G.H.C.2

4, 1961

IN THE PRIVY COUNCIL No. 38 of 1959 63630

ON APPEAL
FROM THE SUPREME COURT OF CEYLON

B E T W E E N :

THE ATTORNEY-GENERAL of Ceylon (Defendant) Appellant

- and -

(1) H. R. FONSEKA, and
(2) K. SELVADURAI
(Plaintiffs) Respondents

CASE FOR THE RESPONDENTS

Record

1. This is an appeal from a Judgment and Decree of the Supreme Court of Ceylon (Basnayake C.J. and Sansoni J; Pulle J. dissenting) dismissing an Appeal by the Appellant from a Judgment and Decree of the District Court of Colombo, (Mr.W.Thalgodapitiya District Judge). pp.25 and 36 pp.17 and 21

2. The Respondent (Plaintiff in the original proceedings) instituted the present action against the Attorney General of Ceylon, the Appellant in the instant appeal.

3. In his plaint dated 5th December 1955, the Respondent set out his cause of action in the following terms:- p.7

"2. The Government of Ceylon acting by its agent the Government Agent W.P. by a notice dated 2nd August 1952 published in the Government Gazette bearing No.10432 dated 8th August 1952 called for tenders for the purchase of the exclusive privilege of selling arrack within the local areas of the taverns at No.7, St. John's Road, No.8, Chekku Street, and No.9, Sea Beach Road, all situated at Colombo during the period 1st October 1952 to 30th September 1953 subject to the arrack sale conditions published by the Excise Commissioner in Government Gazette No.10428 dated 25th July 1952.

Record

3. In response to the said notice the plaintiffs offered at the rate of Rs.4.30 per gallon of arrack to be sold by them during the said period as rent for the said exclusive privilege of selling arrack and the said Government Agent acting as aforesaid accepted the said offer and granted the said privilege to the plaintiffs for the period 1st October 1952 to 30th September 1953.

4. On the termination of the said period, viz: On 30th September 1953, there was in the hands of the plaintiffs at the said taverns a total quantity of 1832 gallons 32 drams of arrack left unsold for which the plaintiffs had paid the Government a sum of Rs.7,882.03 at the above-mentioned rate of Rs.4.30 per gallon.

5. By a notice dated 3rd July 1953 published in Government Gazette No.11,549 of 10th July 1953, the Government of Ceylon acting by its agent the said Government Agent W.P.called for tenders for the purchase of the exclusive privilege of selling arrack within the said local areas set out in paragraph 2 above for the period commencing 1st October 1953 to 30th September 1954, subject to the said arrack sale conditions published in Government Gazette No.10,539 dated 19th June 1953.

6. In response to the said notice the plaintiffs offered at the rate of Rs.4.91 per gallon of arrack to be sold by them during the said period as rent for the said exclusive privilege of selling arrack and the said Government Agent acting as aforesaid accepted the said offer and granted the said privilege to the said plaintiffs for the period 1st October 1953 to 30th September 1954.

7. In terms of condition 9 of the said arrack sale conditions published in the said Gazette No.10,428 the plaintiffs deposited with the said Government Agent W.P. a sum of Rs.66,800 as security for the due performance of the said arrack sale conditions.

8. On the 1st October 1953, the plaintiffs commenced business with the said 1832 gallons 32 drams left over from the previous year referred to in paragraph 4 above for which the

plaintiffs had paid a sum of Rs.7,882.03 at the rate of Rs.4.30 per gallon and for which the plaintiffs had to pay the Government a further sum of Rs.1,117.97 at 61 cents per gallon so as to bring it to the amount of Rs.4.91 payable during the year 1953-54.

9. On the termination of the said period of sale, viz: On 30th September 1954, the said Government Agent became liable to refund to the plaintiffs the said security deposit of Rs.66,800 less the said sum of Rs.1,117.97 but the said Government Agent wrongfully and unlawfully withheld a further sum of Rs.7,882.03 less the said sum of Rs.1,117.97 and has returned the balance of the said security deposit.

10. A cause of action has arisen to the plaintiffs to sue the defendant as representing the Crown for the recovery of the said sum of Rs.7,882.03 together with legal interest thereon."

4. The Appellant in his answer dated the 9th March 1956 while denying that any cause of action had accrued to the Respondent stated:- p. 9

"2. The defendant admits the averments (except certain of the references to the Government Gazette) in paragraphs 2, 3, 4, 5, 6, 7 and 11 of the plaint. The defendant admits also the averments in paragraph 8 of the plaint save and except the allegation that plaintiffs were liable to pay a further sum calculated at only 61 cents per gallon.

3. The defendant denies the allegations in paragraphs 9 and 10 of the plaint.

4. Answering further the defendant states that (a) the plaintiffs who were the outgoing grantees of the privilege for the period 1st October, 1952, to 30th September, 1953, became also the incoming grantees for the period 1st October, 1953, to 30th September, 1954.

(b) the plaintiffs did not in their capacity of outgoing grantees at the termination of the contract for 1952/53 on 30th September 1953, deliver to the warehouse officer in

Record

charge of the nearest warehouse the balance quantity of arrack referred to in paragraph 4 of the plaint, but instead in their capacity of incoming grantees took over the said balance quantity remaining in the taverns from themselves in their capacity of outgoing grantees.

(c) by reason of the averments contained in sub-paragraphs (a) and/or (b) of this paragraph the plaintiffs became liable under conditions 15(2) of the Arrack Rent Sale Conditions for 1953/54 to pay to the Government in respect of every gallon so taken over and remaining in their hands in their taverns at the termination of the contract for 1952/53 an amount equivalent to the rent per gallon payable by the plaintiffs for the privilege of selling arrack for the period 1953/54.

(d) the rent payable under the contract for the said privilege in the period 1st October, 1953, to 30th September 1954, was Rs.4.91 per gallon at which rate the plaintiffs became liable to pay to the Government under the said condition 15(2) referred to above the total sum payable by the plaintiffs being in consequence Rs.8,998.40.

5. The plaintiffs having failed or refused to pay to the Government the said sum of Rs. 8,998.40 the Government Agent as he lawfully might withheld the said sum of Rs.8,998.40 from the sum of Rs.66,800 deposited by the plaintiffs as security for the performance of the contract in respect of the period 1st October, 1953, to 30th September, 1954."

5. At the trial which took place on 26th September
p.12 1956 the following admissions were made:-

"It is admitted that the plaintiff was the grantee for the sale of arrack for the period 1.10.52 to 30.9.53.

It is also agreed that the plaintiff was the grantee for the period 1st October 1953, to 30th September, 1954.

It is admitted that at the termination of the period 30th September, 1953, there were in the taverns 1,832 gallons and 32 drams of arrack left unsold.

Record

It is also admitted that for the arrack stocked by the plaintiff in the taverns for the period ending 30th September, 1953, he had paid the Government Rs.4.30 per gallon as rent.

It is also admitted that the Crown had with it a security deposit of Rs.66,800 out of which the Crown has returned to the plaintiff the entire sum less a sum of Rs.8,998.40.

The plaintiff admits that out of Rs.8,998.40 the Crown was entitled to retain a sum of Rs.1,117.97 which was the difference between the two rates of Rs.4.91 and Rs.4.30, i.e. at 61 cents per gallon for the 1,832 gallons and 32 drams. The plaintiff therefore claims the balance sum of Rs.7,882.03 as being wrongfully withheld by the Crown."

6. Only one issue was framed and answered as under:-

Issue	Answer	p.12, l.28
"1. Are the plaintiffs liable under condition 15(2) of the Arrack Rent Sale Conditions for 1953/54 to pay to the Government in respect of the 1832 gallons 32 drams at the rate of Rs.4.91 per gallon being an amount equivalent to the rent agreed upon?	Yes, but only the difference between Rs.4.91 and Rs.4.30 per gallon.	p.20, l.5

7. In the course of his judgment the learned District Judge (Mr. W. Thalgodapitiya) stated:-

"The position of the Crown is that under condition 15(2) of P4, the plaintiffs are liable to pay Rs.4.91 per gallon for the arrack they had for sale during the year 1st October, 1953, to 30th September, 1954, in spite of the fact that they had paid already Rs.4.30 for it. This attitude of the Crown appears to me, even if legally justifiable, an unjust and unconscionable one, and it must be remembered that our courts are courts of law as well as equity. p.18, l.13

Condition 15 in P4 is as follows:- (p.98, l.12)

Record

'(1) Taking over of Balance Arrack by Incoming Grantee by Mutual Agreement. The grantee shall take over from the outgoing grantee and pay to him an amount, which may be agreed on, in respect of the cost of -

(a) the balance of arrack, in bulk and in bottles, remaining in a tavern, after the closing hour of the date of expiry of the privilege of the outgoing grantee, and

(b) transport, wastage, and other miscellaneous charges.

(2) The grantees shall pay to the Government in respect of every gallon taken over by him from the outgoing grantee an amount equivalent to the rent payable by him for the privilege'.

Now it often happens that at the expiry of one year there must necessarily be some balance arrack left over at each tavern. The Excise Department makes it obligatory for renters to keep in their taverns in stock a minimum quantity of arrack every day. Condition 15 provides for such a contingency. The outgoing grantee is at liberty to sell to the incoming grantee the arrack which he holds in stock at a price agreed upon by them. The incoming grantee has to pay to the Government in respect of every gallon taken over by him from the outgoing grantee an amount equivalent to the rent payable by him for the privilege. The conditions do not set out in specific terms what the position of the outgoing grantee is as regards the rent already paid by him to the Government for the arrack held by him in stock on the last day of the year. According to the contention of the Crown he must bear that loss and cannot claim it from the Crown.

Now the rent payable for the privilege is the sum for which the renter has purchased the exclusive privilege to sell. The privilege is for selling, and not for removing or storing. No doubt the payment is made in advance

Record

for the sake of convenience and for the protection of the Government from fraud or from default in payment; but still the payment is for the privilege to sell as set out in P1, P2, P3, and P4, and the rent becomes payable only for every gallon sold.

Therefore the renter who has a stock in hand and who sells that stock to the incoming grantee will, in my view, be entitled to claim a refund of the money he has already paid to the Government for the privilege to sell that stock, because he has not sold that stock. In this case the outgoing grantee and the incoming grantee were the same; but that does not alter the situation. The incoming grantee could have either claimed a refund of the Rs.4.30 per gallon he had already paid to Government and paid Rs.4.91 per gallon for the stock he took over, or he could pay the difference between Rs. 4.91 and Rs.4.30, which comes to the same thing. That is exactly what the plaintiffs offered to do, as disclosed in their letter P5." (p.136)

8. The learned District Judge concluded as follows:-

"The Plaintiffs are claiming a refund of the money already paid by them for the arrack which they had not sold. According to the contention of the Crown, the plaintiffs will have to pay for the 1,832 gallons and 32 drams of arrack at Rs.4.30 per gallon plus another Rs.4.91 per gallon. This demand of the Crown, as I said earlier, is an utterly unconscionable one, and I see no justification for it even according to the conditions set out in P4." p.19, l.41

9. The learned District Judge entered judgment for the Respondents as prayed for with costs. p.20, l.8

10. The Appellant thereupon appealed to the Supreme Court of Ceylon. The main grounds of Appeal were -

(ii) The learned Judge has misdirected himself as to the interpreation to be put on certain conditions of the contract particularly conditions 15(2) and 31 of the conditions. p.23, Ll.20-30

(iii) The learned Judge erred in holding that the

Record

plaintiffs respondents could have claimed a refund of the rent already paid to Government on the privilege for the year 1952/1953, which had expired when they took over the balance of arrack remaining for the purpose of the privilege for the year 1953-1954.

(iv) The learned Judge erred in holding that the plaintiffs respondents were liable to pay only for such quantity of arrack as was in fact sold and not for the privilege of selling arrack.

p.25 11. The Appeal in the Supreme Court was heard by Basnayake C.J., Pulle J., and Sansoni J.

12. In the course of his judgment Basnayake C.J. stated:-

p.27, l.20 to p.28, l.34 "The Crown maintains that under condition 15 of the agreement P2 the plaintiffs are bound to pay Rs.4.91 per gallon in respect of the 1,832 gallons and 32 drams remaining in the taverns at the close of business on the relevant date.

The plaintiffs admit that they are liable to pay at the rate of Rs.4.91 per gallon but they claim credit for the stocks in their taverns at the rate of Rs.4.30 per gallon which sum they paid when they removed the arrack from the warehouse in the previous year and have offered to pay the difference between Rs.4.91 and Rs.4.30 per gallon.

The Crown disputes the claim of the plaintiffs that they are entitled to a refund of Rs.4.30 per gallon.

The conditions of the agreement P2 which are relevant to the determination of the issue between the parties are conditions 15 and 16 which read as follows:-

'15. (1) Taking over of Balance Arrack by Incoming Grantee by Mutual Agreement:-

The grantee shall take over from the outgoing grantee and pay to him an amount, which may be agreed on, in respect of the cost of (a) the balance of arrack, in bulk and in bottles, remaining in a tavern, after

the closing hour of the date of expiry of the privilege of the outgoing grantee; and

(b) transport, wastage, and other miscellaneous charges.

(2) The grantee shall pay to the Government in respect of every gallon taken over by him from the outgoing grantee an amount equivalent to the rent payable by him for the privilege'.

'16. In default of agreement, Outgoing Grantee to deliver Balance Arrack at nearest warehouse.-

(1) Where the incoming and outgoing grantees cannot agree with regard to the sum to be paid as aforesaid, the outgoing grantee shall forthwith remove the balance of arrack on a permit, to the nearest Excise Warehouse, and deliver it to the Warehouse Officer in charge thereof, and obtain a receipt. Such arrack shall be of the strength prescribed by Notification for the time being in force in that behalf under condition 18.

(2) The outgoing grantee shall present such receipt to the Excise Commissioner, who shall pay to such grantee the value of the arrack so delivered at the rates at which such grantee purchased such arrack.

(3) If the sum payable by the incoming grantee at the time the arrack is so taken over by him, is higher than the sum actually paid for the said arrack by the outgoing grantee, the incoming grantee shall, within fourteen days of the commencement of his privilege pay the difference to the nearest Kachcheri.'

"Condition 15 contemplates the case where the grantee for the year that has expired and the grantee for the year that has begun are different persons and not the case where one and the same person is the grantee for both years. The agreement makes no provision for the case where the same person is the grantee in two successive years. The language of

Record

condition 15 is wholly inappropriate to such a case. In law a person cannot agree with himself or negotiate with himself or take over from himself. To maintain that in the instant case the plaintiffs took over from themselves the arrack in their taverns at the closing hour at the relevant date after having agreed with themselves on the amount to be paid by the plaintiffs to themselves in respect of the cost of the balance of arrack in the tavern and transport, wastage and other miscellaneous charges, would be doing violence not only to elementary concepts of law but also to the language in which the agreement is cast."

13. Basnayake C.J. went on to say -

p.28, l.25 to p.29, l.4

"It is trite law that a person cannot contract with himself and that for the formation of a contract or agreement at least two persons natural or juristic are essential. There can be in the instant case no such agreement or taking over as is contemplated in condition 15(1) and the plaintiffs are under no legal obligation to make the payment provided for in condition 15(2). The author of agreement - the Crown - must suffer for its failure to provide for the case of the same person being the grantee in two successive years especially as it was signed at a time when it was well aware of the situation that would arise on the grant of the privilege to the plaintiffs for the succeeding year. The omission to make special provision for the case of the plaintiffs must in the circumstances be presumed to be deliberate."

14. Basnayake C.J. next referred to the word "rent" used in the agreement, and considered what was the proper meaning to be given to it in the relevant context:-

p.29, l.20

... "The Crown contended that a privilege-holder delivering arrack at an Excise Warehouse is not entitled to a refund of the price paid per gallon for the privilege, as that price was a rent for the privilege. With that contention I am unable to agree.

It is apparent from the agreement that the word rent is used in it merely as a drafting

Record

device for convenience and for shortening the language of the document. The use of such an expression in such circumstances does not alter the character of the payment. What is referred to as rent in the conditions succeeding 8A is the price offered for every gallon of arrack removed from the warehouse by the holder of the privilege. Conditions 8A and 16 of P1 read together undoubtedly provide that the plaintiffs are bound to pay Rs.4.30 per gallon of arrack removed from the Excise Warehouse in addition to the issue price. Now condition 16 of P2 (condition 14 is the corresponding condition of P1) makes it obligatory on the Excise Commissioner to pay the value of the arrack delivered at the rates at which the grantee purchased such arrack. If condition 16 applies to the instant case, and in my opinion it does not, the Crown would have been bound to refund Rs.4.30 per gallon of arrack delivered at the Excise Warehouse in addition to the issue price."

15. Basnayake C.J. next considered the meaning of the word "rates" as used in the agreement:-

"Learned counsel for the Crown also contended that the privilege price is not a rate and is not caught up by the word "rates". He submitted that the word refers to the different issue prices at which the arrack was purchased. I am unable to agree. The use of the plural suggests that different kinds of payment were meant, and not a number of payments of the same kind, as in the case of "rates" levied by a local authority where the word includes a number of levies of different kinds. Even if the use of the word "rates" creates a doubt as to the true meaning of the clause, the rule is that a written agreement is construed against its author, and in any case the Court will lean to that interpretation which will put an equitable construction upon the agreement; and if the Crown has failed to express its intention clearly the Court will not construe the agreement so as to give it an unfair or unreasonable advantage over the plaintiffs." p.30, l.10

16. Basnayake C.J. concluded thus:-

"Apart from the above considerations based on the interpretation of the agreement the p.30, l.24

Record

Crown in the instant case is seeking to enrich itself at the expense of the plaintiffs by charging twice over for the arrack in their taverns on 30th September, 1953. The Courts will not permit any person to unjustly enrich himself at the expense of another and in the instant case it will not permit the Crown to do so.

The appeal is accordingly dismissed with costs." 10

17. Sansoni J. in a separate Judgment agreed with Basnayake C.J. In the course of judgment Sansoni J. stated:-

p.34, l.21 "Now the circumstance that has actually occurred has not been contemplated by the parties; the contract does not provide for the situation that has resulted; and, therefore, if the Crown seeks to impose a liability on the plaintiffs to pay the rent again, it is a liability that must be looked for outside the contract. I think 20 it would be unsafe to decide the question by asking ourselves what the parties might have stipulated in the contract if they had given any thought to the matter, for that would be only to guess what might have been their intention. I think the Court has only to decide whether there is any ground which justifies the retention by the Crown of any part of the security deposit. The question may also be put in this form: Is there any legal justifi- 30 cation for the demand of the Crown that the plaintiffs should pay rent twice over in respect of the same quantity of arrack?

I understood the argument for the Crown to be that upon a reading of the terms of the contract one could imply a liability such as is sought to be imposed on the plaintiffs, even if it is not expressly set out. Two rules laid down by Vander Linden (Bk. 1. Ch. 14. Sect.4) appear to be against such a contention. Para- 40 graph 8 reads:

'However general the expression in a contract may be, they are restricted, in interpretation, to those matters only which the parties appear to have contemplated as their objects in contracting, and are not extended

to others of which they do not appear to have thought..' Record

Paragraph 7 reads:

'In cases of doubt, the words of the covenant must be taken most strongly against the obligee, and in favor of the obligor.'

The same rules are set out by Pothier in the Law of Obligations (Evans Translation) PP 58 and 59."

18. Sansoni J. went on to say:-

"Now the contract sets out the conditions upon which the plaintiffs are granted the exclusive privilege of selling arrack by retail. The plaintiffs did not exercise that privilege in respect of this quantity of arrack which was left unsold. But it is important to remember that, as condition 8A is worded, the rent is payable on every gallon of arrack removed from the Warehouse. There is no provision for the payment of rent twice over where there is only one removal, and if under any circumstances rent was to be payable twice in respect of one removal, the absence of express provision to that effect is significant. I cannot see on what basis the Crown seeks to make the plaintiffs liable to pay a second rent on this quantity of arrack at the rate of Rs.4.91. They were only liable to pay, and they had in fact paid rent, at the rate prevailing at the time of removal. Since, however, they have accepted liability to pay the difference between Rs.4.30 and Rs.4.91 per gallon, the Crown benefits to that extent, but such an acceptance of liability does not decide the question in issue." p.35, l.5

19. Sansoni J. concluded -

"There is the further consideration that it was the privilege of selling arrack that the plaintiff purchased. The plaintiff received no benefit from merely storing the 1832 gallons 32 drams until 30th September, 1953. It is not necessary to decide the hypothetical question whether the plaintiffs would have been entitled to claim a repayment of the issue price and rent paid for this quantity of arrack

Record

left unsold on 30th September, 1953, if they did not become the renters for the following year. They did, in fact, become the renters again, and the contract contains no prohibition against such a quantity of arrack being sold in the following year.

The amount claimed out of the security deposit is therefore payable to the plaintiffs. I would therefore dismiss the appeal with costs."

20. Pulle J. in a separate Judgment held that the Appellant's appeal to the Supreme Court should be allowed. In the course of judgment Pulle J. stated:-

p.32, l.32

"I agree that, in resisting the claim for the refund, Government cannot rely on conditions 15 and 16 of P2 which relate to an incoming grantee taking over the balance arrack by mutual agreement from an outgoing grantee. The idea of an "agreement" between an incoming grantee and an outgoing grantee who is the same person is excluded and, therefore, conditions 15 and 16 are not applicable. Paragraph (2) of condition 16 has, however, some relevance to one aspect of the case. The learned trial Judge says that the attitude of the Government towards the plaintiffs is unconscionable. Condition 16 provides that in default of agreement between the incoming and outgoing grantees, the outgoing grantee must deliver the unsold arrack at the nearest Warehouse and obtain a receipt therefor. Paragraph (2) of condition 16 is in the following terms:-

'The outgoing grantee shall present such receipt to the Excise Commissioner, who shall pay to such grantee the value of the arrack so delivered at the rates at which such grantee purchased such arrack.'

My interpretation of paragraph (2) is that by its very terms the outgoing grantee is disentitled to a refund of any sum paid by way of "rent". A refusal to refund in those circumstances to an outgoing grantee can hardly be described as unconscionable.

I have dealt with this appeal solely on the merits of the ground urged by the plaintiffs that because a certain quantity of arrack was unsold on 30th September, 1953, they became

immediately vested with the right to claim a refund of the sum paid as "rent" for that quantity. That was the basis on which the case for the plaintiffs was fought in the court below and that was also the basis on which the trial Judge gave judgment for the plaintiffs. In my opinion the plaintiffs' position is untenable and I would allow this appeal, with costs here and below." Record

10 21. The Supreme Court (Basnayake C.J. and Sansoni J; Pulle J. dissenting) dismissed the appeal of the Appellant. p.36

22. The Appellant thereupon took steps to appeal to Her Majesty in Council. Conditional Leave was granted on the 9th September, 1958, and Final Leave on the 13th October, 1958. p.42 p.44

23. The Respondent humbly submits that this appeal should be dismissed, with costs, for the following among other

20 R E A S O N S

(1) BECAUSE there was no legal basis for the demand of the Crown that the Respondents should pay rent twice over in respect of the same quantity of arrack;

(2) BECAUSE on a proper interpretation of the Agreement between the parties the Crown was not entitled to make the said demand;

(3) BECAUSE the Crown in making the said demand was seeking to enrich itself at the expense of the
30 Respondents;

(4) BECAUSE the judgments of both the District Court and the Supreme Court were right.

SIRIMEVAN AMERASINGHE.

No.38 of 1959

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF CEYLON

B E T W E E N :

THE ATTORNEY-GENERAL
of Ceylon (Defendant)
Appellant

- and -

(1) H.R. FONSEKA, and
(2) K. SELVADURAI (Plaintiffs)
Respondents

CASE FOR THE RESPONDENTS

A.L. BRYDEN & WILLIAMS,
53, Victoria Street,
London, S.W.1.

Solicitors and Agents for
Respondents.