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

In the matter of an application for mandates in the nature of Writs o Certiorari and Prohibition under and in terms of Article 140 of the Constitution

W.M. Mendis Company Ltd.

No. 309/5 Negombo Road,

Welisara.

Petitioner

Case No. CA (Writ) 256/2013

Vs.

01. D.G.M.V. Hapuarachchi,
Commissioner General of Excise,
Department of Excise,
No. 34, W.A.D. Ramanayake Mawatha,
Colombo 02.

1A. L.K.G. Gunawardena,
Commissioner General of Excise,
Department of Excise,
No. 34, W.A.D. Ramanayake Mawatha,
Colombo 02.

1B. A. Bodaragama,
Commissioner General of Excise,
Department of Excise,
No. 34, W.A.D. Ramanayake Mawatha,
Colombo 02.

1C. Mrs. K.H.A. Meegasmulla,
Commissioner General of Excise,
Department of Excise,
No. 34, W.A.D. Ramanayake Mawatha,
Colombo 02.

02. A. Bodaragama,
Deputy Commissioner of Excise,
Department of Excise,
No. 34, W.A.D. Ramanayake Mawatha,
Colombo 02.

2A. A. Wasantha Dissanayake,
Deputy Commissioner of Excise (Revenue),
Department of Excise,
No. 34, W.A.D. Ramanayake Mawatha,
Colombo 02.

03. M.D. Nandasiri,
Deputy Commissioner of Excise (Revenue),
Department of Excise,
No. 34, W.A.D. Ramanayake Mawatha,
Colombo 02.

04. W.M.D. Bandara,
Deputy Commissioner of Excise (Finance),
Department of Excise,
No. 34, W.A.D. Ramanayake Mawatha,
Colombo 02.

4A. B.A.P.P. Chitrananda,
Deputy Commissioner of Excise (Finance),
Department of Excise,
No. 34, W.A.D. Ramanayake Mawatha,
Colombo 02.

Respondents

Before: Janak De Silva J.

Counsel:

Sanjeewa Jayawardena P.C. with Kamran Aziz for the Petitioner

Suren Gnanaraj SSC for the Respondents

Written Submissions Filed On:

Petitioner on o3.07.2018 and 30.05.2019

Respondents on 03.09.2018 and 02.05.2019

Argued On: 11.03.2020 and 04.09.2019

Decided On: 26.05.2020

Janak De Silva J.

The Petitioner at all times material to this application has been engaged in the business of distilling, manufacturing, bottling, distributing and marketing varieties of arrack under licenses issued in terms of the Excise Ordinance. It manufactures inter alia three varieties of arrack which are blends of processed coconut arrack and potable alcohol. They are:

(a) GOLD LABEL arrack which is a blend of 10% processed coconut arrack and 90% rectified spirits since 1983,

(b) VAT 88 arrack which is a blend of 10% processed coconut arrack and 90% rectified spirits since 1988,

(c) RED LABEL arrack which is a blend of 10% processed coconut arrack and 90% rectified spirits since 1986.

In this application the Petitioner is seeking a writ of certiorari quashing the decision contained in Excise Notification issued by the 1st Respondent dated 31st May 2013 (X14) and a writ of prohibition preventing the Respondents from taking any further steps pursuant to the said Excise Notification. By this notification a demand has been made from the Petitioner to pay the following amounts:

(i) A sum of Rs. 27,057,661.79 for the period between February 1994 and December 1994,

(ii) A sum of Rs. 16,934,887.66 for the period between January 1995 and September 1995,

(iii) A sum of Rs. 292,113,485.23 as late payment charges.

The Petitioner claims that this demand is unlawful, unjustifiable, unreasonable and arbitrary.

According to the Respondents this claim arises from an application made by the Petitioner in CA (Writ) Application No. 150/94 where a writ of certiorari was sought to quash a determination made by the Commissioner General of Excise to levy or enforce a charge beyond what was lawfully due from the Petitioner. The challenge was to the decision of the Commissioner General of Excise to charge excise duty on the above three products of the Petitioner at the rate applicable to "coconut and processed arrack". This was dismissed on 11.09.1995 (X1).

On or about the same day i.e. 11.09.1995, the Petitioner instituted action in the District Court of Colombo against W.N.F. Chandraratne, the then Commissioner of Excise in Case No. 16919/MR praying for the recovery of an aggregate sum of Rs. 45,998,113.96 on account of money already paid. Altogether there were twenty two causes of action based on unjust enrichment. After a prolonged litigation, this action was dismissed on two preliminary issues on 04.05.2001. The preliminary issue was whether the plaint did not comply with section 456 of the Civil Procedure Code.

The Petitioner appealed to this Court and it was heard and concluded by the Provincial High Court of the Western Province holden in Colombo exercising Civil Appellate jurisdiction which by judgment dated 15.10.2008 set aside the order of the District Court. The Commissioner General of Excise sought and obtained leave to appeal from the Supreme Court which by judgment dated 08.06.2012 allowed the appeal, set aside the judgment of the Provincial High Court of the Western Province holden in Colombo and confirmed the order of the District Court.

The Respondents claim that in CA (Writ) Application No. 150/94 initially the Petitioner obtained a stay order with effect from 18.03.1995 restraining the Commissioner General of Excise from recovering excise duty from the Petitioner on its aforesaid three varieties of arrack at the rate applicable to "Coconut and Processed Arrack" until the final determination of the case (R6). Hence the Commissioner General of Excise levied excise duty from the Petitioner on the aforesaid products proportionately according to the rates applicable to each component in the final product (i.e. 10% Coconut arrack and 90% Potable Alcohol) pending the final determination of the case (R7a and R7b).

Once the application of the Petitioner in CA (Writ) Application No. 150/94 was dismissed and after the Petitioner failed in securing Special Leave to Appeal, the Petitioner became liable to pay all the arrears of excise duty which had accrued for the period between February 1994 and September 1995 due to the Petitioner paying excise duty at a lower rate as a result of the stay orders which the Petitioner had obtained from this Court and the Supreme Court.

Therefore, the Commissioner General of Excise by letter dated 17.01.1996 (R10) sought to recover this outstanding excise duty at the rate applicable to "Coconut and Processed Arrack" according to the relevant excise notification. In response the Petitioner through its attorney-at-law by letter dated 29.01.1996 (R11) informed that it had filed action in the District Court of Colombo for the purpose of determining whether the impugned arrack manufactured by the Petitioner was in fact "processed arrack" for the purpose of levying excise duty and contended that in these circumstances it was unjustifiable to collect the excise duty at the rate claimed by the Commissioner General of Excise.

It is the position of the Respondents that the Commissioner General of Excise acceded to this request of the Petitioner and as soon as these proceedings concluded with the judgment of the Supreme Court on 08.06.2012, steps were taken to recover the outstanding amount together with the surcharge by letter dated 31.05.2013 (X14). It is at this point the Petitioner filed this application.

Suppression and/or Misrepresentation of Material Facts

The learned Senior State Counsel submitted that the Petitioner has failed to reveal the two letters R10 and R11 to Court and as such the Petitioner is guilty of suppression and/or misrepresentation of material facts and the application must therefore be dismissed in limine without going into the merits.

It is observed that the Petitioner in its counter affidavit, paragraph 5(e), (f) and (g) admits the document R11 and the meeting held on 17.06.2013 with the officers of the Department of Excise. There the Respondents had demanded the amount set out in X14 and had explained the reasons why recovery of such amounts were suspended which is due to the Petitioner's request in writing marked R11 to await the final decision of the D.C. Colombo Case No. 16919/MR.

The learned President's Counsel for the Petitioner countered by claiming that this ground is been raised for the first time in the written submissions. It was submitted that it is not a material fact and is an attempt of the Respondents to contrive to very conveniently blur the gravamen of the Petitioner's case.

However, the Respondents have in fact, pleaded at paragraph 12(b) of the statement of objections, that the Petitioner is guilty of suppression and misrepresentation of material facts.

It is trite law that discretionary relief will be refused by Court without going into the merits if there has been suppression and/or misrepresentation of material facts. It is necessary in this context to refer to the following passage from the judgment of Pathirana J in *W. S. Alphonso Appuhamy v. Hettiarachchi* [77 N.L.R. 131 at 135,6]:

> *"The necessity of a full and fair disclosure of all the material facts to be placed before the Court when, an application for a writ or injunction, is made and the process of the Court is invoked is laid down in the case of the King v. The General Commissioner for the Purpose of the Income Tax Acts for the District of Kensington-Ex-parte Princess Edmorbd de Poigns. Although this case deals with a writ of prohibition the principles enunciated are applicable to all cases of writs or injunctions. In this case a Divisional Court without dealing with the merits of the case discharged the rule on the ground that the applicant had suppressed or misrepresented the facts material to her application. The Court of Appeal affirmed the decision of the Divisional Court that there had been a suppression of material facts by the applicant in her affidavit and therefore it was justified in refusing a writ of prohibition without going into the merits of the case. In other words, so rigorous is the necessity for a full and truthful disclosure of all material facts that the Court would not go into the merits of the application, but will dismiss it without further examination".*

This principle has been consistently applied by our courts in writ applications. [*Hulangamuwa v. Siriwardena* [(1986) 1 Sri.L.R. 275], *Collettes Ltd. v.* Commissioner of Labour [(1989) 2 Sri.L.R. 6], *Laub v. Attorney General* [(1995) 2 Sri.L.R. 88], *Blanca Diamonds (Pvt) Ltd. v. Wilfred Van Els* [(1997) 1 Sri.L.R. 360], *Jaysinghe v. The National Institute of Fisheries* [(2002) 1 Sri.L.R. 277] and *Lt. Commander Ruwan Pathirana v. Commodore Dharmasiriwardene& Others* [(2007) 1 Sri.L.R. 24].

In fact, this rule has been applied so rigorously by Courts that an application wil be dismissed without going into the merits [*Athula Ratnayake v. Lt. Col. Jayasinghe* (78 N.L.R. 35), *Laub. v. Attorney-General and Another* (1995) 2 Sri.L.R. 88, *Walker Sons & Co. Ltd. v. Wijayasena* (1997)

1 Sri.L.R. 293, *Dahanayake and Others v. Sri Lanka Insurance Corporation Ltd. and Others* (2005) 1 Sri.L.R. 67].

In *Fonseka v. Lt. General Jagath Jayasuriya and Five Others* [(2011) 2 Sri.L.R. 372] a divisional bench of this Court held:

> *"(1) A petitioner who seeks relief by writ which is an extra-ordinary remedy must in fairness to Court, bare every material fact so that the discretion of Court is not wrongly invoked or exercised.*
>
> *(2) It is perfectly settled that a person who makes an ex parte application to Court is under an obligation to make that fullest possible disclosure of all material facts within his knowledge.*
>
> *(3) If there is anything like deception the Court ought not to go in to the merits, but simply say "we will not listen to your application because of what you have done."*

These authorities amply demonstrate that where the Petitioner has suppressed and/or misrepresented material facts in an application for judicial review, the Court can dismiss the application in limine without going into the merits of the matter. However, the suppression and/or misrepresentation must be of a material fact.

In *Hotel Galaxy (Pvt) Ltd. and Others v. Mercantile Hotels Management Ltd.* [(1987) 1 Sri.L.R. 5] where it was held:

> *"To justify the dissolution of an injunction the suppression or misrepresentation should be of "such a character as to present to court a case which was likely to procure the injunction but which was in fact different from the case which really existed"*
>
> ***Thus, a misstatement of the true facts by the plaintiff which put an entirely different complexion on the case as presented by him when the injunction was applied for ex parte would amount to a misrepresentation or suppression of material facts*** *warranting its dissolution without going into the merits".* (Emphasis added)

At the forefront of the case of the Petitioner is that since the action instituted by the Petitioner was dismissed as a result of the judgment of the Supreme Court, the Petitioner was under a legitimate expectation that the issue of overcharging of excise duty was concluded [paragraph 24 of the petition]. That is why in the very next paragraph of the petition the Petitioner goes on to state that the demand made by X14 was to its *"utmost shock, disbelief and dismay"*. These statements were made with the design of moving Court to accept that the issue of outstanding excise duties came to an end with the decision of the Supreme Court.

There must be a representation or holding out for a legitimate expectation to arise. The contents of R10 far from creating any legitimate expectation that the issue of outstanding excise duty is concluded made a specific demand of these dues. The letter R11 evidences that the Petitioner received R10 and made representations that recovery of such dues is unjustified in view of the action it had instituted.

It was also submitted (paragraph 27(h) of the petition) that the purported demand of the 1st Respondent has been made upon a non-operative notification and hence is ex facie unlawful. This is due to Excise Notification 744 having been repealed. However, if R10 was disclosed in the petition the Court would have been aware that a prior demand was made when the relevant Excise Notification was operative.

For the foregoing reasons, I hold that the Petitioner has suppressed and/or misrepresented material facts and as such this application must be dismissed in limine.

That is sufficient to dispose of the matter but for sake of completeness and with a view to providing finality to the issue that the Petitioner has dragged through Courts for over 25 years, I will consider the arguments on the merits as well.

The Petitioner contends that the Respondents have failed to act in terms of sections 34 and 75 of the Civil Procedure Code by not making a claim therein for the sums allegedly due as excise duty. The argument is that a claim in reconvention has the same effect as a plaint in a cross action and the whole of the claim should have been included as a cross claim by the Respondent in D.C. Colombo Case No. 16919/MR.

This submission is legally flawed for two reasons.

Firstly, it was the Petitioner who filed that action against the Commissioner General of Excise. However, the outstanding excise duty is owed by the Petitioner to the State. In terms of section 456 of the Civil Procedure Code, all actions by or against the State shall be instituted by or against the Attorney General. Hence it was not legally possible for the Commissioner General of Excise to make any claim on behalf of the State in that action. In fact this is the basis of the judgment of the Supreme Court (X9).

Secondly, section 75(e) of the Civil Procedure Code does not make it mandatory on a defendant to set up a claim in reconvention. However if he does, then it must comply with section 34 of the Civil Procedure Code.

The Petitioner further submits that the claim to the monies sought to be recovered from the Petitioner is in any event prescribed in terms of section 456 of the Penal Code. It is also submitted that such a claim is prescribed in terms of section 11 of the Prescription Ordinance.

The letter X14 which is impugned in this application is not an "action" or a "prosecution" but only a demand for the Petitioner to settle all outstanding excise dues. Therefore, neither the Prescription Ordinance nor section 456 of the Penal Code is of any relevance to the demand made by X14.

On the other hand it cannot be said that a public officer has acted ultra vires merely because he makes a demand on what is asserted to be a claim that is prescribed. Whether the action or prosecution or recovery proceedings are prescribed is a matter to be dealt by the forum where such action or prosecution or recovery proceedings are instituted.

The Petitioner further contended that the recovery of the impugned excise duty is ultra vires sections 22 and 32 of the Excise Ordinance. It was submitted (paragraph 27(h) of the petition) that the purported demand of the 1st Respondent has been made upon a non-operative notification and is hence ex facie unlawful. This is due to Excise Notification 744 having been repealed. However, in terms of R10, the demand was made when the relevant Excise Notification was operative.

According to the Respondents the surcharge payable in respect of the outstanding excise duty for the period between February 1994 and October 1995 has been calculated at 3% per month as set out in Excise Notification No. 744 (R3) read with the subsequent Excise Notification 912 (X17) which came into effect from 01.03.2010.

However, the Excise Notification No. 912 which came into effect on 01.03.2010 made no change to the value of the surcharge imposed for delayed settlement of excise duty. Under both Excise Notifications 744 and 812, the surcharge rate was fixed at 3% per month. Therefore it appears that the Respondents calculated the surcharge payable on excise duty due for the period between February 1994 and October 1995 under both the above notifications which covers the entire period reflected in the letter X14.

In any event, it is trite law that that an exercise of a power will be referable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory [*Peiris v. The Commissioner of Inland Revenue* (65 N.L.R. 457)].

Conduct of the Petitioner

In terms of Article 140 of the Constitution this Court must act "according to law" in deciding whether to issue writs of Certiorari and Mandamus. This means English common law principles [*Sirisena Cooray v. Tissa Dias Bandaranayake* (1999) 1 Sri. L. R. 1 at 14-15)].

English Courts have considered the conduct of the Petitioner in deciding whether to grant discretionary relief by way of judicial review. A ratepayer was denied a remedy to quash a refusal to make a refund of rates because of his previous deliberate and unjustifiable withholding of rates owed [*Dorot Properties Ltd. v. London Borough of Brent* (1990) C.O.D. 378]. A local authority which pursued pointless litigation was denied any remedy [*Windsor and Maidenhead Royal BC v. Brandrose Investments Ltd.* (1983) 1 W.L.R. 509]. A local council which sought to challenge ministerial confirmation of its own proposals for re-organising schools, relying on their own procedural error was denied relief [*R. v. Secretary of State for Education and Science ex. P. Birmingham City Council* (1985) 83 L.G.R. 79].

Our Courts have adopted this approach and withheld relief due to the unmeritorious conduct of the Petitioner even where there has been a clear violation of the rules of natural justice [*Wickremasinghe v. Ceylon Electricity Board and Another* (1982) 2 Sri.L.R. 607].

In this case the Petitioner by R11 sought a deferment of the recovery of the outstanding excise duty in view of the pending action. Where the public officer, having granted this concession to the Petitioner and at the end of those proceedings, moved to recover the outstanding it is unbecoming of the Petitioner to take the stand it has taken in this application. This unmeritorious conduct on the part of the Petitioner is a ground on which discretionary relief can be denied.

For all the foregoing reasons, I dismiss the application with costs.

Judge of the Court of Appeal