CEYLON OXYGEN LTD.
v
BIYAGAMA PRADESHIYA SABHAWA AND OTHERS

COURT OF APPEAL
SRISKANDARAJAH, J.
CA 501/2005
MARCH 14, 21, 28, 29-2007
JUNE 4, 2007

Pradeshiya Sabha Act No.15 of 1987 – Sections 2(3), 157(2), 158, and 160, Levying of rates on immovable property – Seizing of movable property legality – No reason given – Not pleaded – Consequences? – Seizure under warrant – No specific authority to seize an item – Ultra vires? – Disputed questions of fact – Writ lies?

The respondent issued a statutory notice of assessment indicating that, the machinery and plant were considered as immovable property. The petitioner contended that, the said plant/machinery is movable property and therefore not liable for tax under Section 157 (2). Subsequently the respondent seized a browser containing liquid Nitrogen, as the tax was not paid. The petitioner challenged the said seizure and the order to pay tax on the plant and machinery.

It was contended that, the respondents had not given any reasons for the decision and that, at the point of seizing the bowser the revenue officer was not conferred with any statutory power to come to any decision or to make a determination to seize a particular item. It was further contended that, Section 157 authorizes the Pradeshiya Sabhawa to levy tax on immovable property and not on movable property.

Held:

(1) The petitioner has not challenged the impugned order in the petition on the ground that no reasons were given for the said decision. If this ground was raised in the petition the respondents would have had an opportunity to disclose the reasons to support the said decree.

In the absence of a specific statutory provision to give reasons, reasons need be communicated but if the reasons are given and if it is in the file of the relevant authority would be substantiate compliance with the requirement of the duty to give reasons.

Per Sriskandarajah, J.
"The failure of the petitioner to raise the objection in the petition had deprived the respondent from disclosing reasons in support of his decision ..... this objection cannot be considered by Court.

Held further:

(2) The main challenge to the decision is on the basis that the plant machinery and the fixtures in the said property are movable property. This is a disputed question of fact and it cannot be determined in these proceedings. The appropriate forum to determine whether the plant, machinery and the fixtures are movable properties in the District Court.

(3) It is revealed that the seizure was under Section 158 (1) in terms of a warrant signed by the 3rd respondent issued to the 4th respondent. The 4th respondent – Revenue Inspector was not given specific authority to seize the bowser under the warrant but was given a general authority to seize movable property. When executing the warrant the 4th respondent had used his discretion and decided to seize the bowser which contains Nitrogen – this act of seizing the bowser is *ultra vires* the provisions of Section 160 – as the bowser seized is a restricted article under Section 160 of the Act.

APPLICATION for a writ of certiorari.

Cases referred to:

1) *Thajudeen* v *Sri Lanka Tea Board and another* 1981 2 Sri LR 471.
2) *R* v *Fulham etc Rent Tribunal exp Zerek* 1951 2 KB.
3) *R* v *Home Secretary exp. Zamir* 1980 A1 930-949.
4) Abayadeera v *Dr. Stanley Wijesundera Vice-Chancellor University of Colombo* 1983 2 Sri LR 767.
5) *Culasubadhara* v *University of Colombo* 1985 1 Sri LR 244.
6) *J.B. Textile Ltd.* v *Ministry of Finance and Planning* 1981 2 Sri LR 238.
7) *Kusumawathie and others* v *Aitken Spence and Another* 1996 2 NLR 18.
8) *Yassen Omar* v *Pakistan International Lines Corporation Ltd.* 1999 2 NLR 375.
9) *R* v *Higher Education Funding Council ex parte Institution of Dental Surgeons.*
10) *R.* v *Civil Service Appeal Board ex parte Cunningham.*
11) *Doody* v *Secretary of State.*
12) *William Singho* v *AGA Matara* 41 NLR 215.
13) *De Silva* v *Konnamalai* 30 NLR 128.
14) *Fernando* v *Nelum Gamage Bribery Commissioner* 1994 3 Sri LR 194.
15) *R* v *Inland Revenue Commissioner, ex-parte Ross Minister Ltd.* 1980 Al 952.

Mohan Peiris PC with *Nuwanthi Dias* for petitioner.
Dr. Sunil Cooray for respondents.

September 3, 2007

SRISKANDARAJAH, J.

The petitioner is a public quoted company engaged in the business of production of industrial & medical gases and liquids. Its ancillary businesses include the trading of electrodes, transformers, medical equipments and imported gases. The petitioner in May 1998 established and commissioned an air separation plant at Sapugaskanda Biyagama industrial estate. The petitioner submitted that the air separation plant is mounted on the base of a container with a vertical cold box being bolted to the ground and the pre-liquid storage tank stands on the ground. The control panel is also mounted inside the container. In terms of the Pradeshiya Sabhas Act No. 15 of 1987 a Pradeshiya Sabha "may, subject to the approval of the minister, impose and levy a rate on the annual value of any immovable property or any species of immovable property situated in localities declared by the Pradeshiya Sabha." By gazette notification dated 3rd March 2000, the local authority published its intention of imposing a 5% tax on the annual value of the properties within its jurisdiction.

The petitioner was served with a statutory notice of assessment on the 7th of August 2000 for the years July 1998 to December 1998, 1999 and 2000. The petitioner disputed the said assessment on the basis that the said assessment had included the movable property in the said assessment namely; air separation plant and the petitioner indicated that it is willing to pay the tax on the immovable property. The position of the 3rd respondent is that the machinery and the plant were considered as immovable property and that the respondent would not be amending or reducing the amount already calculated. The petitioner had been served with another statutory notice of assessment on the 1st January 2001 for the same amount that was set out in the previous notice. The 3rd respondent made another request to pay the said amount stipulated in the earlier notice of assessment by his letter dated 2nd July 2001. On the 7th of February 2002 the 3rd respondent informed the petitioner that the 1st respondent would proceed to take steps in terms of Section 158 of the said Act in the event the petitioner failed to pay the tax as informed.

The petitioner submitted that the 1st respondent has failed and /or neglected to consider the several appeals made by the petitioner in

terms of the said Act and continued to demand the petitioner to pay the tax. The petitioner was served with a final notice dated 10.10.2003 before the seizure of the property. On the request of the petitioner the 3rd respondent by letter dated 30th October 2003 provided the petitioner the manner in which the property has been assessed and the breakdown of the sum claimed as tax. The petitioner was also served with the notice of assessment for the year 2004 on the same basis. The objections to the said assessments were investigated and a decision was communicated to the petitioner by letter dated 31.12.2004 by the 2nd respondent that no change to be made to the assessment already made. The petitioner submitted that on 11th March 2005 the 4th respondent arrived at the factory premises of the petitioner, seized and took into his custody a bowser containing liquid hitrogen.

The petitioner in this application has sought a writ of *certiorari* to quash the decision of the respondent to impose a tax on movable property of the petitioner (namely plant and machinery) as intimated by letter dated 31st December 2005, a *mandamus* to re-assess the petitioner's property in terms of the law and a writ of *certiorari* quashing the decision to seize the bowser of liquid nitrogen for the non-payment of tax.

The petitioner's main contention in the said application is that the imposition of tax on movable property (plant and machinery) is contrary to the provisions of the Act wherein it is expressly stated in Section 134(1) that "every Pradeshiya Sabha may subject to the approval of the Minister, impose and levy a rate on the annual value of any immovable property or any species of immovable property situated in locations declared by the Pradeshiya Sabha as built up locations. The respondent contended that the decision conveyed by the letter of 31.12.2004 has been made after the investigation held as required by Section 141(5) in the presence of the authorised representatives of the petitioner. The respondent has assessed the tax on the basis that the plant and machinery of the petitioner in the said premises are permanently affixed to the ground and are irremovable, and constitute immovable property within the meaning of the Pradeshiya Sabha Act.

The main challenge to the said decision is on the basis that the plant, machinery and the fixtures used by the petitioner in the said property are movable property and it cannot be considered as

immovable property. This is a disputed question of fact and this question cannot be determined in these proceedings. In *Thajudeen v Sri Lanka Tea Board and Another*[1] the Court held:

> *"Where the major facts are in dispute and the legal result of the facts is subject to controversy and it is necessary that the questions should be canvassed in a suit where parties would have ample opportunity of examining the witnesses so that the Court would be better able to judge which version is correct a writ will not issue."*

Devilin, J. in *R v Fulham etc. Rent Tribunal exp. Zerek*[2] held:

> *"Where the question of jurisdiction turns solely on a disputed point of law, it is obviously convenient that the court should determine it then and there. But where the dispute turns to a question of fact, about which there is a conflict of evidence, the court will generally declined to interfere."*

Lord Wilberforce in *R v Home Secretary exp. Zamir*[3] at 949 similarly described the position of the court, which hears applications for judicial review:

> *"It considers the case on affidavit evidence, as to which cross-examination, though allowable does not take place in practice. It is, as this case will exemplify, not in a position to find out the truth between conflicting statements."*

On the other hand the Pradeshiya Sabha Act under Section 142(1) provides that any person aggrieved by the decision of the assessment of any property could institute an action in the District Court. Section 142(3) provides that every such court shall hear and determine such action according to the procedure prescribed by law for the time being in force, for the hearing and determination of civil action and that decision of such court shall in all cases be subject to appeal to the Court of Appeal. Hence the District Court is the appropriate forum to determine whether the plant, machinery and the fixtures used by the petitioner in the said property are movable property or immovable property under the given circumstances.

The petitioner at the stage of argument challenged the said decision on the basis that no reasons have been given for the decision which was conveyed to the petitioner by letter dated

31.12.2004 and therefore the decision is bad in law. The respondents objected to this submission as the petitioner is not entitled, at the stage of the argument, to rely on a ground which it has not pleaded in its petition. The respondent in support of this contention relied on the judgments delivered in *Abayadeera* v *Dr. Stanley Wijesundera, Vice-Chancellor, University of Colombo*[4]; *Culasubadhara* v *University of Colombo*[5]; *J.B. Textiles Industries Ltd.* v *Ministry of Finance and Planning*[6]. The respondents further submitted that the scheme of the Act neither provides for an inquiry nor did it make provision for any evidence to be led in support of the objections to the assessment.

Section 141(4) provides: *"The Pradeshiya Sabha shall cause to be kept a book to be called the "Book of Objections" and cause every objection to an assessment or verification to be registered therein. The Pradeshiya Sabha shall cause to be given notice in writing to each objector and the owner or occupier of the house, building, land or tenement or cultivated land of the day on which and the place and the time at which the objections will be investigated".* This section provides only for an investigation of an objection to an assessment. It further provides in subsection (5). "At the time and place so fixed the Pradeshiya Sabha shall cause to be investigated the objections in the presence of the objector, owner and occupier or their authorized agents who may be present. Such investigation may be adjourned from time to time for reasonable cause". This section does not even mandate the presence of the objector when his objection is investigated and subsection (6) provides that the decision to be notified to the objector. But the Act provides for the challenge of the assessment in the District Court under Section 142 of the said Act and in that proceedings the objector has a right to be heard and he also has a right for a reasoned decision.

The issue whether in the absence of a specific statutory requirement to give reasons the Commissioner has to communicate his reasons in compliance with the principles of natural justice was considered in *Kusumawathie and others* v *Aitken Spence and Co. Ltd. and Another*[7]. In this case S.N. Silva, J. (as he then was) held:

> "The finding that there is no requirement in law to give reasons should not be construed as a gateway to arbitrary decisions and orders. If a decision that is challenged is not a speaking order,

when notice is issued by a Court exercising judicial review, reasons to support it have to be disclosed. Rule 52 of the SC Rules 1978 – is intended to afford an opportunity to the respondents for this purpose; the reasons thus disclosed form part of the record and are in themselves subject to review. Thus if the Commissioner fails to disclose his reasons to Court exercising judicial review, an inference may will be drawn that the impugned decision is *ultra vires* and relief granted on this basis".

In *Yaseen Omar* v *Pakistan International Airlines Corporation*[8]

Bandaranayake, J. held: that the Court of Appeal erred in setting aside the impugned order on the ground that giving of reasons is *sine qua non* for a fair hearing. In this Judgment Bandaranayake, J. observed:

"In *R* v *Higher Education Funding Council, ex parte Institute of Dental Surgery*[9], the Queen's Bench Division had examined the decisions in *R* v *Civil Service Appeal Board, ex parte Cunningham*[10], *Doody* v *Secretary of State for the Home Department*[11] and several other judgments regarding the need to give reasons for the decision. In this case the respondent council, which was established by Section 131 of the Education Reform Act 1988, was responsible for administering state funding for the provision of education and research by universities. By Section 131(6) the council had power to make grants for research to universities. The council appointed a panel of academic specialists to assess and rate universities and other research institutions falling within the council's remit for the purpose of providing funding on the basis of the quality of the research undertaken. In 1992 the applicant institute, a university college entirely dedicated to post-graduate teaching and research in dentistry, was rated 2.0 on a 5 point scale. The applicant institute had previously been rated 3.0 and the lower rating was directly reflected in a reduction in funding of approximately 270,000 sterling pounds. No reasons were given for the reduction in the applicant institute's rating and in further correspondence the chief executive of the council refused to disclose the panel's reasons for the lower rating and refused to consider any appeal against the assessment unless it was shown that the assessment had been made on the basis of erroneous information. The applicant institute applied for judicial

review of the council's decision to assess its rating as 2.0 contending, *inter alia*, that the council had acted unfairly in failing to give reasons for its decision and stating that in the absence of its reasons its decision was irrational.

It was held that there was no duty cast on administrative bodies to give reasons for their decisions either on general grounds of fairness or simply to enable any grounds for judicial review of a decision to be exposed. After an exhaustive examination of the legal position relating to the 'duty to give reasons', Sedley, J. stated in a summary that-

1. there is no general duty to give reasons for a decision, but there are classes of cases where there is such a duty;
2. one such class is where the subject-matter is an interest so highly regarded by the law – for example personal liberty – that fairness requires that reasons, at least for particular decisions, be given as of rights.
3. another such class is where the decision appears aberrant."

In this application the petitioner has not challenged the impugned order in the petition on the ground that no reasons were given for the said decision. If this ground was raised in the petition the respondent would have had an opportunity to disclose the reasons to support the said decision when notice is issued by this Court. In the absence of a specific statutory provision to give reasons the reasons need not be communicated but if the reasons are given and if it is in the file of the relevant authority would be substantial compliance with the requirement of the duty to give reasons. The failure of the petitioner to raise this objection in the petition had deprived the respondent from disclosing reasons in support of his decision. Hence the petitioner's objection which was raised first time at the stage of argument that no reasons was given for the impugned decision cannot be considered by this Court.

The petitioner has also challenged the seizure of the said bowser as *ultra vires* and illegal on the basis that section 160 of the Pradeshiya Sabha Act mandates that "no property of any class or description set out hereunder shall be seized or sold in execution of any warrant issued under this Act" which includes "the tools, utensils

and implements of trade or business of such person..." The petitioner contended that the respondents have seized the petitioner's implements of trade (a bowser containing liquid nitrogen) in total disregard to and contrary to the express provisions of the said Act.

The respondent contended that the words "the tools, utensils and implements of trade or business of such person ...." have been in our statute book long prior to being incorporated in the Pradeshiya Sabhas Act. Similar words in Section 218(b) of the Civil Procedure Code have been interpreted in *William Singho* v *A.G.A. Matara*(12) that the words "tools, utensils and implements of trade or business" are qualified by the words" as may be reasonably necessary to enable him to earn his livelihood as such". In *Dr. Silva* v *Konamalai*(13) it was held that a large fishing board is not an implement of trade of a fisherman. In view of the above interpretation the bowser seized is not restricted from seizure under Section 160 of the said Act.

The decision in *De Silva* v *Konamalai (supra)* cannot be directly applied to this case as words in Section 218 of the CPC are different from the words used in Section 160 of the Pradeshiya Sabha Act.

Civil Procedure Code in Section 218 when describing the properties that are not liable to be seized, in Section 218(b) provides; "tools, utensils and implements of trade or business .... as may **in the opinion of the Court** be necessary to enable him to earn his lively hood:

Section 160 of the Pradeshiya Sabha Act when describing the properties that are not liable to be seized in Section 160(b) provides: "the tools, utensils and implements of trade or business of such person .... as may be reasonably necessary to enable him to earn his lively hood;

Unlike in Section 218(b) of the Civil Procedure Code, Section 159 read with Section 160 of the Pradeshiya Sabha Act does not permit the authority exercising the powers under these sections to form an opinion as to whether a particular property is reasonably necessary to enable him to earn his livelihood.

As contended by the petitioner it is primarily engaged in the business of production of industrial & medical gases and liquids, namely oxygen, nitrogen, nitrous oxide, carbon dioxide, dry ice

dissolved acetylene and the petitioner has three bowsers out of which two are used for the storage of liquid nitrogen whilst the other is used for the storage of liquid oxygen and in the absence of any other material contrary to this position, the respondent cannot come to the conclusion that the bowser is neither a tool, utensil, or implements of the trade or business of the petitioner nor that the bowser seized is not reasonably necessary to enable the petitioner to earn his livelihood. Hence the court holds that the bowser seized is a restricted article under Section 160 of the said Act.

The learned Counsel for the respondent submitted that in any event the act of seizing the bowser cannot be quashed by Certiorari for the reason that at the point of seizing the bowser, the revenue officer of the Pradeshiya Sabha is not conferred with any statutory power to come to any decision or to make a determination about anything. He relied on the Judgment of the Supreme Court in *Fernando* v *Nelum Gamage, Bribery Commissioner*(14) it was held that the decision of the investigating police officer to make an application to the Magistrate to make an order to assist the conduct of a criminal investigation (including an order for the holding of an identification parade) is not amenable to *certiorari*. The learned Counsel submitted that the Court came to this conclusion because at this stage the state did not require the investigating police officer to come to any finding, decision or determination before making such application. In reply to the submissions of the learned President's Counsel for the petitioner that the decision to seize is a decision amenable to judicial review and the citation of the judgment of *R.* v *Inland Revenue Commissioners, Exparte Ross Minister Limited*(15) in support of this contention, the learned Counsel for the Respondent contended that in the said case the officers of the inland revenue had exceeded the powers expressly conferred on them by Section 20(c) of the Taxes Management Act of 1970 to seize and remove during the search of a premises on a search warrant "anything whatsoever found there" which they had "reasonable cause to believe may be required as evidence of a tax fraud" and the matter in issue in the said case is not the decision to seize.

The facts and circumstances of the instant case reveals that the seizure under Section 158(1)(a) of the said Act took place in terms of a warrant dated 10.1.2005 signed by the 3rd respondent and issued

to the 4th respondent. The 4th respondent was not given specific authority to seize the bowser under the said warrant but he was given a general authority to seize the movable property of the petitioner. When executing the said warrant the 4th respondent had used his discretion and decided to seize the bowser which contains nitrogen. This decision to seize the bowser is *ultra vires* to the provisions of Section 160 of the said Act as discussed above. Hence this Court issues a writ of *certiorari* quashing the decision to seize the bowser of the petitioner for non-payment of tax.

This application is allowed without costs, only in relation to the above relief.

Writ of certiorari quashing the decision to seize the bowser for non-payment of tax issued.

Application partly allowed.