, tax, fine (other than a fine imposed by a court of law), or confiscation imposed or ordered under the provisions of this Ordinance or of any other law for the time being in force relating to liquor;*

The matter in issue, i.e. setting up *ad hoc* Special Units comprising Excise Officers in order to carry out raids to apprehend violators of the Excise Laws, has no direct bearing on “excise revenue”, although increased revenue to the State’s coffers will be concomitant of successful raids. It is not the only objective or the only result. There may be many other objectives/results, such as protecting consumers from unfair trade practices adopted by unscrupulous licensed liquor sellers, controlling the consumption of illicit liquor in view of general health, addressing socio-economic issues, and the desirability of advancing a just society.

Matters in connection with licence fees, taxes, fines etc. easily fall into matters of “excise revenue”, which, *inter alia*, need Parliament confirmation followed by Gazette Notification as stipulated by section 32. It is important to remember that subsection (2) of section 32 does not confer additional powers on the Minister. In other words, it does not expand the scope of section 32(1), which empowers the Minister to make Rules relating to excise revenue. Section 32(2) has been introduced “*solely to preclude any argument that the subjects stipulated*

*in subsection (2) fall outside the general words conferring the rule-making power.”<sup>1</sup>* In any event, learned President’s Counsel for the petitioner did not establish that the setting up of Special Units to conduct raids falls under any particular item of subsection (2).

However, the position taken by the petitioner in the petition is that such Special Units can be set up by the Minister under section 8 of the Excise Ordinance.

Paragraphs 43-46 of the amended petition run as follows:

*43. The petitioner is advised to state that in terms of section 8 (b) of the Excise Ordinance No. 08 of 1912, as amended, it is only the Minister-in-charge of Finance, i.e., the 8<sup>th</sup> respondent, who is vested with the power to appoint officers or persons to perform the acts and duties mentioned in section 33, 35 and 48(a) and furthermore, under section 8(c), to set out the designations, powers and duties of officers of the Excise Ordinance under the Excise Ordinance.*

*44. Furthermore, as stipulated in the preparatory portion of the said section 8, when exercising all powers set out therein, the Minister shall publish a notification, applicable for the whole or part of Sri Lanka or to any district or local area in which the Excise Ordinance is in force.*

*45. The petitioner is advised to state that section 60 of the Excise Ordinance No 08 of 1912, as amended, provides that every*

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<sup>1</sup> *Rajanayagam v. Wijayaratne, Commissioner-General of Excise [1998] 3 Sri LR 129 at 136 per Mark Fernando J.*

*notification issued under the said Ordinance, be published in the Gazette.*

*46. However, the petitioner most categorically states that the purported Excise Special Operations Bureaus of Western and Central Provinces (which had purportedly raided the petitioner's wine stores respectively on 08/07/2016 and 12/04/2017), is very simply and clearly, not a lawful unit, appointed by the 8<sup>th</sup> respondent, in accordance with section 8 of the Excise Ordinance No. 08 of 1912, as amended and that it is in gross violation of the law and indeed a blatant disregard for the law and moreover, of the fundamental concept of the Rule of Law due process, to inter alia, permit such an illegal and extra-judicial unit, to be established, function and continue to function. It is patently outside the pale of the law and of the governing statute and clearly needs to be reigned in.*

I am mindful that the petitioner in the instant case was not a party to SC (FR) 219/2016 (P2). But the petitioner himself tendered P2 to strengthen his case, knowing fully well that he was not a party to the said case. Therefore, he cannot now, when he realises that it is unfavourable to him, detach himself from his earlier position. A party to a judicial proceeding cannot blow hot and cold, affirm and disaffirm, approbate and reprobate the same transaction simultaneously.

With this in mind, the position taken by the petitioners in SC (FR) 219/2016 (P2) appears to be that collection of excise revenue rests with the Commissioner General of Excise and not with the Minister. Paragraph 28 of P2 reads thus:



*28. The petitioners state that in terms of section 7 of the Excise Ordinance, the collection of Excise revenue vests with the Commissioner General of Excise and he is empowered to exercise all or any powers and perform all or any powers of the Government Agent (District Secretary) under the Excise Ordinance, either concurrently or independent to the Government Agent. Accordingly, the Commissioner General has the power to inter alia; A) issue passes for import, export or transport of excisable articles in terms of section 14; B) establish or authorize the establishment of distilleries and breweries for manufacture of liquor, subject to conditions- in terms of section 16(a); C) establish or authorize the establishment of warehouses wherein any excisable article may be deposited- in terms of section 16(b); D) grant exclusive privilege of manufacture and/or supply and/or sale of any country liquor- in terms of section 19; and E) grant exclusive privilege for sale of foreign liquor by retail, in a tavern within any local areas in terms of section 19(d).*

Further, the position of the petitioners in SC (FR) 219/2016 (P2) is that the establishment of such Units by the Minister is a usurpation of the powers of Excise Officers. Paragraphs 71(B), (C), (H) read as follows:

*(B) The Department of Excise is the sole and exclusive governmental authority/functionary, established to carry out the powers and functions of the Excise Ordinance No. 08 of 1912, as amended and therefore, the purported establishment and functioning of the purported unit for the prevention of the production and distribution of illegal liquor, outside the purview of the Excise Department is ex facie illegal and bad in law;*

*(C) Section 7(a) of the Excise Ordinance No. 08 of 1912, as amended, vests the exclusive power to collect excise revenue, with the 1<sup>st</sup> respondent and therefore, collection of revenue by the purported establishment of the unit for the prevention of production and distribution of illegal liquor, headed by the 64<sup>th</sup> respondent, amounts to a patent violation of the said statutory provision and moreover, an usurpation of statutory powers of the 1<sup>st</sup> respondent;*

*(H) The establishment and continued functioning of the said purported Unit is manifestly illegal, in as much as inter alia it constitutes an usurpation of the powers of the Excise officers who have been duly appointed;*

It is clear there are contradictions *inter se* and *per se*! Writ being a discretionary remedy, the conduct of the party applying is relevant.

I see no illegality or *ultra vires* of the Excise Ordinance or usurpation of powers of the Minister in setting up Special Operations Units comprising Excise Officers, as contemplated in P12, which was adopted by the then Commissioner General of Excise (and is now admittedly defunct), as a temporary internal arrangement to bring offenders to book.

The application of the petitioner is dismissed with costs.

Judge of the Court of Appeal