

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

***In the matter of an Application for
Special Leave to Appeal, under and in
terms of Article 128(2) of the
Constitution of the Democratic Socialist
Republic of Sri Lanka.***

SC (Appeal) No. 43/2019

SC Special Leave to Appeal

Application No. 107/2017

**CA Writ Application No.
62/2014**

Rajagopal Rajendran,
No. 84, Main Street,
Norwood.

As the Power of Attorney holder of the
Licensee of Udaya Wine Stores, namely
Liyanage Charitha,
No. 14, Gouravilla Colony,
Upcot.

PETITIONER

Vs

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

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

RESPONDENTS

AND NOW BETWEEN

Rajagopal Rajendran,
No. 84, Main Street,
Norwood.

As the Power of Attorney holder of the
Licensee of Udaya Wine Stores, namely
Liyanage Charitha,
No. 14, Gouravilla Colony,
Upcot.

PETITIONER-APPELLANT

VS

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

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

1A ADDED RESPONDENT-
RESPONDENT

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

1B ADDED RESPONDENT-
RESPONDENT

Presently at
Department of Excise,
No. 33, Kotte Road,
Rajagiriya.

Mrs. Ranasinghe Semasinghe,
Commissioner General of Excise,
Department of Excise,
No. 33, Kotte Road,
Rajagiriya.

1C ADDED RESPONDENT-
RESPONDENT

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

RESPONDENT- RESPONDENTS

BEFORE : **B.P. ALUWIHARE, PC, J.**
MURDU N.B. FERNANDO, PC, J. AND
S. THURAIRAJA, PC, J.

COUNSEL : Sanjeeewa Jayawardena, PC with Lakmini Warusawithana
instructed by Ashoka Niwnhella for the Petitioner-Appellant.
Vikum de Abrew, SDSG for the Respondents- Respondents.

ARGUED ON : 21st July 2020

WRITTEN SUBMISSIONS. : Respondent- Respondent on 7th August 2020.
Petitioner -Appellant on 27th March 2019.

DECIDED ON : 9th July 2021

S. THURAIRAJA, PC, J.

The Parties

The **Petitioner - Appellant** (Hereinafter referred to as the Appellant) in the case is Rajagopal Rajendran who claims to hold the Power of Attorney of Liyanage Charitha, the Licensee of Udaya Wine Stores. The **1st Respondent – Respondent** (Hereinafter referred to as the 1st Respondent) is D.G.M.V. Hapuarachchi who was the Commissioner

of Excise at the time, whereas **1A Added Respondent - Respondent**; Mrs. K.H.A. Meegasmulla, and **1B Added Respondent - Respondent**; Mrs. Ranasinghe Semasinghe had succeeded to the position of Commissioner of Excise and **1C Added Respondent - Respondent**; Mr. Ranasinghe Semasinghe, is the current Commissioner of Excise. The **2nd Respondent - Respondent** (Hereinafter referred to as the 2nd Respondent) Wasantha Dissanayake, is the Deputy Commissioner of Excise, who had issued the purported Technical Crime Report to the said wine stores.

This is an appeal filed by the Appellant against the Order in Case No. CA/WRIT/62/2014 delivered in the Court of Appeal on 31st March 2017 in regard to an application for the issuance of writs of Certiorari and Prohibition as per Article 140 of the Constitution. The case was dismissed by the Court of Appeal observing the lack of locus standi of the Appellant on the basis that he could not have been the Power of Attorney holder of the Licensee of Udaya Wine Stores.

On 8th May 2017 the Appellant has prayed for Special Leave to Appeal before this Court as per Article 128 (2) of the Constitution requesting the Court to set aside the Order of the Court of Appeal and to grant reliefs prayed for or to remit the case back directing the Court of Appeal to hear and determine the writ applications.

On 11th February 2019 Special Leave to Appeal was granted for the following question of law,

“For the purpose of instituting the writ application, was not the said Power-of-Attorney P2 remain, in spite of the demise of Liyanage Udeni Silva and which remained unrevoked by Liyanage Charitha. ” (sic)

The Facts

It is pertinent to note the facts of the case before we proceed further. The facts according to the records submitted before this Court are as follows,

Liyanage Charitha and Liyanage Udenis Silva were co-licensees of three licenses; FL-3, FL-4 and B-3 issued for the retail sale of arrack, foreign liquor and bottled toddy (not to be consumed on the premises) under the Excise Ordinance No. 08 of 1912 as amended, for Udaya Wine Stores located in No.14, Gouravilla Colony, Upcot.

On 7th November 2006 the said co-licensees granted their power and authority to the Appellant to *inter alia* conduct business activities of Udaya Wine Stores, by the Power of Attorney bearing No. 301, marked 'P2'.

However, subsequent to the demise of Liyanage Udenis Silva in or around 2010, the FL-3, FL-4 and B-3 liquor licenses were issued by the authorities in the name of Liyanage Charitha, as the sole license holder in respect of the said premises. However, it is important to note that no new Power of Attorney was issued by Liyanage Charitha to any person including the Appellant.

On the 10th February 2014, the 2nd Respondent visited the said wine stores and purchased a bottle of extra arrack along with a bottle of beer and tendered a sum of Rs. 1100/=.

During the visit, the staff who were at the premises were Iyakannu Reegan who was the salesperson and Subramaniam Mohanraj who acted as the manager. They were found to be in violation of the provisions of the Excise Ordinance and Regulations made under the Excise Ordinance, as the officer detected a 180 ml bottle filled with liquor and 120 opened bottles of Arrack packed in 10 crates.

Accordingly, a statement was recorded from the salesperson as to the said violation and later another statement was recorded from the manager, following which on 18th February 2014 the Technical Crime Report [TCR] bearing No. 27/2014 [the order marked 'X2'] was issued. The said TCR imposed a composite fee of Rs. 2,644,000/= in lieu of cancellation of the liquor license to be paid on or before 5th March 2014, a delay in remittance would result in an additional 10% fee imposing a total fee of Rs.

2,908,400/=. However, the Appellant claimed that the actions of the Respondents were *ultra vires* in terms of Section 56 of the Excise Ordinance No.08 of 1912 as amended.

Accordingly, the Appellant instituted action as the Power of Attorney holder of Liyanage Charitha and filed a writ application bearing No. 62/2014 seeking a writ of Certiorari quashing the decision in the TCR marked 'X2' and a writ of Prohibition preventing the 2nd Respondent from acting on document marked 'X2'. The Respondents then challenged the locus standi of the Appellant for the above writ action.

As stipulated prior, as the Court of Appeal dismissed the application due to lack of locus standi of the Petitioner, and the said question of law on the validity of the unrevoked Power of Attorney marked 'P2' in the context of the death of one of its grantors has been brought before this Court.

Determination of the Question of Law

It is the contention of the Appellant that the power to institute the current action is derived from the impugned Power of Attorney bearing No. 301 signed by the then co-licensees of the said licenses; Liyanage Charitha and Liyanage Udenis Silva on 7th November 2006, despite the death of the said Liyanage Udenis Silva in 2010.

Section 2 of the Power of Attorney Ordinance No. 4 of 1902 as amended describes a Power of Attorney to include,

"... any written power or authority other than that given to an Attorney at Law or Law Agent, given by one person to another to perform any work, do any act, or carry on any trade or business and executed before two witnesses, or executed before or attested by a notary public or by a Justice of Peace, Registrar, Deputy Registrar or by any Judge or Magistrate....."

Accordingly, by way of a Power of Attorney, the power and authority of the grantor attributed to the conduct specified will be conferred to the grantee giving

him/her the power and authority to act on behalf of the grantor within the bounds of the authority specified.

In considering the Power of Attorney before this court, the first operative clause reads,

*"WHEREAS **We, are** carrying on the business for wine shop called and known as "Udaya Wine Stores" [hereinafter called as the said business] at No. 14, Gouravilla janapathaya, Upcot and **we** are duly issued with an FL 4 License by the Government Agent of Ambagamuwa [hereinafter called the said license]"* (Emphasis Added)

Further the purpose of the said Power of Attorney is stipulated as,

*"AND WHEREAS **we are** unable to attend all matters concerning the **said business** and the said license personally.*

*AND WHEREAS **We are** desirous of appointing some fit and proper person as our attorney to manage and transact all **our** business and affairs in respect of the **said business and the said license.**"* (Emphasis Added)

In assessing the above provisions, it is apparent that the authority and power granted to the Appellant, is the authority and power of both Liyanage Udenis Silva and Liyanage Charitha arising from the said license obtained prior to 2014 in their capacity as co – licensees and co-owners of the business, prior to the death of Udenis Silva. In addition to the above purpose the joint power of the said co-licensees were given to the Appellant for the following six additional purposes,

- 1. To appear before the Commissioner of Excise on all matter connected to the said business and the said license and make necessary representation on our behalf*
- 2. To appear before the Commissioner of Labour, Labour tribunal or other any other forum in respect of all industrial disputes with the employees of the said*

business and in matters connected with the payment of EPF ETF payments statutory or otherwise

3. *To appear before the Commissioner of Inland Revenue and represent all matters connected to the said business, make payment business turnover tax, income Tax and other payments, apply for income tax clearance and attend all necessary formalities with regard to the renewal of the said license annually.*
4. *To make representations on my behalf to all statutory provincial and local authorities in respect of the said business and the said license.*
5. *To enter into any compromise of disputes differences concerning the said business and the said license before any of the aforementioned functionaries and authorities and to execute all necessary writings in our name and on behalf to give effect to same.*
6. *To appear sue or answer and to receive all process in any action appeal or other judicial proceedings whatsoever in any court concerning the said business and the said license and generally to act in all such proceedings in any way in which we might if present be permitted or called on to act. "*

In light of the above, it is evident that specific powers were granted to the Appellant by the grantors in their capacity as co-licensees.

The perspective of the Supreme Court of India in this regard would be of assistance to understand the above. Abhay Manohar Sapre, J in **Tmt. Kasthuri Radhakrishnan & Ors V. M.Chinniyan & Anr 2016 SCW 609** observed the following,

*" It is well settled therein that an agent acting under a power of attorney always acts, as a general rule, in the name of his principal. **Any document executed or thing done by an agent on the strength of power of attorney is as effective as if executed or done in the name of principal, i.e., by the principal himself.** An agent, therefore, always acts on behalf of*

the principal and exercises only those powers, which are given to him in the power of attorney by the principal."

(Emphasis Added)

Accordingly, as per the Power of Attorney placed before this court, the Appellant derives his powers from both Liyanage Udenis Silva and Liyanage Charitha hence his actions shall be considered as actions authorized and done by both grantors. Actions of the Appellant prior to the death of Liyanage Udenis Silva could have been said to be authorized and valid under the Power of Attorney bearing No. 301. However, actions following the death would not be covered under the above Power of Attorney as the joint power and authority conferred to the Appellant would come to an end with the death of Liyanage Udenis Silva.

In the instant situation, the business is operating under Liyanage Charitha, who is the sole license holder in respect to the Premises. Accordingly, in order to transfer the powers and authority of the sole licensee derived from the license, a new Power of Attorney would have to be executed. Therefore, the Power of Attorney bearing No.301, will not have effect in regard to the current dispute.

In further addressing the termination of a Power of Attorney, the concept that the death of the principal or the agent terminates an agency is a well-established concept in common law. In **Garvin v Abeywardene (1923) 24 NLR 382** where a power was conferred among two agents, Bertram C.J observed,

*"Where a power is conferred among two agents, it is presumed to be conferred upon them jointly, and an act by one purporting to be an execution of that power is not a good execution. If the two agents are partners, and one partner purports to exercise title power singly as the survivor of the two, his act is none the less invalid. **At the death of one of the two agents, it terminates the authority of the other.**"*

(Emphasis Added)

Similarly, when two principals grant a certain power to an agent, it is the joint power of the two that is conferred. Especially when the grantors share the source from which the power and authority is derived. In the instant case, when the power and authority was conferred to the Appellant in 2006, the grantors of the Power of Attorney were Liyanage Udenis Silva and Liyanage Charitha who got their power from the jointly owned FL 4 license. Therefore, at the death of Liyanage Udenis Silva the joint power and authority conferred would cease to exist, terminating the Power of Attorney granted.

The Appellant in the written submission filed on his behalf refers to a statement made by the Madras High Court in **Ponnusami Pillai V. Chidambaram Chettiar 1918 Mad 279**, which also states,

"We have in each case to determine the true intention of the parties to the contract, from the terms thereof and from the surrounding circumstances"

Accordingly, it is appropriate that we assess the terms of the Power of Attorney to consider the intention of the said parties. The Power of Attorney reads,

*"AND WE do hear by direct all acts which shall be had made or done by our said Attorney **before he or they shall have received notice of death of any one of us** or the revocation of authority contained ... in these presents shall be as binding and valid to all intents and purposes as if same had taken place previous to our death or before such revocation any rule of law or equity to the contrary notwithstanding"*

(Emphasis Added)

The position that the death of one grantor would terminate a Power of Attorney granted is further confirmed by the aforementioned clause of the impugned Power of Attorney. As per the clause, it is evident that the power of the principals conferred to the agent is joint (as opposed to joint and several principals) as only acts conducted during the lifetime of both grantors have been authorized. Accordingly, power and

authority granted by the grantors would come to an end at the death of one of the grantors.

For the completeness of this discussion, it is pertinent to observe the Non – transferability of liquor licenses, in particular the general prohibition against managing privileges derived by licenses by way of Powers of Attorney.

Section 12 of the Excise Notification No.666 of 31st December 1979, issued under the Excise Ordinance reads,

*“(a) Non-Transferability of license - manager to be approved. – No privilege of manufacture, supply or sale or any interest therein shall be sold, transferred or sub rented without the previous permission of the government agent or the excise commissioner: **nor shall any agent or attorney be appointed for the management of any such privilege** or for signing the counterpart agreement of any Excise license **without the previous approval of the Government Agent or the Excise Commissioner.** Such agent or attorney shall, in every case, be a citizen of Sri Lanka and such approval shall be given only in exceptional circumstances at the discretion of the government Agent or the Excise Commissioner*

(b) Provided however that the preceding condition shall not apply in any case where the licensee has obtained the prior written permission of the secretary to the Ministry of Finance and Planning for the purpose.”

(Emphasis Added)

The provision expressly prohibits the appointment of an agent for the management of the privileges of manufacturing, supplying, selling or any interest derived from the licenses issued to the licensee. However, under exceptional circumstances if a person is to be appointed as a Power of Attorney to manage such privileges, special provisions have been introduced under the above Section.

Accordingly, such person could be appointed provided he/she is a Sri Lankan citizen and prior approval has been obtained from the Government Agent or Commissioner of Excise regarding such management.

In the instant case, the co-licensees at the time have given the power to manage and transact all business and affairs relating to the license to the Appellant by the Power of Attorney dated 7th November 2006. The said provision of the Power of Attorney reads,

"... as our attorney to manage and transact all our business and affairs in respect of the said business and the said license."

However, the validity of such transfer is questionable, as there was no prior approval obtained.

The learned counsel for the Appellant attempted to show an impression of a rubber stamp belonging to the office of the Divisional Secretary on the Power of Attorney marked 'P2X' and submitted to Court that the same amounts to an approval of the Divisional Secretary. However, considering that such approval is given only in exceptional circumstances it is highly unlikely that a mere rubber seal could amount to an approval. Further, Section 12 (b) reproduced above, provides "*prior written permission of the secretary to the Ministry of Finance and Planning*" as an exception to Section 12 (a). Accordingly, considering the above, it could be implied that the approval of a Government Agent or the Excise Commissioner ought to be given in writing rather than by way of a mere rubber stamp on a Power of Attorney.

Therefore, it is observed that, the licensees are in violation of the said provision. Nevertheless, Udaya wine stores cannot be managed by an agent appointed by way of a Power of Attorney as the court is not satisfied that prior approval of a Government agent or the excise commissioner was obtained as required by Section 12 of the Excise Notification No.666 of 31st December 1979.

Reverting to the question of law before this court as to the validity of the Power of Attorney, I will briefly recall the decision of the Court of Appeal in this regard.

The learned Judge of the Court of Appeal has briefly observed the question on the ability of the Appellant to make a claim on behalf of Liyanage Charitha among other claims addressed. Accordingly, as per the Order of the Court of Appeal the Appellant has failed to satisfy that he is the Power of Attorney holder of the Sole licensee as of 2014. Further, it has been highlighted that the fact that the Appellant was appointed the Power of Attorney holder for both Liyanage Udenis and Liyanage Charitha does not have a bearing on the case as the same will come to an end at the death of one grantor.

Decision

As discussed extensively, I agree with the Order of the Court of Appeal in observing that the Appellant is not the Power of Attorney holder of the Sole Licensee of Udaya wine stores and thus does not have the locus standi to proceed with the writ application.

The question of law that required the attention of this Court is as follows,

“For the purpose of instituting the writ application, was not the said Power-of-Attorney P2 remain, in spite of the demise of Liyanage Udeni Silva and which remained unrevoked by Liyanage Charitha. ” (sic)

The Power of Attorney ‘P2’ does not remain in force, in spite of the demise of Liyanage Udenis Silva, even though it remained unrevoked by Liyanage Charitha. This is given that the death of Liyanage Udenis Silva would automatically terminate the Power of Attorney issued by the two grantors, jointly in their capacity as co – licensees of the premises. Thus, even though it was not expressly revoked, the Power of Attorney would cease to exist at the death of one of the grantors. Accordingly, I answer the question of law raised in the negative.

Considering all, I hold that the Power of Attorney bearing No. 301, dated 7th of November 2006 has ceased to exist upon the death of Liyanage Udenis Silva, hence the Appellant; Rajagopal Rajendran cannot be considered as the Power of Attorney holder of the sole licensee; Liyanage Charitha. Therefore, the Appellant does not have the locus standi to institute legal action on behalf of the said licensee.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

B.P. ALUWIHARE, PC, J.

I Agree

JUDGE OF THE SUPREME COURT

MURDU N.B. FERNANDO, PC, J.

I Agree

JUDGE OF THE SUPREME COURT