

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

In the matter of an application for mandates in the nature of Writs of Certiorari and Mandamus in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Ace Distriparks (Private) Limited
No. 805/2, Negombo Road, Mabole, Wattala.

Petitioner

Case No. CA (Writ) 195/2012

Vs.

1. Dr. Neville Goonawardana
Director General of Customs,
Sri Lanka Customs,
Main Street, Colombo 01.
2. K. R. Seneviratne
Dep. Director of Customs & Inquiring Officer,
Sri Lanka Customs,
Main Street, Colombo 01.
3. Hatton National Bank PLC
No. 481, T. B. Jayah Mawatha, Colombo 10.

Respondents

Jagath P. Wijeweera
Director General of Customs,
Sri Lanka Customs,
Main Street, Colombo 01.

Substituted 1st Respondent

R. Semasinghe
Acting Director General of Customs,
Sri Lanka Customs,
Main Street, Colombo 01.

Substituted 1st Respondent

Chulananda Perera
Director General of Customs,
Sri Lanka Customs,
Main Street, Colombo 01.

Substituted Substituted

1st Respondent

(Mrs.) P. S. M. Charles
Director General of Customs,
Sri Lanka Customs,
Main Street, Colombo 01.

Substituted Substituted

Substituted 1st Respondent

Before: Janak De Silva J.

N. Bandula Karunarathna J.

Counsel:

Sanjeewa Jayawardena P.C. with Rejeeva Amarasuriya for the Petitioner

Nayomi Kahawita SSC for the Substituted 1st and 2nd Respondents

Written Submissions filed on:

Argued On: 02.09.2019

Petitioner on 07.08.2018, 10.06.2019, 27.08.2019 and 17.10.2019

1st and 2nd Respondents 25.06.2019 and 21.10.2019

Decided on: 29.05.2020

Janak De Silva J.

Parties agreed on 02.09.2019 that this matter can be disposed of by written submissions. It was further agreed that the only issue to be determined by Court is whether sections 12, 44, 57, 59 and 107 of the Customs Ordinance covers other goods stored in the same container with the contraband.

However, the reference to section 107 of the Customs Ordinance is irrelevant to the issue raised by the parties as the further forfeiture amounting to treble the value of goods was made in terms of sections 12, 44, 57, 59 and 130 of the Customs Ordinance.

The contraband in issue is 507.15 Kgs. of sandalwood which was attempted to be exported in a container which inter alia contained other goods. There is no dispute that sandalwood is an item falling within Schedule B of the Customs Ordinance the importation/export of which is subject to restrictions and prohibitions. In view of the concessions made at the hearing, it is not in dispute that there was an attempt to export the contraband in violation of sections 12 and 44 of the Customs Ordinance.

The issue for determination is whether sections 57, 59 and 130 of the Customs Ordinance provide for the imposition of treble the value of goods including other goods stored in the same container with the contraband.

Before proceeding to consider these specific provisions, I wish to consider the order made at the customs inquiry in relation to the forfeiture of the other goods which were stored in the same container as the contraband.

The relevant portion of the order reads:

- i. Forfeiture of 507.15 Kg of sandalwood valued at Rs. 197,789/= in terms of sections 12, 44, 57, 59 and 109 of the Customs Ordinance read with the Import and Export Control Act No. 1 of 1969,

- ii. Further forfeiture of Rs. 20,464,000.80 (20.4 million) being treble the value of the goods in terms of sections 12, 44, 57, 59 and 130 of the Customs Ordinance read with Import and Export Control Act No. 01 of 1969 against the Petitioner,
- iii. Forfeiture of 205 cartons of garments valued at Rs. 2,895,099.57 attempted to be exported by M/s Ayesha Garments, and 223 cartons of garments valued at Rs. 3,224,921.04 attempted to be exported by M/s Jaffersons Garments, in terms of section 59 and 119 of the Customs Ordinance. These goods were released by the 2nd Respondent upon the imposition and payment of a penalty of Rs. 100,000/= each payable by M/s Ayesha Garments and M/s Jaffersons Garments,
- iv. Initial forfeiture and thereafter release of the rest of the cargo in terms of sections 59 and 163 of the Customs Ordinance.

Section 12 of the Customs Ordinance provides for the prohibition or restriction of the export or import of certain goods. Section 44 of the Customs Ordinance provides for the forfeiture of goods that are sought to be exported contrary to the prohibitions and restrictions in section 12 of the Customs Ordinance.

In this context, I wish to explain the incident of forfeiture in the Customs Ordinance.

In *Palasamy Nadar v. Lanktree* (51 N.L.R. 520 at 522) Gratiaen J. stated:

"Section 46 (which is the present Section 44) provides that any goods exported or taken out of the Island contrary to certain specified prohibitions and restrictions *"shall be forfeited* and shall be destroyed or disposed of as the Principal Collector of Customs may direct." The Customs Ordinance is an antiquated enactment Some of its provisions declare that in certain circumstances goods *"shall be forfeited"* while in other circumstances they are merely *"liable to be forfeited"* I am prepared to concede that the draftsmen must be given credit for having intended the terms *"forfeited"* and *"liable to forfeiture"* to convey different meanings. If the goods are declared to be *"forfeited"* as opposed to *"liable to forfeiture"* on the happening of a given event, their owner is automatically and by operation of law divested of his property in the goods as soon as

the event occurs. No adjudication declaring the forfeiture to have taken place is required to implement the automatic incident of forfeiture ...

A forfeiture of goods by operation of law would, of course, be of purely academic interest until the owner is in fact deprived of his property by some official intervention. Section 123 (present Section 125) of the Ordinance provides the machinery for this purpose ... When that is done, the goods "shall be deemed and taken to be condemned" and may be dealt with in the manner directed by law unless the person from whom they have been seized or their owner "shall, *within one month from the date of seizure* ... give notice in writing to the Collector that he intends to enter a claim to the ... goods ... and shall further give security to prosecute such claim before the Court having jurisdiction to entertain same." (Section 146) (This is the present Section 154)

This decision which was made in 1949 was followed a good half a century later by the present Supreme Court in *Lanka Jathika Sarvodaya Shramadana Sangamaya v. Heengama Director General of Customs and Others* (1993) 1 Sri L.R. 1 where Kulatunge J. after making a detailed analysis of the Customs Ordinance went on to state that (at page 13):

"The Customs Law applicable to forfeiture and seizure of goods is relevant to a proper determination of the application before us. Forfeiture of goods is one of the consequences of a breach of the provisions of the Customs Ordinance. Some of the sections provide that in the event of such breach the goods *shall be forfeited* e.g. Sections 34(1), 43, 44, 50, 50A (1)(b), 52, 55, 65, 75, 100A(2), 107, 107A(1), 107A(2), 121, 131 and 142. Section 57 provides *that in the absence of any explanation* to the satisfaction of the Director General of Customs, the goods shall be forfeited. Sections 38 and 68 provide that the goods *shall be liable to forfeiture*".

Hence it is seen that the Customs Ordinance provides for the forfeiture of the goods in relation to which a customs offense takes place. But in certain situations the Customs Ordinance envisages the forfeiture of other goods as well.

Section 57 of the Customs Ordinance requires every exporter to deliver a Bill of Entry, which is in the modern usage sometimes also referred to as a Customs Declaration or "CusDec", containing inter alia an accurate specification of the quantity, quality and value of the goods to be exported and the number, denomination, dimensions and description of the respective packages containing the goods. If the goods do not agree with the particulars in the bill of entry, in the absence of any explanation to the satisfaction of the Director-General of Customs, the same shall be forfeited and *such forfeiture includes all other goods which shall be entered or packed with them as well as the packages in which they are contained.*

In this context, the customs violation results in the forfeiture of the goods concerned as well as all other goods which shall be entered or packed with them as well as the packages in which they are contained. The word "entered" in section 57 of the Customs Ordinance in my view means included in the Bill of Entry or CusDec.

However, section 57 of the Customs Ordinance does not cover the imposition of a forfeiture amounting to treble the value of goods although it provides for the forfeiture of the goods in relation to which the violation of section 57 of the Customs Ordinance occurred as well as the forfeiture of all other goods which were entered or packed with them as well as the packages in which they were contained. Therefore, the impugned order cannot be sustained in terms of section 57 of the Customs Ordinance.

In contrast, section 59 of the Customs Ordinance deals with both the forfeiture of goods together with the means of conveyance and the imposition of treble the value of goods. The question is what is meant by "such goods" in relation to the imposition of treble the value of the goods.

In my view the drafters of the Customs Ordinance appear to have made a clear distinction between situations where they intended to encompass only the goods in relation to which a customs violation occurred compared to situations where all other goods entered or packed with them as well as the packages in which they were contained are brought into the equation. That to me appears to be the reason for section 57 of the Customs Ordinance to specifically refer to goods entered or packed with the goods in relation to which a customs violation

occurred whereas section 59 only refers to "such goods". Therefore, in my view section 59 of the Customs Ordinance does not allow the imposition of treble the value of goods in the instant matter to include all other goods entered or packed with the sandalwood.

Section 130 of the Customs Ordinance provides for the imposition of a forfeiture of, either one hundred thousand or treble the value of goods at the election of the Director-General of Customs. The subject matter of this section is goods which are prohibited or restricted for export.

The question is what is caught up within the words "value of the goods" in this section. Here again, for the same reasons set out above in relation to section 59 of the Customs Ordinance, I am of the view that it means only the goods in relation to which a customs violation took place and not to goods entered or packed with the goods in relation to which a customs violation occurred.

Therefore, that part of the order made by the 2nd Respondent imposing a forfeiture of Rs. 20,464,000.80 (20.4 million) being treble the value of the goods, which included the contraband as well as the other goods entered or packed with it, in terms of sections 12, 44, 57, 59 and 130 of the Customs Ordinance read with Import and Export Control Act No. 01 of 1969 against the Petitioner is ultra vires.

However, I hasten to add that the rest of the order was not assailed in these proceedings. Further that part of the order by which a forfeiture of treble the value of the contraband sandalwood is valid.

In *Ranatunge v. Commissioner-General of Agrarian Development and Another* [CA (Writ) 180/2017, C.A.M. 17.07.2019] I have, after examining the position in English law, held that partial quashing of a decision is possible provided the valid part can be severed from the invalid.

In this case, the 2nd Respondent acted ultra vires by imposing a forfeiture of Rs. 20,464,000.80 (20.4 million) being treble the value of the goods, which included the contraband as well as the other goods entered or packed with it, in terms of sections 12, 44, 57, 59 and 130 of the Customs Ordinance read with Import and Export Control Act No. 01 of 1969 against the Petitioner.

I issue a writ of certiorari quashing that part of the order P-13. For the avoidance of doubt, the order made by the 2nd Respondent should now read as imposing a forfeiture of Rs. 593,367/= (197,789/= X 3) being treble the value of the goods in terms of sections 12, 44, 57, 59 and 130 of the Customs Ordinance read with Import and Export Control Act No. 01 of 1969 against the Petitioner.

The application is partially allowed. Parties shall bear their costs.

Judge of the Court of Appeal

N. Bandula Karunarathna J.

I agree.

Judge of the Court of Appeal