

W. M. MENDIS AND CO., LTD.
v.
COMMISSIONER-GENERAL OF EXCISE

COURT OF APPEAL
TILAKAWARDANE, J.
CA NO. 757/98
MARCH 25, 2002

Excise Ordinance, No. 8 of 1912, sections 21 and 31 – Due compliance with regulations – Is there a public duty envisaged under section 21? – Public duties cast on Commissioner-General of Excise – Outdated legislation/regulations.

The petitioner sought a writ of *mandamus* directing the respondent to take necessary steps to ensure that a label containing the term “Old Arrack” or a similar name with reference to age, the age of the arrack to be stated in years. It was contended that in terms of section 21 of the regulation, if the label contains any words indicating age, the age shall be stated in years, and shall be that of the youngest liquor in this kind.

Held :

- (1) Section 21 (F) imposes a public duty on the 1st respondent to take necessary steps to ensure compliance with the essential requirements laid down therein. The word used in the applicable rules is “shall” which means it is clear that the rules were imposed as mandatory requirements.
- (2) When legislation or a regulation passed by the legislature becomes outdated it is the duty of the legislature to amend such outdated legislation to suit the requirements of the present time.

Per Tilakawardane, J.

“There is an urgent need to amend the relevant regulations and it is the task that should be accomplished through the legislature.”

APPLICATION for a writ in the nature of *mandamus*.

Cases referred to:

1. *Welligama Multi-Purpose Co-operative Society v. Chandradasa Daluwatte* – (1984) 1 Sri LR 195 at 199.
2. *Tanson v. Driefontein Consolidated Mines Ltd.* – (1902) AC 484 500.

Romesh de Silva, PC, with *Hiran de Alwis* for petitioner.

Sathya Hettige, Deputy Solicitor-General with *Mahen Gopallawa*, State Counsel for Attorney-General.

Cur. adv. vult.

December 13, 2002

SHIRANEE TILAKAWARDANE, J.

Petitioner has filed this application seeking a writ of *mandamus* ⁰¹ directing the respondent to take necessary steps to ensure that a label containing the term 'Old Arrack' or a similar name with reference to age, the age of Arrack to be stated in years and shall be of the youngest liquor in the blend.

Petitioner is admittedly a limited liability Company and is engaged in the business of manufacturing and distributing liquor.

The petitioner's case was that by virtue of *Gazette* notification dated 13. 11. 1936, an Excise notification No. 305, marked (XI) was published containing regulations in terms of the Excise Ordinance, No. 8 of 1912. ¹⁰ In terms of section 21 of the said regulation, "if the label contains any words indicating age, the age shall be stated in years, and shall be that of the youngest liquor in the blend". The averment of the petitioner was that although this is a mandatory requirement several manufacturers and distributors of Old Arrack had not complied with the said requirement. So the gravamen of the argument of the petitioner was that despite several communications made to the Commissioner-

General of Excise, the respondent, no action was taken to see that due compliance with the said regulation was carried out. The crux of the matter is whether the said regulation requires mandatory compliance and if so whether the respondent has failed in his statutory duty to take steps to enforce the said regulation. 20

The averments of the respondent was that no public duty was envisaged by section 21 of the said regulation, so as to be enforced by a writ of *mandamus*. Counsel for the respondent has cited the authority *Weligama Multi-Purpose Co-operative Society Ltd. v. Chandradasa Daluwatta* at 199 where Sharvananda, J. stated that "*Mandamus* lies to secure the performance of a public duty, in the performance of which an applicant has sufficient legal interest. To be enforceable by *mandamus* the duty to be performed must be of a public nature and not of merely private character". 30

The first issue to be considered is whether there is a public duty cast upon the respondent by section 21 (F) of the said Excise Notification No. 305. The second issue is whether the petitioner has sufficient legal interest to enforce such public duty. Respondent has contended that the words used in the said section 21 (F) is merely directory and it is not mandatory as alleged by the petitioner. One important fact that has to be kept in mind is that when interpreting a statute or a regulation made in pursuance of the powers vested by a statute, it is unwise to consider a provision in isolation and a provision must necessarily be interpreted after considering all the other provisions and the purpose of a statute or a regulation. The Excise Notification No. 305 was issued under the powers vested by section 31 of the Excise Ordinance, No. 8 of 1912. 40

On a perusal of the said regulation it is clear that it was introduced with the intention of controlling and regulating the manufacture and distribution of liquor. The word used in the applicable rules is "shall" which makes it clear that the rules were imposed as mandatory requirements.

The first word used in the heading of section 21 is "essential" 50
particulars in a label. The only conclusion that can be drawn is
that section 21 (F) imposes a public duty on the 1st respondent
to take necessary steps to ensure compliance with the "essential"
requirements laid down therein. The respondent has contended that
on the basis of R1, a label dated 1996 of the petitioner's product
that the petitioner itself has not adhered to rule 21 (F). It was also
contended that the petitioner had repeatedly flouted the provisions of
Excise Notification No. 832.

What is significant is that the mere fact the petitioner flouted the
Excise regulations and that the respondent has not taken action means 60
that the respondent has failed to carry out its duties and does not
taint this application of the petitioner nor the respondent's powers to
deal with such contravention of the regulations by the petitioner
accordingly. The respondent cannot on that basis justify its failure to
carry out the public duty of being vigilant to the compliance of these
Excise regulations.

The next important contention raised, relates to the disastrous and
destabilizing effects that would have on the entire liquor manufacturing
industry if the relief claimed by the petitioner is to be granted. Besides,
very unfavourable consequences like the petitioner having a monopoly 70
and the small scale manufacturers being swept aside from the market,
the respondent points out that such relief granted would cause
substantial loss of revenue in excise duties to the State.

What must be noted here is that when a legislation or regulation
passed by the legislature becomes outdated, it is the duty of the
legislature to amend such outdated legislation to suit the requirements
of the present time.

It is a well-accepted rule of interpretation that where a statutory provision is clear and unambiguous, the words should be interpreted accordingly.

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Therefore, there is an urgent need to amend the relevant regulation as also being pointed out by the respondent and it is the task that should be accomplished through the legislature.

As Wade on *Constitutional and Administrative Law*, 10th edition, page 59 states the classification of the powers of government into legislative, executive and judicial powers involves many conceptual difficulties and within a system of government based on law, it remains important to distinguish its constitutional structure between the primary functions of law making, law executing and law adjudicating. If these distinctions are abandoned, the concept of law itself can scarcely survive.

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Craies on *Statute Law*, 7th edition, page 176 cites Lord Davey in *Tanson v. Driefontein Consolidated Mines Ltd.*⁽²⁾ where he states "public policy is always an unsafe and treacherous ground for judicial decision, and its application is difficult if not mischievous". Also quotes Burroughs, J. in *Fauntleroy's case* where it is said that public policy "is a restive horse and when you get astride on it, there is no knowing where it will carry you".

On the basis of these authorities and also on the basis of the facts discussed by the respondent wherein he has established that there is a need to change the regulation embodied in Excise Notification No. 305, it becomes clear that it is a task which is entrusted to the legislature.

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However, in applying the law as it is, where anything on the label which connotes age, like "Old Arrack", it is mandatory for the respon-

dent to seek compliance with the regulation referred to above. This states that where words indicate age, the age shall be specified and shall be of the youngest liquor in the blend. The word old has a specific reference to age, as the older the liquor, stronger is the ultimate product. Not to do so, could mislead the consumer. Therefore, this Court issues a writ of *mandamus* directing the respondent to take necessary steps to ensure that a label containing the terms "old arrack", or a similar term which refers or connotes to the age of the arrack, its age should be stated in years and such specification shall be of the youngest liquor in the blend. Application allowed with costs. 110

Application allowed.