

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

In the matter of an Application under Article
140 of the Constitution for a mandate in the
nature of Writ of Mandamus.

CA /WRIT/242/2022

Keerthirathne De Alwis

New Mayflower Chinese Restaurant,

No: 15/1/1,

Old Kesbewa Road,

Nugegoda.

Petitioner

Vs.

1. M.J. Gunasiri

The Commissioner General of Excise,

Department of Excise,

No. 353, Kotte Road,

Rajagiriya.

2. M. D. M. W. K. Dissanayake

Commissioner of Excise Revenue and

Licenses,

Department of Excise,

No. 353, Kotte Road,

Rajagiriya.

2a. Kapila Kumarasinghe

Commissioner of Excise Revenue

And Licenses,

Department of Excise,

No. 353, Kotte Road,

Rajagiriya.

3. B. M. S. Bandara

Additional Commissioner General

Department of Excise,

No. 353, Kotte Road,

Rajagiriya.

3a. A. M. P. Arampath

Additional Commissioner General

Department of Excise,

No. 353, Kotte Road,

Rajagiriya.

4. Hon. Attorney General

Attorney General's Department,

Colombo 12.

Respondents

Before : Sobhitha Rajakaruna, J.
Dhammika Ganepola, J.

Counsel : Yuwin Mathugama for the Petitioner.
Pulina Jayasuriya, S.C. for the Respondents.

Supported On : 16.11.2023

Decided On : 14.12.2023

Dhammika Ganepola, J.

The Petitioner in this application seeks a mandate in the nature of a Writ of Certiorari quashing the decision reflected in the document marked A18 where the Petitioner was refused to grant FL11 liquor license on the basis that he has failed to prove the ownership of the building or submit a deed of lease under Rule 13 of the Excise Notification No.902 and Writ of Mandamus directing the 1st to 3rd Respondents to grant the FL II liquor license to the Petitioner.

We have heard the Learned Counsel for the Petitioner in support of this application and the Learned State Counsel for the Respondents opposing the application.

The Petitioner claims that he has been in possession of premises No.15/1/1, Old Kesbewa, Nugegoda since 2013. Before 2018 one Rukshan Botheju had obtained the liquor license under his name for the same premises. In 2012 one Rukshan Botheju disputed the rights of the Petitioner and filed Case No. L/489/13 in District Court Nugegoda. The Petitioner states that he was allowed to occupy said premises in lieu of the value of the necessary improvement done to the premises by the judgement of the said case No. L/489/13 from 2013(A3).

The Petitioner states that he has made an application to obtain FL 11 liquor license for impugned premises for the year 2000 providing all the necessary requirements. However, the Petitioner was informed by the 1st, 2nd, and 3rd Respondents that the relevant license cannot be granted as the Petitioner failed to provide proof of the ownership or the deed of lease of the building which applies to the premises of

business as per Rule No. 13(b) of the Excise Notification No.902 published in the Extra Ordinary Gazette Notification bearing No.1544/17 dated 10.04. 2008.

The Petitioner submits that he was in possession of the impugned premises throughout. The 1st, 2nd and 3rd Respondents delayed and denied the right of the Petitioner to obtain said license by requesting the documentation and the other material which he had obtained already from the relevant authorities.

As per Rule No.13 (b) of Excise Notification No.902 original deeds, as proof of the ownership of the premises that proposed business or if the premises are not owned by the applicant, a document expressing the consent of the owner of the premises that the proposed business can be carried out undisturbed in the identified premises required to be submitted with the new applications for FL 11 liquor license. Said Clause No. 13(b) reads as follows.

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

...

(b) Poof of right to carry on business at the identified premises by submitting either the original deeds as proof of ownership along with a certified copy of the same which shall be retained in the file maintained for the purpose, or if the premises are not owned by the applicant, a document expressing the consent of the owner of the premises that the proposed business can be carried out undisturbed in the identified premises. Such document should appropriately certified by a Notary Public. If the proposed premises is mortgaged a letter should be submitted from the relevant financial institution confirming that the property is under mortgage.

The above Rules cited as Excise Notification No.902 were made under Section 32 read with Section 25 of the Excise Ordinance and Article 44 of the Constitution of the Democratic Socialist Republic of Sri Lanka. The Petitioner submits that the decision to deny the liquor license to the Petitioner is arbitrary and unfair as the 1st Respondent relies on a narrow interpretation of the Gazette Notification. However, the above Rule No. 13 is plain and unambiguous. Ownership of the property or the consent of the owner to carry out the business on the premises is significant as per the said Rule No.13(b). It is common ground that the Petitioner is not the owner of the relevant premises. Said Rule No. 13(b) requires the consent of the owner of the premises through a document certified by a Notary Public unless the applicant is not

the owner. However, the Petitioner has failed to provide any document certified by a Notary expressing the consent of the owner.

It seems that the Petitioner's claim is completely based on possession, and he relies upon the judgement of case No. L/489/13 marked A3. Then the question arises whether document A3 could be considered as a document that fulfilled the requirements as of the Rule No.13 of Exercise Notification No.902.

The judgement in P3 pertains to an agreement that the Petitioner entered into to occupy a premises. However, the Petitioner has not presented said agreement before the court, so it cannot be determined whether the owner of the premises has given the required consent as per Rule No.13(b). Further, the plain reading of judgement A3 does not mention anything about the owner's consent to carry out the business on the premises. As per the said judgment, the Petitioner has been granted only a limited right to possess the relevant premises to the extent of the value of the improvements made to the property. Further, the occupation under document A3 is prone to disturbance (contrary to Rule 13(b)) as the Petitioner has only the right of *Jus Retentionis* which means that they only have the right to retain the property until the value of any improvements made is settled. Therefore, it cannot be assumed that the proposed business can be carried out undisturbed in the relevant premises.

Accordingly, the Petitioner has failed to establish that there is an arguable ground for judicial review. In ***Ranjith Keerthi Tennakoon v. Hon Attorney General & Others, CA Writ /417/2021 decided on 03.11.2021***, this court held that an application for judicial review, at the stage of notice, demands that a court seized of an application for notice should consider whether the case is suitable for full investigation at a hearing at which all parties have been given notice. (see *R V. Secretary of State for Home Department exp Begum (1990) COD 107*, *A.M. Chaminda Bandara Adikari v. Kapila Adikari, Chief Inspector of Police CA/Writ Application 216/2020 decided on 25.08.2020 at p.140*) The court will take into account the question of whether the application for notice relates to a matter that ought to be resolved after full argument.

This court in ***S. Ravindra Karunanayake v. Attorney General & others CA Writ 63/2020- decided on 07.07.2020*** has held "whether there is an arguable ground for judicial review includes whether there is some properly arguable vitiating flow such

as unlawfulness, unfairness, or unreasonableness. The vitiating ground must be arguably material to the impugned decision. That decision must be arguably amenable to judicial review. - See R v.Chief Rabbi ex p. Wachmann(1992) 1 WLR 1036, at 1037H.”

In De Smith’s ‘Judicial Review’ (Eight Edition by Harry Woolf, Jeffrey Jowell, Catherine Donnelly, Ivan Hare at P.937 at 16-048.), it is stated that one of the purposes in significance of consideration of issuing notice at the threshold stage is that, it may safeguard public authorities by deterring or eliminating clearly ill-founded claims without the need for a full hearing of the matter.

Therefore, this Court is of the view that the Petitioner’s claim is ill-founded as the requirements under Rule No. 13(b) of the said Rules made under the Excise Ordinance have not been complied with.

In the circumstances I take the view, that the Petitioner has not made out an arguable case to issue formal notice on the Respondents in this case. Accordingly, I proceed to refuse the application. I order no cost.

Judge of the Court of Appeal

Sobhitha Rajakaruna J.

I agree.

Judge of the Court of Appeal