RAJANAYAGAM
v.
BANDULA WIJAYARATNE, COMMISSIONER-GENERAL OF EXCISE AND OTHERS

SUPREME COURT
FERNANDO, J.,
WADUGODAPITIYA, J.,
BANDARANAYAKE, J.
S.C. APPLICATION NO. 389/98
SEPTEMBER 03RD, 1998.

Fundamental Rights – Articles 12 (1) and 14 (1) (g) of the Constitution – Licence to sell foreign liquor – Excise Ordinance S. 32 (1) – Rules and notifications – Guidelines. Exercise of Statutory discretion – Opportunity of being heard – Equal protection of the law – Right to livelihood.

Held:

1. Section 32 (1) imperatively requires Parliamentary approval for all rules made under the Excise Ordinance, whether or not they relate to "excise revenue". It is section 32 (1) alone which empowers the Minister to make rules "for the purpose of carrying out the provisions of (the) Ordinance". subsection (2) does not confer any new or additional power, but only spells out some of the subjects on which such rules may be made. That is not in order to expand the scope of subsection (1), but solely to preclude any argument that the subjects stipulated in subsection (2) fall outside the general words conferring the rule making power.

2. It is very clear that the preconditions for the issue of a licence are a matter for rules and not for notifications and that such rules acquire the force of law (subject to the specified exception in the case of urgency) only when Parliamentary confirmation is gazetted by means of a notification. Had there been any doubt, it is axiomatic that is had to be resolved in favour of Parliamentary control of delegated legislation, rather than freedom from such control.

3. The question of law that arises is not whether the notification was ultra vires or void (for lack of Parliamentary confirmation) at the time of publication in November, 1997, but the more limited question whether it had acquired the force of law on 9.3.98 when petitioner made his application for the

licence or even on 13.6.98 when petitioner says he received the 1st respondent's reply that the application could not be entertained. The petitioner's cause of action was the attempt to apply that notification to him in June,1998 and not its publication.

4. The petitioner had the right to apply for a licence under and in terms of the Ordinance, and if the only form which the 1st respondent would issue for that purpose was one prescribed by the guidelines, the mere use of that form would not give rise to an estoppel or waiver of rights. Much more is required to establish an estoppel or a waiver of rights.

5. The 1st respondent applied the principles and provisions of the notifications not because he thought they were right or that he had any choice in the matter, but only because he thought they were valid and binding on him despite the lack of Parliamentary confirmation and subsequent notification. There was no independent exercise of his discretion under the Ordinance, but rather a total abdication of his statutory discretion in favour of the guidelines in the notification.

Even the notification he did not apply fairly. He denied the petitioner even the limited right to a hearing which clause 10 is purported to guarantee.

6. The petitioner was denied the equal protection of the law and his right to livelihood was infringed.

APPLICATION for relief for infringement of fundamental rights guaranteed by Articles 12 (1) and. 14 (1) (*g*) of the Constitution.

Tilak Marapana, PC with *Jayantha Fernando* for the petitioner.

Harsha Fernando, SC for the respondents.

Cur. adv. vult.

October 01, 1998

FERNANDO, J.

The petitioner complains that his fundamental rights under Articles 12 (1) and 14 (1) (*g*) have been infringed by the 1st respondent, the Commissioner-General of Excise, by the refusal of a "restaurant licence" (i.e. a licence to sell foreign liquor for consumption on the premises, or an "FL 11" licence) in respect of premises No. 1, Tangalle Road, Hambantota.

In 1979, the Government Agent, Hambantota, issued a notice calling for tenders for licences to be issued with effect from 1.1.80 to operate "liquor restaurants" within the Hambantota Urban Council area. That notice stated that the selected tenderers "may renew their licences for the subsequent years on payment of licence fees only", and that "restaurant licences will be subject to general conditions for the time being in force and applicable to all excise licences".

The petitioner stated that he and his brother were awarded that tender, and carried on the business up to 1994, in respect of the same premises; that the practice was that upon receipt of a communication from the authorities informing them of the amount to be paid for the renewal of the licence for the following year, that sum was paid and the licence was renewed; and that in 1994 a notice was received informing them of the amount payable for the period 1.1.95 to 30.4.95, which was paid. Consequent to a newspaper advertisement on 15.12.94 by the 1st respondent calling for applications in respect of the rest of 1995, the petitioner and his brother applied for licences, but were refused. They did not apply for licences for 1996 and 1997. Thus from mid-1995 to 1997 they did not carry on the business.

In the *Gazette* No. 1001/20 of 13.11.97 there appeared the following Notification:

THE EXCISE ORDINANCE

Excise Notification No. 833

GUIDELINES AND CONDITIONS APPLICABLE TO THE ISSUE OF EXCISE LICENCES

The Minister of Finance and Planning has under section 25 read with section 32 (2) of the Excise Ordinance directed that the guidelines and conditions given below will be followed in respect of the issue of liquor licences. These guidelines and conditions shall apply in respect of the following category of licences and with these guidelines and conditions coming into operation the Excise

notification No. 827 . . . shall be deemed rescinded, so far as the same is contrary to or incompatible with these guidelines and conditions. . .

B. C. PERERA
Secretary
Ministry of Finance and Planning

1. *(a)* All guidelines and conditions hitherto in operation . . . are hereby revoked, and the said licences shall be issued solely on the basis of, and subject to the guidelines, restrictions and conditions set out below.

(b) The present holders of such licences will not be entitled to automatic renewal thereof; and that [*sic*] all applications will be considered solely on the information and material furnished in the application for the succeeding year in accordance with these guidelines and conditions. Applications furnished by such licensees on or before the 15th day of December of the year preceding the year of licence may be considered by the Commissioner-General of Excise in terms of these guidelines and conditions . . .

2. *(a)* Applications should be made . . . to the Commissioner-General . . . on forms obtained from the Excise Department, on payment of the relevant application fees.

(b) Late applications will not be entertained . . .

Clause 4 specified "Requirements regarding location and premises". Clause 4 (*c*) required that the premises should be 500 metres away (as the crow flies) from schools and places of public religious worship. That was subject to two provisos. "In respect of premises where licences have been in continuous operation for 20 years and more . . . the relaxation of [those] distances . . .. may be considered by the Commissioner-General of Excise if he is satisfied that the premises are suitable for the operation of liquor licences" (clause 4 (*d*)); and, further, that requirement would not apply "where the sale of liquor is not the main commercial object of the enterprise as determined

by the Commissioner-General or any other appropriate authority relevant to the nature of the business of the applicant" (clause 4 (*e*)).

Clause 10 (*a*) imposed a duty on the Commissioner-General, if he was of the opinion that an applicant should not be issued a licence, to inform him within eight weeks of the receipt of the application of "his reasons for forming such opinion" and to "require the applicant *to show cause* as to why he should be issued with a licence", whereupon the applicant had a right to show cause within two weeks.

The petitioner stated that he met the 3rd respondent (the Officer in Charge, Excise Office, Hambantota) on 10.12.97, and requested an application form; he refused, saying that forms are given only to those who had licences for 1997, but added that an application form could be issued if a letter was brought from the Member of Parliament from the People's Alliance Party. On 12.12.97 he asked the 4th respondent (the Area Commissioner of Excise, Excise Office, Bentota) for an application form; he too said that an application form could be issued only if the Member of Parliament from the People's Alliance Party had authorized it. Neither of those respondents filed affidavits contradicting those averments. Although the 1st respondent denied those allegations, he did not claim any personal knowledge. The 1st respondent added that requests made *after the closing date* specified in notification No. 833 were not entertained.

The identical allegations had been made in SC application No. 20/98 which the petitioner filed on 13.1.98 upon the refusal to issue an application form. That application was settled on 24.2.98, upon the 1st respondent agreeing to issue the application form upon payment of the requisite fee. It was also agreed that the application would not be rejected on the ground that it had been made out of time, but would be considered in the normal way, and that, if dissatisfied with the 1st respondent's order, the petitioner would have the right to seek redress.

The petitioner submitted his application on 9.3.98. Not having received a response, he sent a reminder dated 15.5.98, by registered post. He says he thereafter met the 1st respondent at his office on 11.6.98, and that the 1st respondent informed him that a reply dated 8.5.98 had already been sent. This, the petitioner says, he received

only on 13.6.98. In that reply all that the 1st respondent stated was that the licence had not been renewed after 30.9.95, and that the application could not be entertained because there were places of worship and schools within a radius of 500 metres; he did not ask the petitioner to show cause. The petitioner filed this application on 13.7.98, seeking leave to proceed under Articles 12 (1) and 14 (1) (*g*), but not Article 12 (2). Leave was granted.

On behalf of the 1st respondent, learned state counsel took a preliminary objection that the application was time-barred. That objection necessarily involved an assertion by the 1st respondent that his letter dated 8.5.98 had been received by the petitioner before 13.6.98, and therefore the burden of establishing that fact was on him. He did not say that his letter was sent by registered post, and there is no direct evidence of either the date of posting or the date of delivery. On the other hand, even assuming that it had been posted on 8.5.98, it is common knowledge that there were postal delays during the relevant period, and the fact that the petitioner sent a reminder by registered post confirms that he had not received that letter on or before 15.5.98. The petitioner asserted that he had received that letter only on 13.6.98. The 1st respondent merely stated that he was "unaware" of the reminder, without either denying its receipt or explaining his failure to reply to it. The petitioner was obviously interested in vindicating his rights, having already applied to this court simply to get an application form, and it is unlikely that he would have refrained from acting promptly. It is far more probable therefore that the petitioner only received the 1st respondent's reply on 13.6.98. We therefore overruled the preliminary objection.

Mr. Marapana, PC, submitted that "Notification No. 833" did not apply: although section 32 of the Excise Ordinance, gave the Minister the power to make rules, such rules acquire the force of law only upon compliance with section 32 (1):

> "32 (1) 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 into 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 rule be modified or annulled, such rules or rule shall thenceforth be modified or annulled accordingly, but without prejudice to anything done thereunder".

(2) In particular, and without prejudice to the generality of the foregoing provision, the Minister may make rules–

(g) regulating the periods and localities for which licences . . . may be granted;

(h) prescribing the procedure to be followed and the matters to be ascertained before any licence for such sale is granted in any locality;

(i) prescribing the restrictions under and the conditions on which any licence . . . may be granted, including . ."

Learned state counsel submitted that the notification No. 833 had been incorporated in *Gazette* No. 1006 of 7.5.98, and brought before Parliament by a resolution, and had been confirmed on 23.6.98; he conceded, however, that such confirmation had not been notified in the *Gazette,* and that no order had been made under the proviso. No such *Gazette* was produced.

Mr. Marapana replied that he would accept that position, but contended that in the absence of subsequent *Gazette* notification of Parliamentary confirmation, the rules failed to acquire the force of law; and that in any event, when the petitioner's application was made, and even when the refusal was communicated to him, Parliamentary confirmation had not been obtained. Either way, he argued, the 1st respondent was not entitled to refuse the petitioner's application on the basis of the notification No. 833. He went further, contending that

even if that notification was procedurally valid, yet the "requirements" in clause 4 were discriminatory.

State counsel made several submissions in reply. First he contended that section 32 (1) only applies to *rules relating to "excise revenue"*; that the notification did not relate to "excise revenue"; and that therefore Parliamentary confirmation was unnecessary. "Excise revenue" is defined in section 2 as "revenue derived or derivable from any duty, fee, tax, fine . . . " Learned state counsel's contention is plainly untenable because the notification refers to "application fees", and "fees for shifting", and thus obviously relates to excise revenue. But, more important, that contention is based on a misinterpretation of section 32 (1), because the phrase "relating to excise revenue" does not qualify "rules", but only "other law for the time being in force". Thus section 32 (1) imperatively requires Parliamentary approval for *all* rules made under the Excise Ordinance, whether or not they relate to "excise revenue".

His second submission was that notification No. 833 was made under and by virtue of, and fell within, section 32 (2), and not section 32 (1); and that therefore section 32 (1) did not apply. That is a fallacy. That argument attempts to treat the two subsections as if they were entirely distinct and independent provisions, constituting two different sources of authority to enact delegated legislation. It is section 32 (1) alone which empowers the Minister to make rules "for the purpose of carrying out the provisions of [the] Ordinance"; subsection (2) does not confer any new or additional power, but only spells out some of the subjects on which such rules may be made. That is not in order to expand the scope of subsection (1), but solely to preclude any argument that the subjects stipulated in subsection (2) fall outside the general words conferring the rule-making power.

It was his next contention that notification No. 833 was not a set of "rules", but only an "Excise Notification", for which the only requirement was (in terms of section 60 (1) of the Ordinance) publication in the *Gazette.* "Excise Notification" is defined in section 60 (4) to mean a notification made or issued under the Ordinance, or for the purpose of the Ordinance. The notification No. 833 deals with the conditions for the issue of licences. Nowhere does the Ordinance authorise or permit such conditions to be prescribed by means of a

notification. Such conditions can only be prescribed by rules (see sections 32 (2) (*g*), (*h*) and (*l*)). Learned state counsel then tried to fall back on section 25 (*d*), which provides that every licence shall be "in such form and contain such particulars as the Minister may direct . . .". That is a provision which deals only with matters of form, and it is section 25 (*c*) which refers to restrictions and conditions, which – it is plain from section 32 (2) – the Minister may certainly prescribe, but only by means of rules.

In making those three contentions, what learned state counsel was trying to do was to interpret several different provisions of the Ordinance, narrowly and in isolation, in an attempt to persuade us that salutary provisions for Parliamentary control of delegated legislative power were inapplicable. Not only are those interpretations plainly untenable even in isolation, but when the relevant provisions are considered, as they must be, in the context of the Ordinance taken as a whole, it is very clear that the preconditions for the issue of a licence are a matter for rules and not for notifications, and that such rules acquire the force of law (subject to the specified exception in the case of urgency) only when Parliamentary confirmation is gazetted by means of a notification. Had there been any doubt, it is axiomatic that it had to be resolved in favour of Parliamentary control of delegated legislation, rather than freedom from such control.

Fourth, it was argued that this petition was filed out of time because the petitioner sought to challenge the notification No. 833 issued in November, 1997, only eight months later, in July, 1998. That is misconceived. The question of law that arises is not whether the notification was *ultra vires* or void (for lack of Parliamentary confirmation) at the time of publication in November, 1997, but the more limited question whether it had acquired the force of law on 9.3.98 or even on 13.6.98. The petitioner's cause of action was the attempt to apply that notification to him in June, 1998, and not its publication.

State counsel's fifth contention was that because the petitioner had applied for a licence in terms of the guidelines, and had used a form issued under those guidelines, he was not entitled to challenge the guidelines themselves. That is untenable: the petitioner had the right to apply for a licence under and in terms of the Ordinance, and if

the only form which the 1st respondent would issue for that purpose was one prescribed by the guidelines, the mere use of that form would not give rise to an estoppel or a waiver of rights. Much more is required to establish an estoppel or a waiver of rights. That contention is also factually unsound, because in SC Application No. 20/98 the petitioner expressly pleaded that the guidelines did not have the force of law, and it was with knowledge of that that the 1st respondent agreed to issue him an application form thereafter; he knew from the outset that there was no acquiescence or waiver by the petitioner.

Finally, it was urged that even if the notification No. 833 did not have the force of law, yet the 1st respondent had applied its provisions uniformly to all applicants including the petitioner, and that was a legitimate exercise of discretion. That is an inherently contradictory plea. The 1st respondent applied the principles and provisions of the notification not because he thought they were right or that he had any choice in the matter, but only because he thought they were valid and binding on him despite the lack of Parliamentary confirmation and subsequent notification. There was no independent exercise of his discretion under the Ordinance, but rather a total abdication of his statutory discretion in favour of the guidelines in the notification.

And even the notification he did not apply fairly. Thus his letter dated 8.5.98 did not – despite clause 10 – "require the applicant to show cause as to why he should be issued with a licence", and he thereby denied the petitioner even the limited right to a hearing which clause 10 purported to guarantee.

The 1st respondent even tried to justify the refusal of an application form, upon a complete distortion of the notification, claiming that the petitioner's request had been made after the closing date: and that was despite the settlement in SC Application No. 20/98. The only closing date stipulated in the notification is 15th December, and the petitioner's request for a form had been made before that date. Refusal on that ground was therefore capricious and perverse. Further, the 1st respondent deposed that he regarded the petitioner's application as a new one, and not for renewal; and that therefore he did not consider that the petitioner's application fell within clause 4 (*d*) (ie that it was not an application in respect of premises where licences had been in continuous operation for twenty years). Clause 1 (b)

stipulated a closing date only for applications for renewal, and not for new applications. If the 1st respondent had honestly believed that the petitioner's application was not for renewal, he could not have refused that application on the ground that it had been made after 15.12.97, and, *a fortiori*, he should not have refused the petitioner's request for an application form on that ground. Finally, clause 2 (*b*) deals with late *applications*, not with late *requests* for application forms. Admittedly, an application form is issued only upon payment of a fee of Rs. 5,000. If an application subsequently made, using that form, was in law belated, that application would be refused but the fee of Rs. 5,000 already paid would nevertheless remain in the coffers of the state. The refusal of a request for an application form, despite the loss to the revenue, seems inconsistent with the claim that the 1st respondent was endeavouring to apply the guidelines fairly; indeed, it points the other way. I must observe that this is by no means the only instance in which the 1st respondent refused requests for application forms: several fundamental rights applications have been made to this court during the past year in respect of such refusals, in which the grant of leave to proceed was not followed by judgments only because the 1st respondent then agreed to issue application forms.

Another unsatisfactory feature of the guidelines must be mentioned. Notification No. 833 was published only on 13.11.97. An application for a licence for 1998 could have been made on 15.12.97. But even if made with the utmost promptitude, on 13.11.97 itself, clause 10 gave the Commissioner-General eight weeks to convey his opinion, ie till 8.1.98. If that was unfavourable, an applicant had two weeks to appeal. But even if he appealed on 8.1.98, the Commissioner-General had another eight weeks for his decision, ie till 5.3.98. By that time two months of the year would have elapsed. It is arguable that reasonable guidelines should have ensured applicants an early decision before the commencement of the licensing year so that a successful applicant could commence business as soon as possible (providing a service to his customers, employment for his staff, profit for himself, and revenue for the state); and an unsuccessful applicant could apply for timely relief. Be that as it may, given the time limits stipulated, if fairness was the 1st respondent's objective, he would have acted much more expeditiously.

In view of the above conclusions it is unnecessary to consider Mr. Marapana's submissions that the guidelines were discriminatory, and that the distances specified were arbitrary and unreasonable.

The refusal of the petitioner's application for a licence was illegal because the 1st respondent applied the notification No. 833 as if it had the force of law, and did not exercise his statutory discretion; he denied the petitioner an opportunity of being heard in regard to that matter, and as to whether the distances from schools and places of worship were such as to disentitle him in law to a licence; and even if the notification did apply, he acted capriciously, arbitrarily and unreasonably. The petitioner was thus denied the equal protection of the law, and his right to livelihood infringed. I grant the petitioner a declaration that his fundamental rights under Articles 12 (1) and 14 (1) (*g*) have been infringed by the 1st respondent.

In considering what relief should be granted, I must take into account the fact that the 1st respondent has tried to use the guidelines as an instrument of harassment – by refusing an application form, delaying the communication of his initial response, denying an opportunity to show cause, and relying at every turn on technicalities. He should have been better advised from the outset.

The petitioner claims that he expected a monthly income of Rs. 20,000 from the business. He has been prejudiced by the undue delay in issuing an application form and in dealing with his application according to law. To direct the 1st respondent to consider the petitioner's application afresh would be futile, as the decision-making process lends itself to needless delay, and only another three months remain of the year 1998. I therefore award the petitioner a sum of Rs. 200,000 as compensation and Rs. 20,000 as costs, payable by the state. That must be paid, and proof of payment furnished to the registrar of this court, before 10.11.98, failing which the registrar is directed to list this application for an order of court in regard to enforcement.

WADUGODAPITIYA, J. – I agree.

BANDARANAYAKE, J. – I agree.

Relief granted.