

**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* in terms  
of Article 140 of the Constitution of the  
Democratic Socialist Republic of Sri Lanka.

1. Sehu Ismail Akbar Hassan,  
No. 337, Media Road,  
Pasarichenai,  
Pottuvil - 19.
2. Mohideen Pichchai Harron,  
Main Road, Pasarichenai,  
Pottuvil – 19.
3. Pakkeer Mohaideen Yaseen Kiyath,  
No.227, Kudakkalli Road, Pasarichenai,  
Pottuvil – 19.

**PETITIONER**

**CA No. CA/Writ/0346/2020**

v.

1. A. Bodaragama,  
The Commissioner General of Excise,  
Excise Department of Sri Lanka,

No. 353, Kotte Road,  
Rajagiriya.

2. The Deputy Commissioner of Excise  
(Revenue),  
Excise Commissioner's Department,  
Excise Department of Sri Lanka,  
No. 353, Kotte Road,  
Rajagiriya.

3. L. J. Ranaweera,  
Assistant Commissioner of Excise,  
Easten Province,  
Trincomalee.

4. N. Susathran  
Superintendent of Excise,  
Ampara Division,  
Ampara.

5. N. Srikanth  
Officer in Charge of Excise,  
Ampara.

6. Dr. M. K. C. Senanayake,  
Director of General,  
Department of Fiscal Policy,  
3<sup>rd</sup> Floor (New Building),  
The Secretariat,  
Colombo 01.

7. R. Thhiraviyaraj,  
Divisional Secretary,  
Divisional Secretary's Division of Pottuvil,  
Divisional Secretariat,  
Pottuvil.

7A. Sandaruwan Anuruddha  
Divisional Secretary,  
Divisional Secretary Division of Pottuvil,  
Divisional Secretariat,  
Pottuvil.

8. Arugambay Surfers Villa (Private) Limited,  
Arugambay Surfers Villa Hotel,  
Main Street, Arugambay South,  
Pottuvil - 05.

## **RESPONDENTS**

### **BEFORE**

: M. Sampath K. B. Wijeratne J. &  
M. Ahsan R. Marikar J.

### **COUNSEL**

: Rushdie Habeeb with J. Fored for the  
Petitioners.

A. Jayakody, S.C. for the 1<sup>st</sup> to 7<sup>th</sup>  
Respondents.

Sandamal Rajapaksha with Tharushi  
Ishanka for the 8<sup>th</sup> Respondent.

### **ARGUED ON**

: 17.11.2023

**M. Sampath K. B. Wijeratne J.****Introduction**

The 1<sup>st</sup> Petitioner is the Principal of Noorul Hudha Preliminary Arabic School, while the 2<sup>nd</sup> Petitioner serves as the President and the 3<sup>rd</sup> Petitioner is the Secretary of the Board of Trustees of the Jummah Grand Mosque, Pasarichenai (Arugambay South), Pottuvil-19.

The 1<sup>st</sup> Respondent is the Commissioner General of Excise, and the 2<sup>nd</sup> to 5<sup>th</sup> Respondents are his subordinate officers. The 6<sup>th</sup> Respondent is the Director General of the Fiscal Policy Department of the Treasury, and the 7<sup>th</sup> Respondent is the Divisional Secretary of Pottuvil. The 8<sup>th</sup> Respondent is Arugambay Surfers Villa (Private) Limited.

The 1<sup>st</sup> to 3<sup>rd</sup> Petitioners, in their respective capacities, challenge the legality of the liquor license issued to the 8<sup>th</sup> Respondent. The Petitioners allege that the liquor license originally issued to Dr. Somasundaram Kethiswaran Pillai for operating the New Kethees Beach Hotel was irregularly renewed under the name of Arugambay Surfers Villa (Private) Limited, in violation of the distance restrictions.

In their amended Petition dated 9<sup>th</sup> February 2021, the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Petitioners, *inter alia*, sought writs of *certiorari* to quash letter No. 16/308/42/03993 dated 18<sup>th</sup> June 2020 ('P17'<sup>1</sup>) and letter No. 16/308/42/03993 – 1 dated 18<sup>th</sup> June 2020 ('P18'<sup>2</sup>). Additionally, the Petitioners sought a writ of *certiorari* to nullify any licenses issued in terms of 'P17' and 'P18'<sup>3</sup>, as well as a writ of *certiorari* to quash any subsequent renewals made under 'P17' and 'P18'. It is important to note that the Petitioners did not seek writs of

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<sup>1</sup> Prayer (c) of the Petition.

<sup>2</sup> Prayer (e) of the Petition

<sup>3</sup> Prayer (d) and (f) of the Petition.

*mandamus* to prevent the issuance or renewal of licenses under ‘P17’ and ‘P18’.

The Respondents resisted issuance of notices in this matter and accordingly, the 1<sup>st</sup> to 7<sup>th</sup> Respondents filed their limited objections. Due to a mix-up in marking the documents within the limited objections, the issue was rectified in a copy submitted on 23<sup>rd</sup> February 2023, along with a new set of documents which will be taken into account in this judgment. After considering the limited objections filed by the Respondents and the submissions made by the learned Counsel for both the Petitioners and the Respondents, this Court directed the Registrar to issue formal notices to the 1<sup>st</sup> to 8<sup>th</sup> Respondents on 22<sup>nd</sup> March 2023.

Following the issuance of notices, the learned State Counsel for the 1<sup>st</sup> to 7<sup>th</sup> Respondents informed the Court that they would rely on the limited objections previously filed and would not be filing any additional objections.

The 8<sup>th</sup> Respondent filed objections on 5<sup>th</sup> September 2023 under the heading of limited objections and sought to have the Petition dismissed.

In response, the Petitioners filed a counter affidavit.

### **Analysis**

In 2015, Dr. Kethiswaran Pillai applied for FL07 and FL08 liquor licenses for the hotel named New Kethees Beach Hotel, located at Main Street, Arugambay South, Pottuvil 05. According to Extraordinary Gazette No. 1544/17 dated 10<sup>th</sup> April 2008 (‘1R59’), FL07 licenses are granted to hotels approved by the Tourist Board, while FL08 licenses are issued for a bar within a hotel situated in a Municipal Council area<sup>4</sup>. The Assistant Commissioner of Excise for the Eastern Province recommended the application on 16<sup>th</sup> October 2015<sup>5</sup>. Subsequently, the reports from the Divisional Secretary and the Police of Pottuvil were called.

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<sup>4</sup> Page 3A.

<sup>5</sup> ‘1R1’ and ‘1R1 (A)’.

The Petitioners submitted two letters addressed to the Divisional Secretary of Pottuvil, one from the President of the Sinna Ullai Jummah Mosque ('P9a') and the other from the Secretary of Masjithul Mafaza ('P10a'), which raised concerns regarding the distance of the licensed premises from schools, religious schools, mosques, and buddhist temples. However, since neither letter includes a date indicating when they were sent, this Court is not inclined to accept them as objections raised regarding the matter in issue during the relevant period. Additionally, the Petitioners presented three letters sent to the Divisional Secretary of Pottuvil: one from the Secretary of Noorul Hudha Arabic College on 19<sup>th</sup> October 2015<sup>6</sup>, one from the Secretary of the Pasarichchanai Community Centre on 19<sup>th</sup> October 2015<sup>7</sup>, and one from the General Public of the area on 10<sup>th</sup> October 2015<sup>8</sup>, all raising concerns about the distance to the schools and mosques.

Accordingly, the Divisional Secretary, in his report dated 4<sup>th</sup> December 2015, informed that there was public protest to the granting of the license<sup>9</sup>.

Although this issue was not explicitly raised, a related question might be whether the prohibited institutions existed before the liquor licenses were issued or if they were established afterward. According to the Petitioners, Noorul Hudha Arabic College is depicted within Lot 3 of the plan marked 'P26,' which was made in 2003. This establishes that the Arabic College was there even before the liquor licenses FL07 and FL08 were first issued to Dr. Kethiswaran Pillai.

Based on the Divisional Secretary's report, on 10<sup>th</sup> February 2016, the Commissioner General of Excise directed the Superintendent of Excise in Batticaloa to conduct an inquiry into the public protests<sup>10</sup>.

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<sup>6</sup> 'P12a'.

<sup>7</sup> 'P13a'.

<sup>8</sup> 'P14a'.

<sup>9</sup> '1R5'.

<sup>10</sup> '1R6'.

Notably, no report from the Government Superintendent of Surveys, which is required under such circumstances according to Clause 13(h) of Gazette ‘1R59,’ was requested.

However, after his previous letter dated 4<sup>th</sup> December 2015 (‘1R5’), the Divisional Secretary of Pottuvil recommended the issuance of the license in a letter dated 14<sup>th</sup> January 2016<sup>11</sup>. The Sri Lanka Tourist Board also recommended granting the license in letters dated 26<sup>th</sup> January 2016, as the 8<sup>th</sup> Respondent had subsequently complied with the specifications set by the Tourist Board<sup>12</sup>.

Eventually, the Commissioner of Excise received a letter, copy sent to the Sri Lanka Tourist Board<sup>13</sup>, from the Board of Trustees of the Mohideen Jummah Grand Mosque of Pottuvil, stating that they had no objections to the granting of the license.

Upon receiving the Divisional Secretary’s recommendation, the Commissioner of Excise requested further clarification on whether the public protest had subsided or was still ongoing. The Divisional Secretary responded that the protest had subsided<sup>14</sup>.

At this time, the Superintendent of Excise in Batticaloa also submitted his report, prepared in response to the direction issued by the Commissioner of Excise, stating that the liquor license could be issued<sup>15</sup>.

Consequently, two liquor licenses dated 9<sup>th</sup> March 2016 were issued to Dr. Kethiswaran Pillai: FL/7 for the hotel (approved by the Tourist Board) and FL/8 for the bar license within a municipal council limit, allowing operation at New Kethees Beach Hotel, Main Street, Arugambay South, Pottuvil 05. These licenses were valid from 9<sup>th</sup> March 2016 to 31<sup>st</sup> December 2016<sup>16</sup>.

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<sup>11</sup> ‘1R8’.

<sup>12</sup> ‘1R9’.

<sup>13</sup> ‘1R7’ and ‘1R7 (A)’.

<sup>14</sup> ‘1R10’ and ‘1R10 (A)’.

<sup>15</sup> ‘1R11’.

<sup>16</sup> ‘1R12’ and ‘1R12 (A)’.

The documents and reports required to be submitted with a new application are outlined in Clause 13 of Gazette ‘1R59.’ Among these requirements is a survey plan from a licensed surveyor indicating the distance to nearest places of public religious worship and to schools. If complaints regarding violations of the prescribed distances are received, a survey plan from the Government Superintendent of Surveys, as it applies to this instance, will be required<sup>17</sup>. However, the objections filed by the 1<sup>st</sup> to 7<sup>th</sup> Respondents make no mention of whether this requirement has been fulfilled. Furthermore, the 1<sup>st</sup> to 7<sup>th</sup> Respondents did not provide any documentary evidence indicating that a survey plan was requested or submitted prior to the issuance of the license in 2016. This indicates that even the initial license issued in 2016 was granted in violation of Gazette ‘1R59.’

Following the issuance of the liquor licenses, the Eastern Provincial Council submitted its objections via letters dated 27<sup>th</sup> April 2016 and 11<sup>th</sup> May 2016, stating that the licenses had been issued in contravention of the Excise Rules, as a mosque and two schools are located within a 500-meter radius<sup>18</sup>. In response, the Excise Department informed that the issuance of the liquor licenses was recommended by the relevant authorities after an inquiry and, therefore, was granted in accordance with the law<sup>19</sup>. Nevertheless, it remains a fact that the Excise Department did not request a survey report in accordance with Gazette ‘1R59.’

By a letter dated 25<sup>th</sup> April 2016<sup>20</sup>, the license holder, Dr. Kethiswaran Pillai, requested the Commissioner General of Excise to transfer the liquor license to Mr. Vethavanam Vasantham, as he had sold the hotel to him. However, he later withdrew this request in a letter dated 21<sup>st</sup> June 2016<sup>21</sup>.

The Sri Lanka Tourism Development Authority also requested the transfer of the license to Arugambay Surfers Villa (Pvt) Ltd, the 8th Respondent, in a

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<sup>17</sup> Clause 13(g).

<sup>18</sup> ‘1R13’ and ‘1R14’.

<sup>19</sup> ‘1R15’.

<sup>20</sup> ‘1R17’.

<sup>21</sup> ‘1R18’.



letter dated 29<sup>th</sup> November 2016<sup>22</sup>, citing a change in ownership. Subsequently, Mr. V. Vasantham applied to transfer the licenses to the name of Arugambay Surfers Villa in a letter dated 2<sup>nd</sup> October 2016<sup>23</sup>. Along with this letter, an affidavit sworn on 3<sup>rd</sup> October 2016 by the previous owner, Dr. Kethiswaran Pillai, consenting to the issuance of the license in the name of Arugambay Surfers Villa was also provided.

However, on 14<sup>th</sup> December 2016, Dr. Kethiswaran Pillai himself applied to renew the license for the year 2017<sup>24</sup>. In the meantime, the Coordinating Committee of the Pottuvil Divisional Secretariat decided at their meeting to oppose the issuance of the licenses, and this decision was communicated to the Commissioner General of Excise by the Divisional Secretary of Pottuvil in a letter dated 20<sup>th</sup> December 2016<sup>25</sup>. Nevertheless, the liquor licenses for the period from 1<sup>st</sup> January 2017 to 31<sup>st</sup> March 2017 was issued in the name of Dr. Kethiswaran Pillai<sup>26</sup> without requesting a report from the Government Superintendent of Surveys to determine whether the distance rules had been violated.

One might argue that since this was a renewal of the license by an existing license holder, only the documents specified in Clauses 13(b), (c), (d), and (j) are required, and the survey plan under Clause (g) is not necessary, particularly given that complaints had been received after the issuance of the license valid until 31<sup>st</sup> March 2017. However, under Clause 13(h) of Gazette '1R59,' there is a provision to request a Government Superintendent of Surveys Plan if complaints regarding violations of the prescribed distances are received. If the distance rules have been violated, the license could be revoked. However, it is important to note that there had been prior complaints<sup>27</sup>, yet no survey plan was requested before the renewal of the license.

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<sup>22</sup> '1R19'.

<sup>23</sup> '1R20'.

<sup>24</sup> '1R22', '1R22(A)', '1R22(B)' and '1R22 (C)'.

<sup>25</sup> '1R25'.

<sup>26</sup> '1R23'/'1R24'.

<sup>27</sup> *Vide* paragraph 7 (v), (xii), (xiii) and (xiv) of the 1<sup>st</sup> to 7<sup>th</sup> Respondents own objections.

Upon receiving further complaints regarding non-compliance with the regulations concerning the prescribed distances to schools and religious places, the Commissioner General of Excise directed the license holder to submit a plan prepared by the Government Superintendent of Surveys, illustrating the linear distance from the hotel to the schools and religious places<sup>28</sup>. Subsequently, the license holder appealed to the Minister of Tourism to grant the license without the Government Superintendent of Surveys' plan<sup>29</sup>.

Afterwards, the new owner applied<sup>30</sup> to extend the liquor license issued to the 8<sup>th</sup> Respondent, Arugambay Surfers Villa, until the end of 2017. However, the extension was not granted, as the current license holder had placed objections on record<sup>31</sup>. Subsequently, the Excise Department requested a report from the Divisional Secretary<sup>32</sup> and the Police of Pottuvil<sup>33</sup> to assess whether the new applicant was a suitable candidate for a license, and both authorities<sup>34</sup> provided favorable responses. Following this, Dr. Kethiswaran Pillai once again requested the Excise Department to issue the license in his name<sup>35</sup>. In response, the Excise Department informed him that no license would be issued for the year 2018 due to the ongoing court proceedings concerning the premises related to the license<sup>36</sup>.

According to the 1<sup>st</sup> to 7<sup>th</sup> Respondents, following the amicable resolution of the legal proceedings, the 8<sup>th</sup> Respondent submitted applications for FL07 and FL08 licenses<sup>37</sup>, which were subsequently recommended by the Deputy Commissioner of Excise (Legal)<sup>38</sup>. Thereafter, the Commissioner General of Excise informed the Divisional Secretary of Pottuvil by letter dated 19<sup>th</sup>

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<sup>28</sup> '1R26'.

<sup>29</sup> '1R27'.

<sup>30</sup> '1R28'.

<sup>31</sup> '1R29'.

<sup>32</sup> '1R30'.

<sup>33</sup> '1R31'.

<sup>34</sup> '1R32' and '1R33'.

<sup>35</sup> '1R34'.

<sup>36</sup> '1R35'.

<sup>37</sup> '1R36' and '1R36 (A)'.

<sup>38</sup> '1R37'.

December 2019 to issue the licenses in the name of the 8<sup>th</sup> Respondent for the premises of Arugambay Surfers Villa Hotel<sup>39</sup>.

According to the 1<sup>st</sup> to 7<sup>th</sup> Respondents, the 8<sup>th</sup> Respondent was subsequently granted FL07 and FL08 licenses, valid from 1<sup>st</sup> January 2019 to 31<sup>st</sup> December 2019<sup>40</sup>.

There is no statement in the objections filed by the 1<sup>st</sup> to 7<sup>th</sup> Respondents, nor any evidence presented to indicate that the 8<sup>th</sup> Respondent submitted the Government Superintendent of Surveys plan requested by the Commissioner General of Excise, as stipulated in Clause 13(h), or at least a plan prepared by a licensed surveyor, as required by Clause 13(g) of Gazette '1R59'. It was a new application that was submitted<sup>41</sup> and not merely an application for the transfer of a license. However, according to the 1<sup>st</sup> to 7<sup>th</sup> Respondents, it is argued that this application should be considered a renewal due to the transfer of ownership of the business<sup>42</sup>. Even if it were a transfer, Clause 28 of Gazette '1R59' mandates that all documents required for a new application must be submitted.

Following that, the 8<sup>th</sup> Respondent applied to renew the license for the year 2020<sup>43</sup>, accompanied by a recommendation from the Sri Lanka Tourism Development Authority<sup>44</sup>. Following the receipt of this application, the Deputy Commissioner of Excise (Revenue) requested a report from the Assistant Commissioner of Excise (Eastern Province) on 4<sup>th</sup> March 2020 regarding the discrepancies in the boundaries stated in the license and the deed of transfer of the property to the new owner<sup>45</sup>. In response, the Assistant Commissioner of Excise (Eastern Province) recommended in a letter sent in June 2020 that the liquor licenses be issued after obtaining a report from the Superintendent of Surveys.

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<sup>39</sup> '1R38'/'1R39'.

<sup>40</sup> Paragraph iii, under the heading 2019 license, of the objections filed by the 1<sup>st</sup> to 7<sup>th</sup> Respondents.

<sup>41</sup> '1R36' & '1R 36(A)'.

<sup>42</sup> At paragraph 10 (iii) of the 1<sup>st</sup> to 7<sup>th</sup> Respondents objections.

<sup>43</sup> '1R40', '1R41' and '1R42'.

<sup>44</sup> '1R40 (A)'.

<sup>45</sup> '1R43'.

The 1<sup>st</sup> to 7<sup>th</sup> Respondents state that the 8<sup>th</sup> Respondent subsequently submitted a sketch; however, no such sketch has been produced in court. In letter ‘1R44,’ the 8<sup>th</sup> Respondent acknowledged the discrepancies between the boundaries in the application and the title deed. Furthermore, the 8<sup>th</sup> Respondent indicated that the licensed premises would be relocated within the same land to comply with the distance criteria<sup>46</sup>. However, relocating the licensed premises within the land will not resolve the distance criteria as per Gazette ‘1R59’; it is the linear distances from *boundary to boundary* that must be considered<sup>47</sup>.

Additionally, the recommendation from the Assistant Commissioner of Excise (Eastern Province)<sup>48</sup> to obtain a Government Superintendent of Surveys plan was not fulfilled by the 8<sup>th</sup> Respondent. The requirement for a Government Superintendent of Surveys plan under Clause 13(h) of Gazette ‘1R59’ cannot be replaced by a sketch. According to the 1<sup>st</sup> to 7<sup>th</sup> Respondents, the Divisional Secretary once again indicated that there was public protest to the issuance of the license<sup>49</sup>; however, no inquiry was conducted as required under Clause 21 of the Gazette notification ‘1R59.’ Despite this, the Commissioner General of Excise authorized the Divisional Secretary, Pottuvil, to issue the licenses<sup>50</sup>. Consequently, on 18<sup>th</sup> June 2020, the FL07 and FL08 licenses were issued for the year 2020, valid until 31<sup>st</sup> December 2020.

Accordingly, these licenses for the year 2020 were issued in direct violation of the provisions in Gazette ‘1R59.’

The Petitioners filed this application on 18<sup>th</sup> September 2020 and subsequently amended the Petition on 9<sup>th</sup> February 2021. The 8<sup>th</sup> Respondent submitted a request for the renewal of the FL07 and FL08 licenses for the year 2021 on 22<sup>nd</sup> December 2020<sup>51</sup>.

By the time the Assistant Commissioner of Excise (Eastern Province) initiated and completed an inquiry into the complaints regarding Arugambay Surfers

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<sup>46</sup> ‘1R44 (A)’.

<sup>47</sup> Clause 20 (c).

<sup>48</sup> ‘1R43 (A)’.

<sup>49</sup> ‘1R45’.

<sup>50</sup> ‘1R46’ and ‘1R47’.

<sup>51</sup> ‘1R48’ and ‘1R48 (A)’.

Villa Hotel and submitted his report dated 8<sup>th</sup> October 2020 through the Deputy Commissioner of Excise (Licenses) to the Commissioner General of Excise, outlining his recommendations<sup>52</sup>. The Court notes that all his recommendations pertained to alterations to the buildings and did not address the violations of the distance regulations specified in Gazette ‘1R59.’

However, on 20<sup>th</sup> October 2020<sup>53</sup>, the Deputy Commissioner General of Excise (Revenue) informed the Divisional Secretary of Pottuvil that the Commissioner General had decided to request a surveyor’s report from a Government Surveyor. This report was to detail the proximity of schools, temples, and kovils to the licensed premises<sup>54</sup>, along with the *boundary-to-boundary* linear distances. It is noteworthy that the 1<sup>st</sup> to 7<sup>th</sup> Respondents did not clarify whether the Government Surveyor's report was received or if it complied with the requirements outlined in Gazette ‘1R59.’ Moreover, no copy of the survey plan was submitted to the Court. Despite this, the liquor licenses FL07 and FL08 for the year 2021 were issued on 21<sup>st</sup> December 2020<sup>55</sup>.

It is evident from the available documentation that the Divisional Secretary of Pottuvil, in response to the Commissioner General of Excise's decision, requested the Senior Superintendent of Surveys to submit a plan and report only on 1<sup>st</sup> February 2022<sup>56</sup>.

In light of the above facts, it is evident that the liquor license for the year 2021 was issued in violation of the conditions specified in Gazette ‘1R59’, as it was granted without obtaining the survey plan that the Commissioner General of Excise had requested.

Subsequently, an application for the FL07 and FL08 liquor licenses for the year 2022<sup>57</sup> was submitted. The Commissioner General of Excise, in a letter dated 29<sup>th</sup> December 2021, authorized the Divisional Secretary of Pottuvil to issue

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<sup>52</sup> ‘1R49’.

<sup>53</sup> ‘1R50’.

<sup>54</sup> ‘1R50’.

<sup>55</sup> ‘1R51’ and ‘1R52’.

<sup>56</sup> *Vide* the letter next to ‘1R50’.

<sup>57</sup> ‘1R53’ and ‘1R55’.

the licenses<sup>58</sup>. As a result, the licenses were granted without even requesting the Government Superintendent of Surveys plan, which had been requested by the Commissioner General of Excise in the previous year, 2021. It is important to emphasize that, by this time, the Respondents were represented in this case in court.

The learned State Counsel representing the 1<sup>st</sup> to 7<sup>th</sup> Respondents submitted a plan and a report from the Survey General's Department along with a motion dated 11<sup>th</sup> May 2023. This plan provides the *boundary-to-boundary* distances in accordance with Clause 20(c) of the Gazette '1R59'. According to the plan, the distances from the 8<sup>th</sup> Respondent, Arugambay Surfers Villa, to various institutions are as follows: 20.08 meters to the Arabic College, 249.73 meters to the Jumma Mosque, 190.98 meters to the Mafaza Mosque, and 338.7 meters to the Sinhala Vidyalaya. Therefore, it is evident that all these distances fall below the required 500-meter radius, with the Arabic College located within 100 meters. As a result, the issuance of both licenses FL07 and FL08 contravenes the distance criteria outlined in the Gazette '1R59'.

The 8<sup>th</sup> Respondent submitted a plan prepared by a private surveyor on 11<sup>th</sup> July 2023, marked as 'X10', along with its objections. Similar to the plan provided by the Survey General's Department, the distances in 'X10' are also measured from *boundary-to-boundary*.

In the plan marked 'X10', the distances to the aforementioned institutions significantly differ from those in the Survey General Department's plan. Be that as it may, even according to 'X10', only the Periya Ullai School is located beyond the 500-meter radius, while the Periya Ullai Mosque, Periya Ullai Arabic College, and Sinhaputhra School are situated within the 500-meter radius.

The 8<sup>th</sup> Respondent has submitted another plan, dated 11<sup>th</sup> July 2023, marked as 'X11'. According to this plan, only the Periya Ullai Arabic College falls within the 500-meter radius, while the Periya Ullai School, Periya Ullai Mosque, and

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<sup>58</sup> '1R55'.

Sinhaputhra School are shown as being beyond the 500-meter radius. However, even to the naked eye, it is evident that the distances indicated in plan 'X11' cannot be accurate. This is because some locations that appear farther away are shown with shorter distances than those that are closer.

Moreover, in plan 'X11,' the distances are measured not from *boundary to boundary*, but from the specific location where the 8<sup>th</sup> Respondent suggests the liquor restaurant could be relocated. As a result, plan 'X11' does not comply with Clause 20(c) of Gazette '1R59,' which mandates that distances must be measured from boundary to boundary from the location of the premises where licenses are to be operated.

According to Clause 13(h) of the Gazette '1R59,' when complaints are made regarding the violation of distance requirements between licensed premises and schools or religious institutions, a report from the Government Superintendent of Surveys must be obtained. Therefore, the legally valid plan is the one prepared by the Survey General's Department, not the private plan. As previously mentioned, the Survey General's plan shows that two mosques and two schools are located within the 500-meter radius, with one of the schools falling within the 100-meter radius. It should be 100-meter radius for the sale of liquor off the premises and 500-meter radius for consumption within the premises<sup>59</sup>.

It is important to note that on 3<sup>rd</sup> May 2023, the 8<sup>th</sup> Respondent informed the Survey General that the Survey General's plan was not properly prepared<sup>60</sup>. Subsequently, on 1<sup>st</sup> June 2023, the 8<sup>th</sup> Respondent requested the Divisional Secretary to conduct a resurvey, citing discrepancies between the two plans<sup>61</sup>. However, the 8<sup>th</sup> Respondent's request to measure distances from *building to building* contradicts the provisions of Clause 20(c) of Gazette '1R59,' which stipulates that distances must be measured from *boundary to boundary*.

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<sup>59</sup> Clause 20(c) of the Gazette '1R59'.

<sup>60</sup> 'X13'.

<sup>61</sup> 'X12'.

Thus, it is evident that the liquor licenses granted to the 8<sup>th</sup> Respondent were issued in contravention of Clause 20 (c) of the Gazette ‘1R59’.

### **Preliminary Objections**

The 1<sup>st</sup> to 7<sup>th</sup> Respondents, along with the 8<sup>th</sup> Respondent, raised preliminary objections in relation to this writ application filed by the Petitioners.

Accordingly, this Court identifies the following key preliminary objections.

- i. The Petitioners application is misconceived in law.
- ii. The Petitioners have suppressed and misrepresented material facts.
- iii. The Petitioners have failed to come before Court with clean hands and lacks *uberrima fidei*.
- iv. The Petitioners are guilty of *laches*.
- v. The reliefs sought by the Petitioners is futile.
- vi. No valid grounds urged by the petitioners for the issuance of writs.

As this Court views it, the first argument that the application is misconceived in law and the last one that there are no valid grounds to issue writs are derived from the various other grounds outlined in the objections which I have already analyzed above. Therefore, I will address the other grounds.

The Respondents argue that the Petitioners have suppressed material facts, specifically failing to disclose that the chief incumbent priest of the Samudragiri Buddhist Temple, Pottuvil, and the principal of Sinhapura Sinhala Vidyalaya had withdrawn their objections by letters dated 5<sup>th</sup> October 2020<sup>62</sup>. This argument is frivolous because the letter was sent after the date of filing this application. Be that as it may, the core issue is not whether the individuals in charge of the relevant institutions object to the issuance of the license, but rather whether the location of those institutions violates the Regulations outlined in Gazette ‘1R59’, a matter determined by law, not by individual objections. Furthermore, may be the Petitioners were unaware of the withdrawal of objections by the chief incumbent and the school principal.

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<sup>62</sup> ‘1R50’ and ‘1R51’ respectively.



Therefore, in my view, the non-disclosure of these facts does not amount to suppression or misrepresentation of material facts. Consequently, it cannot be alleged that the Petitioners have not come to Court with clean hands or that they lack *uberrima fides*.

The next issue to address is whether the Petitioners are guilty of *laches*. The first liquor licenses were issued in 2016 and renewed for 2017. No licenses were issued for 2018, but from 2019 to 2022, licenses were continuously issued in the name of the 8<sup>th</sup> Respondent. As previously mentioned, the Petitioners filed this application on 18<sup>th</sup> September 2020. This indicates a delay of four years since the initial issuance of the licenses in 2016. However, it is important to note that the licenses continued to be renewed until 2022, even after the Petitioners filed this application.

Given this context, I am not inclined to conclude that the Petitioners are guilty of *laches*. Therefore, I find that there are valid grounds for the Petitioners to pursue this Writ application.

The next significant question to consider is whether the Petitioners' application has now become futile. A writ application should not be dismissed solely on the grounds of futility<sup>63</sup>. Despite the objections raised by the public, the 1<sup>st</sup> to 7<sup>th</sup> Respondents have arbitrarily proceeded to issue and renew the liquor licenses, compelling the Petitioners to file this application. Moreover, the 1<sup>st</sup> to 7<sup>th</sup> Respondents did the same without adhering to the conditions outlined in the Gazette '1R59', while these proceedings were ongoing.

I am of the view that such actions are arbitrary, capricious, erroneous, contrary to law, and *ultra vires*. If this Court does not issue an order regarding the impugned actions of the 1<sup>st</sup> to 7<sup>th</sup> Respondents, they would likely continue their unlawful conduct. Therefore, at the very least, to convey to the 1<sup>st</sup> to 7<sup>th</sup> Respondents, who are public officers, that their actions are *ultra vires* and to condemn those actions, this Court should grant the reliefs prayed for in the Petition.

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<sup>63</sup> *Sudakaran v. Bharathi*, (S.C.) [1989]1 Sri L.R. 46; *Nimalsiri v. Divisional Secretary, Galewela*, (C.A.), [2003]3 Sri L.R. 88.

At this juncture, it is important to note that the Proviso of Clause 20 (c) of the Gazette '1R59' allows the Commissioner General of Excise to relax the distance requirements specified in paragraph (c) if he is satisfied that there are no specific objections from the public regarding the issuance of a license for the premises.

- i. Licenses approved by the Tourism Development Authority.
- ii. Licenses which have been in continuous operation for 10 years or more at the same location.
- iii. Licenses remained in force prior to the establishment of such public religious place of worship or school.

Consequently, this judgment should not hinder the Commissioner General of Excise from exercising the powers granted to him under the Proviso of Clause 20 (c) of the Gazette '1R59'.

### **Conclusion**

In light of the analysis provided, I hereby issue the writ of *certiorari* prayed in paragraph (c) of the Petition, quashing the letter No. 16/308/42/03993 dated 18<sup>th</sup> June 2020 ('P17'), as well as the writ of *certiorari* sought in paragraph (e) of the Petition, quashing the letter No. 16/308/42/03993 – 1 dated 18<sup>th</sup> June 2020 ('P18'). Additionally, I also quash the subsequent renewals done without complying with the distance criteria set forth in Gazette '1R59'.

Each party shall bear their own costs.

**JUDGE OF THE COURT OF APPEAL**

**M. Ahsan. R. Marikar J.**

I Agree.

**JUDGE OF THE COURT OF APPEAL**