

RATNAYAKE
v
COMMISSIONER-GENERAL OF EXCISE AND OTHERS

COURT OF APPEAL
SRIPAVAN, J.
C.A. 992/2003
NOVEMBER 6 , 2003

Writ of certiorari – Issue of liquor licence – Rule of audi alteram partem – Licence in continuous operation for over 10 years – Applicability of the distance rule – Non consideration of Regulations – Legitimate expectation – Does writ lie?

The petitioner had been carrying on the business of a retail liquor shop from 1987. The petitioner made an application for a licence for 2003 and was refused in May 2003 on the basis that a Muslim mosque is situated close to the petitioner's liquor shop.

The petitioner contended that he had a legitimate expectation to have his licence. No hearing was granted to the petitioner prior to making the impugned decision, that the construction of the mosque 10 years after the petitioner commenced his business is not a valid reason for the refusal and the authorities had not considered the relevant circular where it had been laid down that, when a licence has been in continuous operation for 10 years or more at the same location the distance rule will not be adhered to.

Held:

- (i) When refusing the petitioner's licence for 2002, the 1st respondent has failed to give an opportunity to the petitioner to controvert or contradict the report relied upon by the respondent.

"No man can incur a loss of property by judicial or quasi judicial proceedings unless and until he has had a fair opportunity of answering the complaint made against him"

- (ii) The refusal to issue the licence for the year 2003 is arbitrary, capricious and unreasonable, especially where the gazette marked P1 (14.11.2000) is silent as opposed to gazette marked P16 (22.09.2003). The petitioner had no control over the construction of the Muslim mosque 10 years after he commenced his liquor business.

APPLICATION for a *writ of certiorari*.

Cases referred to:

1. *Gamlathge Ranjit Gamlath v Commissioner General of Excise and others* - CA 1675/02 – CAM 28.03.2003
2. *Errington v Minister of Health* - (1935) 1 KB 249
3. *Schmidt v Secretary of State for Home Affairs* (1969) 2 Ch. 149 at 170.
4. *R v Flintshire County Licensing Committee ex. p Barret* (1957) 1 QB 350.
5. *General Medical Council v Spackman* – (1943) AC 627 at 644

Ronald Perera with *D. W. Johnthasan* for petitioner

Janak de Silva, State Counsel for respondents.

Cur.adv.vult

24 November, 2003

SRIPAVAN, J.

The petitioner carried on the business of a retail liquor shop at premises No. 34, Ragala, Halgranoya under the name "Dilani Foreign Liquor Shop" from 1987 until 1994. When the petitioner's liquor licence was not renewed in 1995, the petitioner instituted a fundamental rights application and upon a direction issued by the Supreme Court, the petitioner obtained the licence for the year 1995. Thereafter, in 1996, 1997 and 1998 the petitioner obtained the licence for the relevant years on the orders made by the Supreme Court. Thus, the petitioner alleges that he continued his retail liquor business at the aforesaid address without a break.

When the petitioner's liquor licence for the year 2002 was refused, he filed C. A. Appl 1670 / 2002 and this court by way of an interim order allowed the petitioner to carry on his liquor business till 31st December 2002. It is common ground that the issuance of liquor licences from 1st January 2002 is governed by the Excise Notification No. 837 and published in the Government Gazette (Extraordinary) 1158/31 dated 14th November 2000 marked P1. Even though the petitioner made an application for a liquor licence for the year 2003 in terms of the said Notification marked P1, he did not receive any reply

till May 2003. A letter dated 23rd May 2003 sent by the third respondent was received by the petitioner on 30th May 2003 according to which the licence was refused on the basis that a Muslim Mosque is situated close to the petitioner's liquor shop in violation of P1. The petitioner seeks to quash the said letter dated 23rd May 2003 (P12) on the following grounds: 20

- (a) that the petitioner has been carrying on the said liquor shop in the same location for several years and as such he has a legitimate expectation to have the liquor licence renewed without any hindrance.
- (b) that no valid hearing was granted to the petitioner by the respondents prior to the making of the impugned decision marked P12. 30
- (c) that the construction of the Muslim Mosque ten years after the petitioner commenced his liquor business is not a valid reason for the refusal of his licence; and
- (d) that in any event, commencing from 1st January in terms of the Excise Notification No. 859 published in the Government Gazette (Extraordinary) 1307/3 dated 22nd September 2003 marked P16, premises where a licence has been in continuous operation for ten years or more at the same location, the distance rule will not be adhered to. 40

It is relevant to note that with the guidelines and conditions referred to in P16 coming into force, the Excise Notification 837 (P1) is rescinded and all categories of licences shall be issued in accordance with P16. When cancelling the petitioner's licence for the year 2003, the first respondent has failed to give an opportunity to the petitioner to controvert or contradict the report marked 1R5. This conduct on the part of the first respondent in fact contravenes the cabinet decision marked 1R1. I would like to quote a paragraph from my own judgement in *Gamlathge Ranjith Gamlath v Commissioner General of Excise and two others*⁽¹⁾. 50

"It is one of the fundamental principles in the administration of justice that an administrative body which is to decide must hear both sides and give both an opportunity of hearing before a decision is taken. No man can incur a loss of property by judicial or quasi-judicial

proceedings unless and until he has had a fair opportunity of answering the complaint made against him. Thus, objectors at public inquiries must be given a fair opportunity to meet adverse evidence, even though the statutory provisions do not cover the case expressly. (Vide *Errington v Minister of Health*)⁽²⁾. The court would certainly regard any decision as having grave consequences if it affects proprietary rights. In *Schmidt v Secretary of State for Home Affairs* ⁽³⁾ at 170 Lord Denning M. R. suggested that the ambit of natural justice extended not merely to protect rights but any legitimate expectation of which it would not be fair to deprive a person without hearing what he has to say'. 60

Where a refreshment licence was refused to a theatre which had enjoyed it for over fifty years on the ground that it should be treated equally with a new theatre where an application has been refused and because there were other facilities nearby, the Court observed that the licensing committee were held to have given too little weight to the fifty years' enjoyment and too much to rigid consistency. (Vide *R v Flintshire County Licensing Committee ex. p Barrett*).⁽⁴⁾ 70

On an undertaking given by the learned State Counsel on 24th July 2003 an inquiry was held on 13th August 2003 by a committee presided over by the fourth respondent. According to the report of the said committee marked P14, it would appear that the committee too recommended that the petitioner's application for a FL4 licence for the year 2003 be considered. However the first respondent has refused the licence to the petitioner as evidenced by the letter dated 29th August 2003 marked P15. 80

This court is of the view that the petitioner had no control over the construction of the Muslim Mosque ten years after he commenced his liquor business (Vide P13). The petitioner's application for the renewal of his licence for the year 2003 was refused due to no fault of the petitioner. The petitioner should not be penalised on an unreasonable basis. Nobody, of course can dispute that the first respondent has a discretion in the matter. It is a discretion to be exercised reasonably, fairly and justly. It would appear that the first respondent issued the licence to the petitioner in the year 2002 upon the recommendations of the relevant officials including the fourth respondent. The said licence was cancelled subsequently on an arbitrary basis violating the principles of natural justice. "If the principles of natural justice are vio- 90

lated in respect of any decision it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision". - *per* Lord Wright in *General Medical Council v Spackman*.⁽⁵⁾

Considering the totality of the material placed before this Court, I am of the view that the first respondent's refusal to issue the FL4 licence to the petitioner for the year 2003 is arbitrary, capricious and unreasonable especially where the gazette marked P1 is silent (as opposed to the Gazette marked P16) with regard to situations where a place of public religious worship is established subsequent to the issue of a licence to a business premise. 100

In the circumstances, a *writ of certiorari* is issued quashing the documents marked P12 and P15 dated 23rd May 2003 and 29th August 2003 respectively. A *writ of mandamus* is issued on the respondents directing them to issue the FL4 licence, forthwith to the petitioner for the balance period in the year 2003 upon payment of the licence fee by the petitioner on a pro-rata basis. The petitioner is also entitled to costs in a sum of Rupees 7500 payable by the first respondent. 110

Application allowed.