

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

"NATIONAL AUTHORITY ON TOBACCO AND ALCOHOL" BILL

S.C.(SD) Application Nos.1 to 6/2006

S.C.(SD) No.1/2006

Intervenient Petitioners

- Ceylon Tobacco Company Ltd,
Colombo 15 (Petitioner)
1. H.S.Dhamika de Saram
 2. Lion Brewery of Ceylon Ltd
 3. H.C.H.D.Liyanagama
 4. Jayavim Perera
 5. M.R.Rizvi and Mohamed Faiz
 6. Dr.Sirira Kodagoda - Sri Lanka Amadyapa Samithi Sammelanaya
 7. K.K.Kumari - Lawyers for Human Rights and Development
 8. Rev.Kingsley Perera
 9. Rt.Rev.Duleep de Chickera
 10. Rev.W.P.Ebenezer Joseph
 11. Alcohol and Drug Information Centre
 12. Swarna Hansa Foundation

S.C(SD) No.2.2006

1. Trans Asia Hotels Ltd, Colombo 2
2. Blue Oceanic Beach Hotel Ltd., Colombo 2
3. Pearl Beach Hotel Ltd., Colombo 2
(Petitioners)

S.C.(SD)No.3/2006

1. N.J.H.Mahinda Cooray, President
Tourist Hotel's Association of Sri Lanka
2. J.E.P.Kehelpannala, Vice President
Tourist Hotel's Association of Sri Lanka
3. Tourist Hotel's Association of Sri Lanka
(Petitioners)

S.C.(SD)No. 4/2006

All Ceylon Barn Owners Association

Intervenient Petitioner

Ven Dr.Omalpe Sobitha Thero

S.C(SD) No. 5/2006

Jagathpriy Hennayake, Malabe (Petitioner)

S.C(SD) No.6/2006

K.B.P.Saman Kumara, Malabe (Petitioner)

Respondents SC(SD) Nos.1/06, 2/06,
3/06, 4/06, 5/06 and 6/06)

1. Hon.Nimal Siripala de Silva
2. The Hon.Attorney General

Before : S.N.Silva Chief Justice
Shiranee Thilakawardane, Judge of the Supreme Court
Gamini Amaratunga, Judge of the Supreme Court.

Counsel: Kanag Iswaran, P.C., with Nigel Barathlemuz instructed by
D.L. and S.De Seram for Petitioners in SC (SD) 5 & 6 of 2006
K.Tiranagama with Hasanthi Ratnayake for intervenient Petitioner in SC
(SD) 1/06
Manohara de Silva for intervenient Petitioners with Udaya Gammanpila,
Bandara Thalagune, Anusha Perusinghe, (Ven.Omalpe Sobitha Thero and Sri
Lanka Temperance Association in SD. 4/2006
Nihal Jayamanne PC., for intervenient Petitioner instructed by
Dissanayake Amaratunga Associates
Chamantha Weerakoon Unamboowa with Shaky Nanayakkara for
Alcohol-Drug Information Centre
M.A.Sumanthiran with Viran Corea for intervenient Petitioners
(President, Baptist Church, Methodist Church & Bishop of Colombo)
Chandana Premathilake for Intervenient Petitioner with Sampath de Seram in
SC SD 1/06
Sanjeewa Jayawardena with Mohan Wijesinghe, Nilshantha Sirimanne and
Rajeev Amarasuriya for the Petitioner in SC SD 1/06
Sanjeewa Jayawardena with Nilshantha and Sirimanne for Petitioner in
SD 2/06
Sanjeewa Jayawardena with Senani Dayaratne for Petitioner in SD 3/06.
D.S.Wijesinghe PC, with Kaushalya Molligoda for the Petitioner in SC SD.
4/06.
C.Witharana with Medha N.Gamage for the Petitioner in SC.SD 1/2006.
Mohan Peiris P.C., with Nuwanthi Dias instructed by G.G.Arulpragasam for
the Intervenient Petitioners in SC.SD 1/06 (M.R.Rizvi, and Mohamed Raiz)
Avindra Rodrigo with Ms.D.Ilikpitiya for the Intervenient Petitioner
(The Lion Brewery Ltd)

P.A.Rathnayake ASG, with A.Gnanadasan DSG and Indika Demuni de Silva
SSC, for Attorney General

Court assembled for hearing at 10.30 on 14th June 2006.

Written submissions tendered on 20th June 2006.

A Bill bearing the above title has been published in the Government Gazette of 5.5.2006 and placed on the Order Paper of Parliament.

The parties named above have filed petitions in this Court, in terms of Article 121(1) of the Constitution to invoke the jurisdiction of this Court to determine the constitutionality of the provisions that would be hereinafter referred to, others have sought to intervene.

At the outset it is necessary to state that a Bill substantially similar in content bearing the same title was presented as a Private Member's Bill by Ven. Omalpe Sobitha Thera, M.P., The contents of that Bill formed the subject matter of S.C (SD) No.13/2005 to 22/2005 heard on 10.01.2006. In those proceedings the Petitioners challenged the constitutionality of the entire Bill, on the basis that it is inconsistent with Articles 12(1) and 14(1)(g) of the Constitution. The challenge in items of Article 14(1)(g) was on the basis that the Bill amounted to a restriction of the freedom to engage in a lawful trade, business or enterprise, since the trade in alcohol and tobacco products which the Petitioners were engaged in was permitted by law. It was contended by the Ven. Thera who presented the Bill and some of the intervenient Petitioners that the restriction of trade as contained in the Bill is warranted in terms of Article 15(7), which permits restrictions of the fundamental rights guaranteed by Articles 12 and 14, inter alia, for the protection of public health.

The Court examined the contention of both parties exhaustively and determined that the Bill taken as a whole considering its objects would constitute a permitted restriction in terms of Article 15(7) of the Constitution and is not inconsistent with Article 14(1)(g) of the Constitution. It was held that the alleged inconsistency with Article 12(1) of the Constitution on the basis of unequal protection of the law in relation to the "illicit trade" of alcohol is misconceived, since the Petitioners who were engaged in permitted trades cannot be classified together with those who commit offences by engaging in an illicit trade.

In this connection the Court noted that "its indeed the bounden duty of the State to take such measures as envisaged in the Bill in the face of the proven risk to public health resulting from the use/consumption of tobacco and alcohol products.

Presumably in view of the determination on the previous Bill being substantially the same in content the Petitioners have not challenged the present Bill in its entirety. The challenge by the tobacco industry and related business interests is in reference to clause 40 of the Bill, which seeks to prohibit smoking in enclosed public places. A similar provision was not included in the previous Bill and clause 40 has been included on the basis of an observation made in the previous determination. This observation was made on the submissions of counsel representing the Bishops and Heads of several Christian Churches in Sri Lanka. Counsel relied on the evidence that was adduced as to the harmful effects of what is described as "passive smoking". Having considered the objectives of the Bill which was intended for the elimination of the tobacco and alcohol related harm the Court agreed with the submission that a suitable provision should be included in the Bill for the prohibition of "smoking in enclosed public places." It was further noted that such a prohibition would not be inconsistent with any provision of the Constitution.

Clause 40 included in the Bill was challenged by the Petitioners on certain grounds some of which need not be dealt with since the Deputy Solicitor General submitted that the Hon. Minister who presented the Bill in Parliament and who was present in Court at the time of the hearing, would move a Committee Stage amendment in Parliament to replace clause 40 in its present form and substitute it with another clause which takes into account some of the objections raised by the Petitioners.

In these circumstances the amended clause was made available to Counsel and it was agreed that submissions be restricted to the amended formulation. The re-formulation of clause 40 as drafted by the Legal Draftsman and submitted to Court is as follows:

"40(1) No person shall smoke or allow any person to smoke any tobacco product within any enclosed public place.

(2) Any person who being the owner, occupier, proprietor, manager, trustee or person in charge of any enclosed public place shall ensure that no person smokes any tobacco product within any such enclosed public place;

Provided however-

(a) any hotel, guest house or lodge having thirty rooms or more;

(b) any restaurant or club having the capacity to accommodate the minimum of thirty persons; or

(c) an airport

may, notwithstanding the provisions of subsection (1), have within its premises an enclosed space or enclosed area as the case may be set aside exclusively for smoking. Such area shall be provided with adequate ventilation and conform to the prescribed air quality standards.

(3) The Minister may, in consultation with the Director General of Health Services, from time to time, issue general or special directions not inconsistent with any written law, as may be required for the enforcement and monitoring of the provisions of this section.

(4) Any person who contravenes the provisions of subsections (1) and (2) shall be guilty of an offence under this Act, and shall on conviction after summary trial before a Magistrate be liable to a fine not exceeding two thousand rupees or to imprisonment for a period not exceeding one year or to both such fine and imprisonment."

The Counsel for the Petitioners are substantially in agreement that the re-formulated clause 40 obviates some of the grounds of inconsistency with the Constitution alleged by the Petitioners. They have submitted further amendments to ensure the constitutionality of the clause.

Prior to dealing with the different contentions of parties it is necessary to briefly state the object of the clause and its general content as submitted by the State.

The Deputy Solicitor General submitted that clause 40 which is intended to prohibit smoking in enclosed public places is based primarily on the World Health Organisation (WHO) Framework Convention on Tobacco Control (FCTC), being the first treaty negotiated under the auspices of the WHO. The Forward of the FCTC specifically states it is "an evidence based treaty that reaffirms the right of all people to the highest standards of health"

As submitted by the State and in particular the Interventient Petitioner H.S.Dhamika De Saram, who supported the contents of the Bill, Sri Lanka became a signatory to the WHO (FCTC) on 23.9.2003 and ratified the same on 11.11.2003. It was submitted that altogether 168 countries are signatory to the WHO (FCTC) and 116 countries are parties thereto. In terms of Article 5 of the FCTC it is incumbent on each party State to, inter alia, adopt and implement effective legislative, executive administrative and other measures to

prevent and reduce tobacco consumption, nicotine addiction and exposure of tobacco smoke. The provisions of clause 40 of the Bill now in issue relates to what is described in the FCTC as protection from exposure to tobacco smoke or in ordinary parlance "passive smoking". Article 8(1) state as follows: "The Parties recognize that scientific evidence has unequivocally established that exposure to tobacco smoke causes death, disease and disability."

Article 8(2) requires each Party (including Sri Lanka) to adopt by national law "effective legislative measures" providing for "protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and' as appropriate other public places.

In this background there would be no basis to any general challenge of the contents of clause 40 intended to prohibit smoking in enclosed public places. The restriction comes well within the ambit of Article 16(7) of the Constitution which permits restrictions by law of any of the fundamental rights guaranteed, inter alia, by Articles 12 and 14, for "the protection of public health". Exposure to tobacco smoke as envisaged in the WHO (FCTC) or "passive smoking" in common parlance which would necessarily result from smoking in public places is undoubtedly harmful to public health and a law could be validly enacted to prevent such exposure to tobacco smoke in enclosed public places.

We would now deal with the specific amendments suggested by the Petitioners. They are:

- i. that the prohibition in clause 40(1) that no person shall "allow any person to smoke any tobacco product within any enclosed public place", should have a limitation that the prohibition is restricted in its operation only to persons referred to in clause 40(2), namely owner, occupier and the like of the place;

We are of the view that the ambit of sub-clauses (1) and (2) are different. Sub-clause (1) deals with an actual state of affairs where any person who could take steps to prevent "allows" any other person to smoke in an enclosed public place, whereas sub clause (2) relates to general preventive measures that have to be taken by the owner/occupier and the like, to 'ensure' that no person shall smoke within an enclosed public place. In the circumstances we do not see any merit in this ground of objection. It certainly does not involve any question of unconstitutionality in view of the findings stated above.

- ii. That in proviso (a) and (b) to sub-clause (2) the requirement of "having thirty rooms or more" and of having the capacity to "accommodate the minimum of thirty persons," be deleted.

The submission is that the proviso should permit any hotel, guest house, lodge or restaurant irrespective of the capacity to have exclusive areas for smoking with adequate ventilation. It appears from the material submitted that the restriction in the proviso with reference to thirty rooms or seating capacity of thirty persons, is based on the Act now operative in India bearing the title "the Cigarettes and Other Tobacco

Products (Prohibition of Advertisement and Regulations of Trade and Commerce, Production, Supply and Distribution) Act - 2003" -Act No. 34 of 2003.

A similar provision appears in Section 4 of the Indian Act. The rationale for permitting exclusive smoking areas based on the capacity of the establishment is to prevent a possible avoidance of liability. It is clear that only large establishments could afford in economic terms the provision of sufficiently ventilated places exclusively for smoking. In view of the harm to the smoker by smoking in such places, the exception should be limited in its application. The restriction adopted in the Indian legislation is, in our view, reasonable.

- iii. We have to make similar observation with regard to submission that provision should be included to have one or more enclosed spaces or enclosed areas which could be set aside exclusively for smoking. The entire objective of the Bill would be defeated by a proliferation of exclusive smoking areas;
- iv. that the definition in sub clause (5) be restricted to what is meant by the phrase "public place" and that it should not be a definition of "enclosed public place."

The submission is that whether any "public place" is enclosed in order to attract the prohibition would be a question of fact to be determined by a Court depending on the facts and circumstances of each alleged contravention.

The present formulation would involve certain difficulties primarily in interpretation. The first part of clause 5 reads as follows:

"For the purpose of this section "enclosed public place" means any place to which public have access, whether as a right or otherwise of a permanent or semi-permanent nature".

The second part specifies certain places, included in the definition.

In our view the first part of the definition that an enclosed public place mean any place to which public have access, whether as a right or otherwise of a permanent or semi permanent nature, includes a degree of artificiality. A place to which public have access, would indeed be a public place. But, the law cannot go further and define such place as being "an enclosed public place".

Therefore in our view the definition should be separated as follows:

The first part will define the phrase "public place" to mean any place to which public have access, whether as a right or otherwise and the second part to define an "enclosed public place" to include the places that are specified in the definition.

Further we are of the view that the reference at the end to "kiosk or any other similar place" extends the operation of the definition to wide and imprecise area which would be both, unreasonable considering that smoking is yet lawful and incapable of proper enforcement.

Therefore in our view the prohibition should be limited to what would ordinarily come within the meaning of phrase "enclosed public place."

Whilst the other places specified in the definition would generally have the characteristic of being enclosed public places and warrant the prohibition, the word "kiosk" does not have a generally operative meaning of being a place which is enclosed. In the circumstances we are of the view that inclusion of the words "kiosk or any other similar place" would be unreasonable and be in conflict with Article 12(1) of the Constitution. Subject to the foregoing we are of the view that clause 40 as appearing above would not be inconsistent with the Constitution.

The other main objection to the Bill is by the intervenient Petitioners including Ven. Dr. Omalpe Sobitha Thero, M.P., who presented the previous Bill, who submit that the definition of "alcohol products" as appearing in clause 46 has been changed from the definition contained in clause 42 of the previous Bill after its content was specifically considered by this Court in the previous determination and found to be reasonable and constitutional. It was submitted that the amendment has been made to remove the Brewery Industry and trade from the operation of the proposed law and as such the amendment-

- i) defeats the purpose of the Bill.
- ii) is contrary to government policy, and
- iii) confer an undue advantage on those engaged in the brewery industry and trade so as to be inconsistent with Article 12(1) of the Constitution.

It was specifically submitted on behalf of the Ven. Thera that the prohibition on the sale of inter alia of alcohol products to persons below the age of 21 years, being an amendment done after consideration by Court to clause 29 of the previous Bill will be defeated entirely by the new definition of "alcohol product" in the present Bill.

In view of the serious submissions that have been made that touch on the bona fides of the amendment that has been now been presented by Government, it is necessary to consider this matter in its entirety.

The term "alcohol product" was defined in the previous Bill as follows: "Alcohol product means a beverage containing a volume of one per centum or more of alcohol"

Objections were raised to this provision especially the brewery industry and certain others on the basis that some pharmaceuticals contain more than 1% alcohol. The Court in its previous determination has specifically held that there is no evidence of any pharmaceutical product that would come within the definition and that the Petitioners have in any event no interest in the pharmaceutical or ayurvedic drug industry. The Court further noted that the alcohol content to be specified is a matter of policy and that there was no material to demonstrate that the definition is per se unreasonable so as to be inconsistent with Article 12(1) of the Constitution.

The submissions of the intervenient Petitioners is that the definition in the previous Bill based on a lower percentage of alcohol so as to include brewery products is consistent

with the policy of the Government as contained in the "Mahinda Chintanaya" which proclaimed that there should be a stop to intoxicants ^u;g ;s;&'

In this context it was submitted that the definition in clause 46 of the present Bill which provides that only a beverage containing in volume of 4.5% or more of alcohol would be an alcohol product, would in effect remove beer from the definition of alcohol product and permit the sale of beer to persons below the age 21 years and also permit beer advertisements.

On this basis the intervenient Petitioners supported the grounds of objection that the amendment is; (1) inconsistent with the proclaimed Government policy of there being a "stop to intoxicants ^u;g ;s;&; (2) that the purpose of the Bill in prohibiting the sale of liquor to persons below the age of 21 and the advertisement of alcohol products, will be defeated; and (3) give an unduly favourable treatment to those in the brewery industry and trade by exempting them from the operation of the restrictions as contained in the Bill.

Having considered the submissions we are in agreement with the grounds of objections raised. These grounds of objection are in our view well founded. Addl. Solicitor General when questioned by Court was not able to make any submission as to the basis on which the present Bill departs from the definition as affirmed by this Court in the previous determination.

The submission that the amendment has been made to accommodate the interests of the brewery industry and trade is also well founded, since in the petition dated 13.6.06 in SD 1/2006 filed by the Intervient Petitioner - Lion Brewery Ceylon Ltd., in paragraph 17 it is stated as follows: "The Intervient Petitioners state that some of the products manufactured by the intervenient Petitioners falls outside the definition of the word "alcohol product" as defined in clause 46 of the new Bill.

Thus it is manifest that what the brewery industry failed to achieve when the Bill was considered by this Court previously as to its constitutionality; it has obtained by having the Bill presented again by Government including an amendment which substantially exempts its products from the operation of the law.

The more serious aspect of this amendment is in relation to certain amendments that were suggested by Court in the previous Bill which originally contained a prohibition of sale and promotion of sale of any tobacco or alcohol product within the radius of 100 meters of any premises frequented mainly by children or young adults (clause 29 of the previous Bill). The term "children" was defined to mean persons who are 18 years of age and young adults to persons who are of 18 but below 25 years. It was strenuously contended before this Court that this provision would amount to an effective prohibition of sale of tobacco and alcohol products within a city such as Colombo.

In these circumstances it was agreed by all parties that this provision be deleted and substituted with a provision which prohibits the sale of tobacco and alcohol products to persons below the age of 21. The entire purpose of this clause was to protect the younger

generation from early use and addiction to tobacco and alcohol products. This amendment was specifically agreed upon on the basis that brewery products would come within the ambit of the prohibition and that there would be no sale of brewery products to persons below the age of 21 years and there would be no advertisements of those products.

In the circumstances we are of the view that all 3 grounds of objection raised by the intervenient Petitioners in regard to the increase of alcohol content in the definition of "alcohol product" in clause 46 of the Bill which is intended to circuitously exempt the sale of brewery products from the prohibitions and restrictions in the Bill is inconsistent with Article 12(1) of the Constitution. Irrespective of legal considerations it is a reversal of the proclaimed policy of Government of there being a "stop to intoxicants" ^u;g ;s;&'

Accordingly we are of the view that this clause should be amended to include the previous definition that had been considered by this Court and found to be consistent with the Constitution.

For the reasons stated above we make a determination that the Bill is not inconsistent with the Constitution subject to the amendment of clause 40 (5) and the amendment of the definition of "alcohol product" appearing in clause 46 to be the same as in clause 42 of the previous Bill.

Sarath N Silva
Chief Justice

Shiranee Tilakawardena
Judge of the Supreme Court

Gamini Amaratunga
Judge of the Supreme Court