

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

C.J. Fernando,
No.2A, Fernando Place,
Moratuwa.
Petitioner

CASE NO: CA/WRIT/137/2017

Vs.

1. G.A.N. Jayantha,
Commissioner of Revenue,
Department of Revenue –
Western Provincial Council,
No.204, Denzil Kobbekaduwa
Mawatha,
Battaramulla.
- 1A. S. Dedigama,
Commissioner of Revenue,
Department of Revenue –
Western Provincial Council,
No.204, Denzil Kobbekaduwa
Mawatha,
Battaramulla.

2. M.C.T.M.S. Fernando,
Provincial Deputy Commissioner
of Revenue (Provincial Assessor),
Stamp Duty Section,
Department of Revenue –
Western Provincial Council,
No.204, Denzil Kobbekaduwa
Mawatha,
Battaramulla.
3. Attorney General,
Attorney General's Department,
Hulftsdorp,
Colombo 12.
Respondents

Before: Mahinda Samayawardhena, J.
Arjuna Obeyesekere, J.

Counsel: Uditha Egalahewa, P.C., with Pasindu Silva,
Miyuru Egalahewa and Arunodha
Jayawardena for the Petitioner.
Manohara Jayasinghe, S.S.C., for the
Respondents.

Argued on: 21.07.2020

Decided on: 02.09.2020

Mahinda Samayawardhena, J.

The Petitioner is an Attorney-at-Law and a Notary Public. The 1st Respondent, the Commissioner of Revenue of the Western Province, found systematic stamp duty forgeries on a large number of Deeds executed by the Petitioner. The *modus operandi* had been affixing forged stamp duty payment receipts on the Deeds, thereby defrauding the Registrar of Lands, the Commissioner of Revenue and Government revenue.

The Petitioner's position is these forgeries were committed unknown to him by his clerk who pleaded guilty to forgery when proceedings were instituted against him (the clerk) in the Magistrate's Court. The Petitioner further says this clerk, who is a freelance clerk, similarly deceived two other Attorneys-at-Law who had obtained the services of the clerk in the course of their notarial practice.

The 1st Respondent by letter marked P3(a) dated 17.11.2015 informed the Petitioner that the stamp duty payable on Deed No. 1966 executed by the Petitioner had not been credited to the Commissioner's account, and requested the Petitioner to pay the stamp duty of Rs. 279,000 with a 300% penalty thereon in a sum of Rs. 837,000, amounting to a total sum of Rs.1,116,000. The payment was requested within seven days.

The Petitioner immediately paid the stamp duty but did not pay the penalty.

The 1st Respondent thereafter sent the notice marked P6 dated 30.11.2015, issued under section 57(1)(b) of the Financial Statute of the Western Province, No. 6 of 1990, requiring the Petitioner to pay the penalty immediately.

However, the Petitioner did not pay the penalty even thereafter. Nor did he file an appeal against the penalty, as he is entitled in law to do under section 79(1) of the said Financial Statute.

The 1st Respondent then sent the notice marked P9 dated 11.01.2016, under section 87 of the said Financial Statute, informing the Petitioner that legal action was being contemplated to recover the penalty in a sum of Rs. 837,000.

It is not in dispute that under section 57(1)(b) of the said Financial Statute, in addition to the stamp duty in default, a penalty equal to three times the stamp duty can be imposed.

The appeal marked P10(a) dated 08.02.2016 was filed by the Petitioner not against the section 57(1)(b) notice marked P6, but against the section 87 notice marked P9 – *vide* P10(a).

The Petitioner says no inquiry was held on this appeal marked P10(a).

This is the first complaint of the Petitioner before this Court.

This leads me to consider the second complaint of the Petitioner.

The Petitioner also received the letter marked P7(a) dated 16.12.2015 from the 1st Respondent informing him that for Deed Nos. 1866-1993 executed by the Petitioner during the period of January 2014-August 2015 (amounting to 127 Deeds) stamp

duties had not been credited to the account of the 1st Respondent (although fraudulent payment receipts had been affixed to the duplicate Deeds to prove due payment of stamp duties). By this letter, the Petitioner was informed to pay within seven days the default stamp duty in a sum of Rs. 1,415,750 and also a 300% penalty thereon in a sum of Rs. 4,247,250, aggregating the total to a sum of Rs. 5,663,000.

In this instance also, the Petitioner paid only the stamp duty, and the penalty was not paid.

The 1st Respondent sent the notice marked P8 dated 31.12.2015 (mistakenly written as 2016), issued in terms of section 57(1)(b) of the Financial Statute, requiring the Petitioner to pay the stamp duty and the penalty immediately. It is clear that at the time of sending this notice, the 1st Respondent was unaware the Petitioner had paid the stamp duty in default. However, the Petitioner did not pay the penalty even after receipt of P8.

Nonetheless, the Petitioner filed the appeal marked P10(b) dated 08.02.2016 against the said notice marked P8, stating he only received the said notice on 09.01.2018 – *vide* the first paragraph of P10(b).

The Petitioner states the 1st Respondent did not hear the appeal, and, instead, sent the notice marked P11 dated 25.04.2016, issued under section 87, stating legal action was being contemplated to recover the penalty in a sum of Rs. 4,247,250.

After receipt of P11, the Petitioner waited for about 10 months and then met with the 1st Respondent on 22.02.2017 and

handed over the letter marked P12 dated 22.02.2017. By P12, the Petitioner informed the 1st Respondent that no hearing was given on the appeal marked P10(b) dated 08.02.2016.

The 1st Respondent by P13 dated 22.03.2017 informed the Petitioner that relief (i.e. waiver or reduction of the penalties) could not be granted, as the matter involves defrauding stamp duties, and actions had already been instituted (in the Magistrate's Court) to recover the penalties.

The Petitioner has filed this application seeking to quash P3(a), P6, P7(a), P8, P9, P11, P13 by a writ of certiorari; to prevent the Respondents from taking legal action to recover the penalties by a writ of prohibition; and to direct the 1st Respondent to consider P10(a) and P10(b) as proper appeals and to hold an inquiry into the matters reflected in P3(a), P6, P7(a), P8, P9, P11, P13 by mandamus.

The gravamen of the submission of learned President's Counsel for the Petitioner is that in violation of the rules of natural justice, the Petitioner was not heard on his appeals marked P10(a) and P10(b) prior to the 1st Respondent taking steps to recover the penalties.

Let me now consider this submission.

Section 57(1)(b) of the Financial Statute of the Western Province states:

if he [the Commissioner] is of opinion that such instrument is chargeable with stamp duty and is not duly stamped, he shall, by notice in writing, require the person liable to pay

the stamp duty to pay the proper duty or the amount required to make up the same, together with a penalty not exceeding three times the amount of the proper duty.

Hence, I hold the P6 and P8 notices sent under section 57(1)(b) contain lawful decisions. These notices cannot be quashed by certiorari.

Section 79(1) of the said Financial Statute states any person aggrieved by the decision made under section 57(1)(b) may appeal against it to the 1st Respondent Commissioner within thirty days after the service of notice.

The Petitioner did not file an appeal against the notice marked P6 issued under section 57(1)(b) within the stipulated time or anytime thereafter.

As I stated earlier, the Petitioner filed the appeal P10(a) against the notice P9, issued under section 87 of the Financial Statute.

There is no right of appeal against notice issued in terms of section 87. Section 87 notice is sent to alert the defaulter that legal action to recover the default amount is imminent, so the defaulter can, if he so desires, pay the default amount immediately to avoid litigation (and perhaps embarrassment). Upon section 87(1) notice being served, “objections” can be filed under section 87(2) within thirty days of the date of notice, and *“the Commissioner shall consider such objections and give his decision thereon which shall be final.”*

This is different from the right of appeal, which is expressly preserved by section 79, against notice under section 57(1)(b). I

will deal with section 79 later in this Judgment when I discuss the P10(b) appeal.

The Petitioner did not file a proper appeal against the P6 notice issued under section 57(1)(b), nor did he file due objections, as contemplated in section 87(2), against the P9 notice issued in terms of section 87(1).

On the other hand, even if proper objections had been filed, the Commissioner is not statutorily bound to fix the matter for hearing, unlike in an appeal against section 57(1)(b) notice. At the stage of section 87 notice, the full hearing stage has passed. To put it differently, a full hearing is afforded upon appeals filed against section 57(1)(b) notices, not against section 87 notices. Under section 87(2), the Commissioner can consider the objections and give his decision thereon.

The Petitioner has only himself to blame for not filing an appeal against the P6 notice.

The situation is different in regard to the appeal marked P10(b) filed against the notice marked P8 under section 57(1)(b). Although the P8 notice is dated 31.12.2011, the Petitioner in the P10(b) appeal says he received P8 on 09.01.2016. The P10(b) appeal is dated 08.02.2016. The 1st Respondent has not specifically denied in his statement of objections the assertion of the Petitioner that P8 was received on 09.01.2016. According to section 79(1) of the Financial Statute, an appeal against section 57(1)(b) notice can be filed “*within thirty days after the service of notice*”, unlike in section 87(2) which says objections can be filed “*within thirty days of the date of the notice*”. January 2016 had

31 days. Even though there is an arguable point, no submission has been made that the appeal was out of time. Hence, I consider that the appeal P10(b) has been filed within time.

According to section 79(6) of the Financial Statute, unless there is an adjustment, “*the Commissioner shall fix a time and place for the hearing of the appeal*” made against a notice under section 57(1)(b) and a proper inquiry shall be held. A detailed procedure is laid down in section 79 running into subparagraphs (1)-(13) regarding the conduct of the appeal. An aggrieved party can appeal against the decision of the Commissioner to the Board of Review and then to the Court of Appeal. The procedure is illustrated in chapters XXV and XXVI of the Financial Statute.

No such inquiry was held by the 1st Respondent in respect of the appeal marked P10(b).

Without the appeal being heard and a decision given thereon, the 1st Respondent could not have issued the notice marked P11 under section 87, nor could proceedings have been instituted in the Magistrate’s Court to recover the penalty imposed.

For the aforesaid reasons I hold:

- (a) The 1st Respondent can take steps to recover the penalty as reflected in P9, and if the Magistrate’s Court proceedings have already been initiated to recover money thereon, the said proceedings can continue.
- (b) Unless the P10(b) appeal is heard and decided, no steps can be taken to recover the penalty as reflected in P8.

- (c) The P11 notice and the P13 decision, insofar as the recovery of the penalty in relation to P8 is concerned, are null and void. Any proceedings instituted in the Magistrate's Court to recover money thereon shall also be null and void. I quash such proceedings by certiorari.
- (d) I direct the 1st Respondent by mandamus to hear the appeal P10(b) in relation to the P8 notice and make a determination in accordance with the law.
- (e) The 1st Respondent need not hear the appeal P10(a).

The application of the Petitioner is partly allowed. The parties will bear their own costs.

Judge of the Court of Appeal

Arjuna Obeyesekere, J.

I agree.

Judge of the Court of Appeal