ASIA SIYAKA COMMODITIES (PVT) LTD
v.
FORBES & WALKER TEA BROKERS (PVT) LIMITED AND OTHERS

SUPREME COURT
FERNANDO, J.,
WEERASEKERA, J. AND
GUNASEKERA, J.
S.C. (SLA) NO. 226/98
C.A. APPLICATION NO. 191/98
JULY 21, 1999

Writ of certiorari – Special leave to appeal to the Supreme Court – Article 128 (2) of the Constitution – Basis of granting leave.

The petitioner company (the petitioner) sought special leave to appeal to the Supreme Court against a judgment of the Court of Appeal which quashed the licence issued to the petitioner under the Licensing of Produce Brokers Act, No. 9 of 1979. The 1st respondent Company applied for such quashing by way of *certiorari* on the ground that upon the petitioner's application made in February, 1998, a licence could legally have issued in terms of the relevant regulation only for the year 1999 and not for 1998. The Court of Appeal upheld the 1st respondent's interpretation and quashed the licence issued to the petitioner "for 1998 and 1999".

Held:

Substantial questions of law are involved, and there is a live issue for determination; hence, the matter is fit for review by the Supreme Court.

Cases referred to:

1. *Commissioner of Taxation for NSW v. Baxter* – (1908) 24 Times LR 249.
2. *State of Mysore v. Alexander* – *AIR* 1970 SC 1024.
3. *Sun Life Assurance Co. of Canada v. Jervis* – (1944) 1 ALL ER 469.
4. *Ainsbury v. Millington* – (1987) 1 ALL ER 929.
5. *Sundarkaran v. Bharath* – (1989) 1 Sri LR 46.

APPLICATION for Special Leave to Appeal from the judgment of the Court of Appeal.

H. L. de Silva, PC with *D. S. Wijesinghe*, PC, *Gomin Dayasiri*, *Kushan de Alwis*, *Dilan de Silva* and *P. Obeysekera* for the petitioner.

K. N. Choksy, PC with *Miss Kishan Wijetunga* for the 1st respondent.

S. Marsoof, PC, ASG with *M. Gopallawa*, SC for the 2nd and 3rd respondents.

Cur. adv. vult.

September 24, 1999.

FERNANDO, J.

The 3rd respondent-petitioner-company (the petitioner) seeks special leave to appeal against a judgment of the Court of Appeal which quashed the licence issued to the petitioner under the Licensing of Produce Brokers Act, No. 9 of 1979.

Regulations in respect of the business of broking of tea were first made under that Act on 27. 8. 79 ("the 1979 Regulations"), and were amended on 2. 6. 81 ("the 1981 amendments").

The petitioner-company was incorporated in February, 1998, and its main object was to engage in the business of a produce broker in tea. It applied for and obtained a licence in February, 1998. The 1st respondent-company (the 1st respondent) applied to the Court of Appeal for a *writ of certiorari* to quash that licence – on the ground that upon the petitioner's application made in February, 1998, a licence could legally have been issued only for the year 1999, and not for 1998.

Regulation 8 of the 1979 regulations required an applicant for a licence to furnish certain information which an existing produce broker could furnish, but which, obviously, a person entering the business

of broking of tea for the first time (a new entrant) could not : for example, "details of staff employed in the business of broking of tea exclusively", "evidence of the availability of adequate facilities to clients of the applicant in regard to (i) market information, (ii) advice on the manufacture of tea. . .".

Regulation 11 provided that an application for a licence for a particular year shall be made on or before the 30th of September of the preceding year, and that the licensing authority shall determine such application on or before the 30th of October next. It made an exception only in the case of licences for the very first year (1979), for which year applications had to be made on or before the 30th of September of the same year, and determined before the 30th of October next.

Prima facie, regulation 8 would have had the effect of stifling competition, by preventing any new entrant entering the business. The 1981 amendments changed the position. Not only was regulation 8 amended, by expressly excluding new entrants from its purview, but a new regulation 8A was introduced specifying the information which a new entrant should furnish: "details of staff *to be* employed . . .", "facilities which are *proposed to be* provided to clients . . .". etc. Another new regulation 11A required every application by a new entrant to be determined by the licensing authority within thirty days.

There is no dispute that the petitioner being a new entrant, its application was subject to regulation 8A, and that regulation 8 was inapplicable. It is also clear that regulation 11A applied, so that a determination had to be made upon an application by a new entrant within thirty days. The crucial question which the Court of Appeal had to decide was whether regulation 11 was *also* applicable, in which event a licence issued on the approval of the petitioner's application, although made as early as February, 1998, could not become legally operative until January of the following year.

Let me state the issue in more specific terms. The petitioner contended that its application made in February, 1998, had to be determined within thirty days, and if approved a licence, valid for the

rest of 1998, had to be issued. The 1st respondent's submission, however, was that regulation 11A also applied; in order to obtain a licence for 1998, the petitioner should have made an application before 30th September, 1997; further, the scheme of the regulations was that a licence could be issued only for a full year at a time, and not for part of an year (except for 1979); and consequently, upon the February 1998 application a licence could only have been issued to the petitioner for the year 1999. It is a corollary of the 1st respondent's submissions that if an application had been made by a new entrant on, say, 5th October, 1998, and even if that application had been approved before 30th October (or within the prescribed thirty days), nevertheless a licence could only have been issued for the year 2000 – not for 1999.

By its judgment dated 11. 11. 98, the Court of Appeal upheld the 1st respondent's interpretation, and quashed the licence issued to the petitioner.

Mr. H. L. de Silva, PC on behalf of the petitioner contended that the Court of Appeal was in error in its interpretation of the regulations, for several reasons. He urged that the purpose of the 1981 amendments was to make special provision for new entrants, and regulation 11A had to be regarded as a special enactment which would override the general provisions in regulation 11 – because *generalibus specialia derogant.* The Court of Appeal should have adopted a purposive interpretation. Properly interpreted, he submitted, regulation 11 could not be treated as applicable to a new entrant. The question also arises whether the right to carry on the business of a produce broker falls within Article 14 (1) (*g*) of the Constitution; if so, whether that right can be subject only to restrictions prescribed by law, and not by subordinate legislation; and, in any event, whether the regulations as amended must be interpreted broadly – so as to enhance the fundamental right, rather than to curtail it.

In my view substantial questions of law are involved, and the matter is fit for review by this Court.

However, Mr. K. N. Choksy, PC, for the 1st respondent, submitted that Article 128 (2) confers a discretion on this Court whether or not to grant special leave to appeal, and that this Court should not

exercise that discretion, because, he claimed, there was no longer a live issue. This, he said, was the result of a new regulation 11A, introduced on 23. 11. 98, after and in consequence of the Court of Appeal judgment. In a motion filed on 23. 6. 99 in this Court, on behalf of the 1st respondent, it was urged that that amendment was made "in order to change the law as it existed at the time of the institution and decision of these proceedings in the Court of Appeal and to enable persons in the position of the [petitioner] to qualify for licences". The new regulation 11A provides:

> "Every application for a licence for a particular year made by [a new entrant] may, notwithstanding anything in regulation 11, be submitted to the Appropriate Authority at any time during the year in respect of which the licence is applied for and shall be determined by the Appropriate Authority within thirty days of the date on which such application is made, and such licence shall expire on the thirty-first day of December of the year in which it was so issued;
>
> provided that, notwithstanding the provisions of regulation 10, any licence issued under this regulation upon an application made on or after the first day of October in any year, [by a new entrant], shall expire on the thirty-first day of December of the succeeding year."

In terms of that regulation a licence was issued on 27. 11. 98 to the petitioner, the relevant portion of which is as follows:

> *"Licence for 1998 & 1999*
>
> In terms of section 2 (1) of Licensing of Produce Brokers Act, No. 9 of 1979 [the petitioner is] hereby authorised to carry on the business of a Produce Broker for tea.
>
> This licence shall be valid up to the thirty-first day of December, 1999."

Mr. Choksy submitted that upon the introduction of the new regulation 11A, regulation 11 ceased to apply to a new entrant; and that

upon an application made in mid-year a licence could be issued for the remainder of that year. Thus, whether the Court of Appeal was right or wrong in its interpretation of the Regulations, the law is now settled for the future. Whether that Court erred in quashing the petitioner's February 1998 licence was no longer a live issue. He cited Halsbury, Laws of England, (4th edition) volume 37, para 682 :

"An appeal does not lie where the question or issue raised for the determination of the appellate court . . . has ceased to be a live issue, or where the parties have no longer any real interest in the result of the appeal, because of an agreement that the decision of the appellate court is not to affect their proprietary interests or for any other reasons. Nor does an appeal lie where the question or issue raised is or where the facts are hypothetical.

The Court of Appeal may refuse to entertain an appeal where the amount or issue at stake is trifling."

By a motion dated 16. 7. 99, the petitioner submitted that the new regulation 11A was prospective only, and did not validate the licence granted on 26. 2. 98 for the year ending 31. 12. 98, which had been quashed by the Court of Appeal. Consequently, the petitioner who had carried on business from 26. 2. 98 to 11. 11. 98 became liable to criminal prosecution for having contravened section 2 (1) of the Act; and also ran the risk of being sued in civil proceedings for loss and damage caused to other produce brokers by having conducted business without a licence during that period. Further, it was asserted that the petitioner had throughout acted lawfully and *bona fide*, and reserved the right to seek compensation in appropriate proceedings from the 1st respondent for all loss caused to its business by reason of the 1st respondent's conduct. Accordingly, it was essential to have a determination of the question of law on which special leave is sought.

Mr. Choksy cited five decisions to which I must now turn.

The first was *Commissioners of Taxation for NSW v. Baxter*[1]. The High Court of Australia held that income tax could not be levied upon the salary paid to an officer of the Commonwealth under an Act of an Australian State. The taxing authority sought special leave to appeal

to the Privy Council. Before the hearing, there was passed an Act, of the Commonwealth expressly authorizing States to impose taxation of that kind. In those circumstances, the Privy Council held "that the controversy cannot be raised again"; that "the sums actually in dispute or indirectly affected are inconsiderable in amount"; and refused to advise the grant of special leave. That decision depended on two conditions being satisfied : that the controversy *"cannot"* be raised again; and that the amounts in dispute were trifling. I must observe that the taxpayer was thus allowed *to retain* a sum of money, which he might not legally have been entitled to, because that sum was thought to be "inconsiderable" presumably from the point of view of the taxing authority. If the result of declining to entertain an appeal would have been *to deprive* the taxpayer of a sum of money, a different view may very well have been taken.

State of Mysore v. Alexander[2] was similar. The High Court held that a statutory provision imposing a tax on "passenger transport operators" was invalid, and declared them entitled to a refund. Pending appeal to the Supreme Court, the impugned provision ceased to be in operation. The Supreme Court held that "the claims involved in these appeals are by no means substantial . . . Hence, we do not think that these are fit cases in which this Court should exercise its special and discretionery jurisdiction . . ."

In *Sun Life Assurance Co. of Canada v. Jervis*,[3] the House of Lords declined to hear an appeal because the Court of Appeal granted leave upon the appellant's undertaking both to pay the costs incurred in the House of Lords and not to ask for the return of any money ordered to be paid under the judgment of the Court of Appeal. Thus, it became :

> ". . . a matter of complete indifference to the respondent whether the appellant wins or loses; the respondent will be in exactly the same position in either case. He has nothing to fight for, because he has already got everything that he can possibly get, however the appeal turns out, and cannot be deprived of it."

Ainsbury v. Millington,[4] was another illustration of the same principle. An unmarried couple who were living together obtained a joint tenancy of a house from the local authority. After they separated, and while they were litigating about the right to possession of the house, the local authority legally resumed possession of the house; the woman was given another house; and (in other unconnected proceedings) the man was sentenced to imprisonment. The House of Lords declined to hear an appeal because the joint tenancy had come to an end; and there remained not even an issue about costs, because both parties were receiving legal aid, and so there was only a remote possibility of any order for costs.

The fifth was *Sundarkaran v. Bharath*,[5] where this Court quashed the decision of a Government Agent not to issue a liquor licence to the petitioner for the year 1987, although that year had passed: granting a licence for 1987 was no longer possible. The principles laid down in the Court's decision obviously had relevance to further applications for licences. Mr. Choksy argued that whatever principles this Court may lay down in regard to the quashing of the February 1998 licence would have no application to further applications for licences.

Mr. Choksy submitted that the petitioner's apprehensions of criminal prosecution were groundless: because the licensing authority had supported the petitioner right along, and it was hardly likely that the Attorney-General would ever launch a prosecution. But, that does not satisfy the tests laid down in the cases which he cited. Thus, it cannot be said that "the controversy cannot be raised again"; or that whether the petitioner wins or loses he "will be in exactly the same position [and] has nothing to fight for, because he has already got everything that he can possibly get, however the appeal turns out"; or that "the sums actually in dispute *or indirectly affected* are inconsiderable in amount" – because the claims for compensation which can be made by or against the petitioner will be affected if the order of the Court of Appeal is set aside.

The suggestion was also made during the hearing that the licence issued in November, 1998, was valid for the whole of 1999. It is true

that that licence is described as a "licence for 1998 & 1999", seemingly implying that it is valid for the whole of 1998. However, the new regulation 11A was introduced only on 23. 11. 98, and *prima facie* it would seem that neither the regulation nor any act done thereunder is retrospective. It was also suggested that if a prosecution is ever instituted against the petitioner, he can then plead that the February,1998, licence was valid. The question will then arise as to whether the original Court (or the High Court or the Court of Appeal) is bound (because of *stare decisis*, or *res judicata*, or otherwise) by the judgment now impugned. If that judgment would be binding at that stage, it seems to me inequitable that this Court should now decline to consider the correctness of that judgment, but nevertheless allow it to be binding even if it were wrong. On the other hand, if that judgment would *not* be binding, then it means that the same controversy (ie whether the February, 1998, licence is valid or not) can be raised again.

For the above reasons, I hold that the decisions cited by Mr. Choksy are inapplicable, and that there is a live issue for determination.

I grant special leave to appeal upon the questions referred to earlier in this judgment (which are also referred to in paragraph 6 (*a*), (*b*), (*c*) and (*g*) of the petition dated 19. 11. 98.

If the petitioner succeeds in appeal, it will be entitled to the costs of this application, but the 1st respondent will not in any event be entitled to such costs. The petitioner and the respondents will file their written submissions on 15. 11. 99 and 31. 12. 99, respectively, and the date of hearing will be fixed forthwith by the Registrar after consulting counsel.

GUNASEKERA, J. – I agree.

WEERASEKERA, J. – I agree.

Special leave to appeal granted.