



- p. Record  
69 to the following conditions contained in the exhibit marked P1 dated the 22nd day of August, 1952:
- p. 72, 1.1 "8A - Grant of Privilege - The Privilege will be granted to the person who offers the highest price for every gallon of arrack removed from the appropriate warehouse referred to in Schedule B hereto for sale in the tavern or taverns to which the privilege relates. Such price (hereinafter referred to as the "rent") shall not include the price at which Arrack is issued from the warehouse as fixed by the Excise Commissioner under condition 16." 10
- p. 89, 1.1 (Note: The "rent" offered by the Respondents and accepted by the Excise Commissioner for the relevant year was Rs. 4/30 per gallon, exclusive of the price at which such Arrack was issued from the warehouse.)
- p. 75, 1.33 "13(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. 20
- p. 75, 1.40 "13(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. 30
- p. 75, 1.43 "14. 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 to deliver it to the Warehouse Officer in charge thereof, and obtain a receipt .....
- (2) the outgoing grantee shall present such receipt to the Excise Commissioner, who shall pay to such grantee the value of the arrack so 40

delivered at the rates at which such grantee purchased such arrack.

Record

"28(2). No remission of the rent payable in respect of the privilege will be granted on any plea of the grantee's having overestimated the value of any tavern or on any other ground.

p. 79, 1.1

"29. Termination of Privilege

p. 79, 1.39

The privilege shall terminate on (a) the expiry of the term for which it is granted

10 (b) .....

4. At the close of business on 30th September, 1953 there were remaining unsold in the Respondent's taverns a total quantity of 1,832 gallons 32 drams of arrack for which the Respondents had paid an aggregate sum of Rs. 7,882/03 at the stipulated rent of Rs. 4/30 per gallon in respect of the year 1952/53. The privilege granted to the Respondents on the 22nd April, 1952 having expired at the close of business on 30th September, 1953, they could no longer law-  
20 fully sell the said quantity of arrack by retail except under the authority of a fresh privilege granted by the Excise Commissioner in respect of the following year.

5. In the meantime, however, the Excise Commissioner had in fact, in the exercise of the powers vested in him by section 18 of the Excise Ordinance, granted to the Respondents the exclusive privilege of selling arrack by retail during the period 1st October, 1953 to 30th September, 1954 in the same taverns previously  
30 referred to. This further privilege was granted subject, inter alia, to the following conditions set out in the Exhibit marked P2 dated the 30th day of July, 1953:

"Conditions 9, 15(1), 15(2), 16(1), 16(2), 31(2) and 32 which correspond precisely to the conditions 8(a), 13(1), 13(2), 14(1), 14(2), 28(2) and 29 respectively of the Exhibit P1 previously quoted."

40 (Note: The rent for the privilege offered by the Respondents and accepted by the Excise Commissioner for the year 1953-54 was Rs. 4/91 per gallon exclusive of the price at which such arrack was issued from the Warehouse).

Record

6. On 1st October, 1953 the Respondents admittedly commenced business, under the authority of the second privilege granted to them, with the balance stock of 1,832 gallons 32 drams remaining unsold at the end of the previous day. The question therefore arose as to what rent was payable by the Respondents in respect of this quantity of arrack for the year commencing on 1st October, 1953. In this connection the Respondents clarified their position as follows in their letter marked P5 dated the 30th June, 1954 addressed to the Government Agent, Western Province: 10

p.137, 1.5

"Our position is that we were the incoming renters for 1953/54 as well as the outgoing renters for 1952/53. The balance stocks as at 30.9.53 were duly carried over by us against the 1953/54 period in respect of each tavern.."

7. The Respondents did not dispute their liability to pay rent to the Crown at the rate of Rs. 4/91 per gallon in respect of this quantity of arrack taken over by them for the year 1953/54. They claimed, however, that they were entitled to credit in the sum of Rs. 7,882/03 which they had previously paid as rent in respect of the same quantity of arrack for the previous year. Accordingly, they offered to make a payment on the basis that their net liability in respect of this quantity of arrack was only Rs. 1,117/97 (i.e. Rs. 9000/- at Rs. 4/91 per gallon less Rs. 7,882/03 at Rs. 4/30 per gallon). 20

8. The Government of Ceylon denied that the Respondents were entitled to set off any sum whatsoever against the amount of their liability calculated at Rs. 4/91 per gallon in respect of the year 1953/54. 30

9. In due course the Respondents instituted an action against the Appellant as representing the Crown on the 5th day of September, 1955, claiming a refund of the sum of Rs. 7,882/03 alleged by the Respondents to have been wrongfully withheld from them out of a sum of Rs. 66,800 which had been deposited by them as security under condition 10 of P2 for the due performance of their obligations under the contract. In paragraph 8 of their plaint the Respondent pleaded that they "had to pay the Government a further sum of (only) Rs. 1117/97 at 61 cents per gallon so as to bring it to the amount of Rs. 4/91 payable during the year 1953/54." 40

p. 7

p. 133, 1.13

10. The Appellant filed an Answer on 9th March, 1956 denying that any sum had been wrongfully withheld from the Respondents out of the amount deposited as security.

Record  
p. 9

11. At the trial of the action, after a preliminary discussion, the following issue was framed for adjudication:

10 "Are the Plaintiffs liable under condition 15(2) of the Arrack Sales Conditions for 1953/54 to pay to the Government in respect of the 1,832 galls. 32 drams at the rate of Rs. 4/91 per gallons being an amount equivalent to the rent agreed upon?"

p. 12, 1.28

20 This issue was understood by both parties and by the learned District Judge to be confined solely to the question whether or not a sum of Rs. 7,882/03 should be deducted from the Respondents' admitted liability of Rs. 4/91 per gallon. It was argued on behalf of the Respondents that only an additional rent of 61 cents per gallon (i.e. Rs. 4/91 less Rs. 4/30 which had been paid in respect of the previous year) was due by them. Learned Counsel appearing for the Respondents submitted that the sum of Rs. 7,882/03 paid as rent for the previous year "had not become lawfully payable because after the 30th September midnight the Plaintiff was prohibited from selling." The gist of this argument, presumably, was that the consideration for the payment of rent had failed and that the Crown was therefore liable to give credit for this amount to the Respondents.

p. 14, 1.11

30 12. As against this argument, it was contended on behalf of the Appellant that rent calculated at the rate of Rs. 4/91 per gallon was payable for the year 1953/54 without deduction, and that the Respondents were in any event precluded by the conditions attaching to the grant of the privilege from claiming any remission of rent on any ground whatsoever.

40 13. The learned District Judge held that on a correct interpretation of the relevant Arrack Sales Conditions "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

p. 19, 1.16

Record

- 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 the 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." The learned District Judge also rejected the Appellant's submission that no remission of rent could in any event be claimed in view of the conditions attaching to the grant. Accordingly, a decree was entered in favour of the Respondents as prayed for with costs. 10
- p.19, 11.28-40
- p.21
- p.22 14. From this judgment and decree the Appellant appealed to the Supreme Court of Ceylon on the 6th day of November, 1956.
- p.25 15. On appeal, Basnayake C.J. held that, on a correct interpretation of P1 and P2, the Respondents had wrongly conceded their liability to pay rent at even 61 cents per gallon for the privilege of selling the arrack during the year 1953/54. He expressed the view that conditions 13 and 14 of P1 and conditions 15 and 16 of P2 had no application to a case where the same person was the grantee in two successive years, and that in such a situation the Respondents, having retained their stock of arrack, were not liable to pay any additional rent for the privilege of selling that stock after the expiry of the privilege granted to them in respect of the previous year. Finally, Basnayake C.J. held that the Appellant's defence was shut out by the operation of the rule against unjust enrichment. 20
- p.28, 1.20
- p.30, 1.25 16. Sansoni J. agreed with Basnayake C.J. that "condition 15(2) of P2 cannot apply to such a case as this where the privilege is granted for two successive years to the same person." He also held that the Respondents were not liable either under the terms of the contract or on general considerations "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." Finally, Sansoni J. expressed the opinion that the Respondents, having become the renters again, were 30
- p.33, 1.36
- p.35, 1.16
- p.35, 1.30 40

not prevented from selling the arrack after 30th September, 1953 because "the contract contains no prohibition against such a quantity of arrack being sold in the following year."

Record

17. Pulle J., in a dissenting judgment, held that the Respondents' action should be dismissed with costs. At the conclusion of his judgment he said, "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." It is respectfully submitted that this part of the judgment of Pulle J. was correct.

p.30

p.33, 1.11

18. In view of the judgments of the majority of the Court the Appellant's appeal was dismissed with costs and decree was entered accordingly, and on 10th October, 1958 the Appellant was granted final leave to appeal to Her Majesty in Council against the Judgment and Decree of the Supreme Court dated 31st July, 1958.

p.36

p.46

19. The Appellant respectfully submits that the Judgments of Basnayake C.J. and Sansoni J. and of the learned District Judge of Colombo were wrong.

20. The Respondents' cause of action was formulated solely on the basis that the Crown was not entitled to retain the rent paid in respect of the quantity of arrack left unsold at the expiry of the period for which the first privilege had been granted to them. It is submitted that there is no provision either in the contract between the parties or under the general law whereby a claim to a refund in these circumstances can be supported.

21. The grounds on which Basnayake C.J. and Sansoni J. dismissed the Appellant's appeal were entirely different to those on which the Respondents had presented their case against the Appellant. The Respondents did not claim that, having paid rent at Rs. 4/30 per gallon for the privilege of selling the arrack during the year 1953/53, they were not liable to make any further payment for the privilege

Record

p.30

p.33, 1.11

p.36

p.46

Record

of retaining the same stock for sale in their taverns during the subsequent year. Had a claim on this basis been formulated, it is submitted that the Appellant could inter alia have relied on the following defences:

(A) that the Respondents had properly conceded, and had also acted on the footing, that they were the "outgoing grantees" as well as the "incoming grantees" within the meaning of conditions 15 and 16 attaching to the grant. Rent at the stipulated rate was therefore payable by them under condition 15(2) of P2 as incoming grantees for every gallon of arrack retained by them in the taverns for sale during that year. In other words, the Respondents, having exercised their right as "incoming grantees" under condition 15(1) to "take over" the arrack for sale during the year 1953/54, could not lawfully repudiate their corresponding obligation to pay rent under condition 15(2).

10

20

(B) that, in the alternative, it would have been the duty of the Respondents as outgoing grantees (under condition 16 of P2) to remove the entire stock of unsold arrack to the nearest Excise Warehouse at the expiry of the year 1952/53, and to recover from the Excise Commissioner only the "value" of the arrack (which term in the context clearly excludes "rent").

(C) that the Respondents, having contravened condition 16 of P2, could not legally take advantage of that contravention to support the repudiation of their liability to pay rent in respect of this quantity of arrack for the year 1953/1954, and

30

(D) that as a matter of law the Respondents were precluded by the provisions of section 461 of the Civil Procedure Code from obtaining relief on the basis of a cause of action which was entirely different to that which had been formulated in their notice of action and in their pleadings.

40

22. The Appellant submits that on a correct interpretation of P1 and P2 the Respondents were not entitled to a refund of any part of the rental paid by them in respect of the year 1952/53 and that they



10 were also liable to pay rental at Rs. 4/91 per gallon as rent in respect of all unsold arrack retained by them for sale in 1953/54. The consideration for the earlier payment had not failed merely because the Respondents had not succeeded in selling the arrack before the close of business on 30th September, 1959. On the other hand, the consideration for the additional payment was the grant of the privilege (which the Respondents had previously not enjoyed) of selling the arrack after 30th September, 1953.

20 23. If the incoming grantee for 1953/54 and the outgoing grantee for 1952/53 had been different persons, the Crown would have been entitled (a) to retain the rent paid by the outgoing grantee for the arrack remaining unsold at the end of the year 1952/53 and (b) also to claim rent from the incoming grantee for the stock taken over by him for sale at the commencement of the year 1953/54. There is nothing in the provisions of P1 and P2 which supports the view that, because the same grantee happened to enjoy the privilege for two successive years, he should derive an advantage to the detriment of the Crown in respect of the rent payable for arrack remaining unsold at the end of the first period.

30 24. The Appellant submits that the Judgment and Decree of the District Court, dated 25th October, 1956, and of the Supreme Court, dated 31st July, 1958, should be set aside and that the Respondents' action against the Appellant should be dismissed with costs in all Courts for the following among other

#### R E A S O N S

- (1) BECAUSE Pulle J. correctly held that the Respondents were not entitled to a refund of Rs. 7,882/03 paid by them as rent in respect of the quantity of arrack lying unsold in their taverns at the close of business on 30th September, 1953.
- 40 (2) BECAUSE the Respondents were precluded by the provisions of condition 28(2) of P1 from claiming a refund of the said sum of Rs. 7,882/03.
- (3) BECAUSE Basnayake C.J., and Sansoni J. were

Record

wrong in deciding that the Respondents were entitled to exercise the privilege of selling the said quantity of arrack during the year 1953/54 without payment of additional rent at the stipulated rate of Rs. 4/91 per gallon.

- (4) BECAUSE on a correct interpretation of P1 and P2 the Respondents correctly conceded their liability to pay rent at Rs. 4/91 per gallon for the year 1953/54, but were wrong in their contention that a sum of Rs. 7882/03 should be deducted from the aggregate amount of their admitted liability. 10
- (5) BECAUSE it was not open to the majority of the learned Judges of the Supreme Court to grant relief to the Respondents upon a cause of action which was substantially different to that which was formulated in their notice of action and in their pleadings and at the trial before the learned District Judge. 20
- (6) BECAUSE the rule against unjust enrichment has no application to the facts of the present case.

E.F.N. GRATIAEN

WALTER JAYAWARDENE

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. SELVADURAL  
(Plaintiffs) Respondents

---

CASE FOR THE APPELLANT

---

T.L. Wilson & Co.,  
6, Westminster Palace Gardens,  
London, S.W.1.  
Solicitors for the Appellant.