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

1. R. H. Mary Perumal,
   No. 49, 5th Lane,
   Nawala.
2. J. I. J. Casie Chetty,
   No.15, Amarasekara Mawatha,
   Colombo 05.
   Appearing through his
   Power-of-Attorney holder
   Kathiresan Kugabalan,
   No. 52, Main Street,
   Nanu Oya.
3. Kathiresan Kugabalan,
   No. 52, Main Street,
   Nanu Oya.

   Petitioners

CASE NO: CA/WRIT/239/2014

Vs.

1. R. M. Senarathne,
   Chief Inspector of Excise,
   Excise Office (station),
   Hatton.

2. A. Bodharagama,
   Deputy Commissioner of Excise
   (Revenue),
   No. 34, W. A. D. Ramanayake
   Mawatha,
   Colombo 02.
3. Wasantha Hapuarachchi,
   Former Commissioner General of,
   Excise,
   No. 34, W. A. D. Ramanayake
   Mawatha,
   Colombo 02.

3A. L. K. G. Gunawardena,
   Commissioner General of Excise,
   No. 34, W. A. D. Ramanayake
   Mawatha,
   Colombo 02.
   Respondents

Before:	Mahinda Samayawardhena, J. Arjuna Obeyesekere, J.
Counsel:	Dulindra Weerasuriya, P.C., with Pasan Malinda for the Petitioners. Shaheeda Barrie, S.S.C., for the Respondents.
Argued on:	16.07.2020
Decided on:	02.09.2020

Mahinda Samayawardhena, J.

The 1st and 2nd Petitioners are two of three co-licensees of FL3 and FL4 liquor licenses. Their liquor shop at Lindula in the Nuwara Eliya district was raided by a team headed by the 1st Respondent on 10.06.2014 and *inter alia* adulterated liquor was found in the shop. The shop was sealed on the following day, 11.06.2014. The 3rd Respondent, who was neither a licensee nor present at the time of the raid but had a Power of Attorney to look after the liquor shop on behalf of the 2nd Respondent, met with the officers of the Hatton Excise office on the next day, 12.06.2014. He was asked to meet the 2nd Respondent, the Deputy Commissioner of Excise (Revenue), in Colombo. Immediately following the weekend (14th and 15th), the 3rd Petitioner met the 2nd Respondent on 16.06.2014.

According to the Respondents, the 3rd Petitioner pleaded guilty to the charges in P6, and thereafter, instead of suspension or cancellation of the licenses in terms of section 27 of the Excise Ordinance, the matter was compounded in terms of section 56 of the Excise Ordinance and a sum of Rs. 4,000,000 was ordered to be paid – *vide* P7.

The Petitioners filed this application seeking to quash P6 and P7 by certiorari and to compel the Respondents to refund the Rs. 2,000,000 already paid at the time of filing the application – *vide* P8.

However, R10 shows that during the pendency of the case a total sum of Rs. 4,150,000 was paid by the Petitioners.

The Petitioners submit they are entitled to the reliefs sought on three grounds.

The first is there was a violation of the *audi alteram partem* rule on the part of the Respondents. It is a fundamental principle of natural justice that before a decision is taken the decision-maker shall hear both sides. The *audi alteram partem* rule embodies this principle. Hearing both sides does not mean hearing for the sake of hearing. The party to be penalised shall be given a fair hearing.

Was a fair hearing given to the Petitioners in this case? The Respondents in paragraph 12 of the statement of objections say the 3rd Petitioner pleaded guilty to "the charge sheet" marked P6/R5(a). To begin with, P6 is not a charge sheet. It is a standard show cause notice (Form No. Excise E41). According to clause 2 of P6, a date shall be given to show cause in writing. The Respondents also tender R5(b) to establish their claim that the 3rd Petitioner pleaded guilty to the charges in P6. R5(b) does not indicate a plea of guilt. It is in fact a request by the 3rd Petitioner to make the payment ordered under section 56 of the Excise Ordinance in installments.

The 3rd Petitioner does not accept that he pleaded guilty, as alleged by the Respondents. He only admits he met with the 2nd Respondent to seek the reopening of the business, which had been sealed on 11.06.2014.

On the premise that the 3rd Petitioner pleaded guilty, the 2nd Respondent ordered payment of a sum of Rs. 4,000,000, which

was admittedly done in terms of section 56 of the Excise Ordinance.

In my view, the Petitioners were not given a fair hearing before the decision contained in P7 was made, which is a violation of the *audi alteram partem* rule. Decisions taken in breach of natural justice are a nullity.

The Petitioners further state levying charges in a sum of Rs. 4,000,000 on the basis of compounding the offences is *ultra vires*. Section 56 of the Excise Ordinance stipulates a monetary cap to the discretion afforded to an officer in ordering the amount to be paid thereunder. This means, in compounding an offence, the officer cannot order any amount he thinks appropriate in consideration of the severity of the offence. In terms of this section, the officer can only order a "*sum of money, not exceeding five hundred thousand rupees*" to be paid. In the instant case, a sum of Rs. 4,000,000 was ordered, and in the end, a sum of Rs. 4,150,000 was recovered from the Petitioners.

The Respondents say the Rs. 500,000 limit stipulated in section 56 is directory, not mandatory. I reject this argument. The previous limit under this section was Rs. 1000; it has been increased to Rs. 500,000 by Excise (Amendment) Act, No.37 of 1990.

It is also relevant to note that by the said Amendment Act, section 58A was introduced, whereby the Excise Reward Fund was established. This new section states all sums of money received upon compounding charges under section 56 shall be

credited to the Excise Reward Fund, which is to be used for payments to be made as awards to excise officers and informers.

The Respondents say there was acquiescence on the part of the Petitioners because the 3rd Petitioner paid Rs. 2,000,000 on the day following the issuance of P6 and P7 and the remaining amount during the pendency of the case, and therefore the Petitioners are estopped from canvassing the matter further. I reject this argument. The liquor shop was to be kept shut until payment was made by the Petitioners. In any event, as held by the Supreme Court in *Pararajasekeram v. Vijayaratnam (1968) 76 NLR 470*, "*The doctrine of estoppel cannot be invoked in the face of a statue, for against a statute no estoppel can prevail.*" Clearly, the decision of the Respondents is *ultra vires*.

In view of the above, there is no necessity for me to consider the third argument of the Petitioners predicated on the doctrine of double jeopardy.

The Respondents have taken up a spate of preliminary objections for the first time in the written submissions. This unhealthy practice shall be discouraged. If there are preliminary objections, such objections shall be taken up at least in the statement of objections to allow the Petitioner to reply in the counter objections. I must also mention that preliminary objections shall not be raised as a matter of routine. Such practice contributes significantly to law's delays.

Having said so, let me briefly consider the said preliminary objections.

The Respondents say only two of the three licensees of the liquor shop have filed this application. According to the Respondents, unless all three licensees are made parties, the application is not maintainable. This is not necessary.

Then, the Respondents say the 3rd Petitioner has no *locus standi* to be a Petitioner to this application because he is not a licensee. This preliminary objection is counterproductive. If this position is to be accepted, it can be equally said that none of the three licensees were given a hearing prior to the impugned decision contained in P7 being taken. The 3rd Petitioner has *locus standi* because it is he who is alleged to have pleaded guilty to the charges. The sum of Rs. 4,000,000 was ordered on this basis.

Next, the Respondents say there is no proper application before this Court because the supporting affidavit to the petition has been filed by the 3rd Petitioner who has no *locus standi* to be a party to the application. As I have already explained, the 3rd Petitioner has *locus standi*. In any event, the supporting affidavit to the petition need not necessarily be by a party to the application. Rule 3(1)(a) of the Court of Appeal Rules 1990 only requires an affidavit in support of the averments set out in the petition.

The preliminary objection on "*acquiescence/estoppel*" has already been dealt with.

The final preliminary objection is the Petitioners have not exhausted alternative remedies, in that, they have not appealed "*to the Minister in the manner provided by the rules under section 32(2)(c)*" of the Excise Ordinance. This objection is also

overruled. On the one hand, the availability of alternative remedies does not oust the writ jurisdiction of this Court unless the alternative remedies are equally effective. On the other hand, the rules referred to have not been tendered by the Respondents and the Court is unaware of such rules.

Learned President's Counsel for the Petitioners informed the Court during the course of the argument that the Petitioners will not contest the case if they are required to pay only the maximum amount legally permitted on compounding an offence under section 56 of the Excise Ordinance, i.e. Rs. 500,000.

For the aforesaid reasons, I grant the relief as prayed for in paragraph (b) of the prayer to the petition and formally quash P7 by certiorari and, instead, order the Respondents to recover only Rs. 500,000 by way of compounding the offence and to release the balance sum already paid of Rs. 3,650,000 to the Petitioners.

The application of the Petitioners is partly allowed. No costs.

Judge of the Court of Appeal

Arjuna Obeyesekere, J.
I agree.

Judge of the Court of Appeal