

**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 a Writ of *Certiorari* and *Prohibition* in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) application No: 33/2020

1. MSH Packaging Industries (Private) Limited
No. 143/17, Sri Wickrama Mawatha,
Colombo 15
2. Amanda Lalindra Weerasinghe
Managing Director
MSH Packaging Industries (Private) Limited
No. 143/17, Sri Wickrama Mawatha,
Colombo 15
3. Mohamed Nazeer Mohamed Rifnaz
Chief Financial Officer
MSH Packaging Industries (Private) Limited
No. 143/17, Sri Wickrama Mawatha,
Colombo 15
4. Essaya Puwaneswaran
Procurement and Logistics Manager
MSH Packaging Industries (Private) Limited
No. 143/17, Sri Wickrama Mawatha,
Colombo 15

PETITIONERS

-Vs-

1. Anuradha Weerakoon
Acting Director General of Customs
Customs House
Colombo 11

1A. Maj. Gen (Retd.) Vijitha Ravipriy
Director General of Customs
Customs House
Colombo 11.

1B. P.B.S.C. NONIS
Director General of Customs
Customs House
Colombo 11.

2. P.K.N. Siriwardhana
Deputy Director Of Customs Inquiring
Officer
Sri Lanka Customs
Customs House
Colombo 11.

2A. Chanaki H. Ranatunge
Deputy Director of Customs
Inquiring officer
Sri Lanka Customs
Customs House
Colombo 11.

3. C. Perinpanayagam
Director Of Customs
Customs House
Colombo 11.

3A. W.L.D.R. DE ALWIS
Director of Customs
Customs House
Colombo 11.

RESPONDENTS

Before: M. T. Mohammed Laffar, J.

S. U. B. Karalliyadde, J.

Counsel: Riyad Ameen with Rumesh Perera instructed by Paul Rathnayake

Associates for the Petitioners.

Chaya Sri Nammuni, DSG for the Respondents.

Argued on: 18.07.2023

Decided on: 27.03.2025

S. U. B. Karalliyadde, J.

When this Application was taken up on 26.11.2024 for argument, Counsels appearing for both parties agreed to dispose of this matter by way of written submissions in addition to the oral submissions made by the learned Counsel appearing for the Petitioner on 18.07.2023. Thereafter, this Court permitted the Petitioners to file written submissions on or before 19.02.2024 and the Respondents to file written submissions on or before 16.01.2025. However, it is noted that none of the parties have submitted their written submissions to this date. Therefore, this Court decided to deliver the judgment based on the materials before this Court. The 1st Petitioner in the instant Application is a company duly incorporated under the Companies Act, No. 07 of 2007, and the 2nd to 4th Petitioners are its employees. The 1st Petitioner engages in the business of manufacturing sack craft paper bags for both its foreign and local customers. The primary raw materials (Semi Extensible Sack Kraft paper) that are used for the

manufacturing are imported, and the 1st Petitioner had entered into an agreement with the Sri Lanka Customs marked as P2, allowing the 1st Petitioner to import raw materials duty-free to manufacture bags that are to be exported. In terms of P2, the importation takes place under the TIEP scheme for the materials approved by the Ministry of Industries and Sri Lanka Customs, and the imported materials must be utilised only for export purposes. The raw materials for manufacturing paper bags for local customers are either imported outside the TIEP scheme by paying all applicable duties and levies or the raw materials are provided by the customers themselves.

The Petitioners state that Customs officers visited the 1st Petitioner's factory on 21.11.2018 without informing the reasons for their visits. The Petitioners state that, at the request of those officers, they provided certain information on the materials imported and the final products. Thereafter, a Customs inquiry was held in terms of Section 8(1) of the Customs Ordinance. After concluding the said inquiry, the 1st Petitioner was charged under Section 50A(1) and 50A(2) of the Customs Ordinance and the 2nd to 4th Petitioners under Section 129 of the Customs Ordinance (P5). After the inquiry, the 2nd Respondent made the order dated 20.12.2019 marked as P7 by imposing a forfeiture of Rs. 30,477,229/- and 1,200,00/- on the 1st Respondent under section 50A(2) and a penalty of Rs. 100,000/- each under Section 129 on the 2nd to 4th Petitioners. Thereafter, by the letters dated 06.02.2020 marked as P9A to P9D, the 3rd Respondent had informed that the Petitioners have not complied with the order marked P7 and therefore, legal action will be taken against them.

The Petitioners argue that the order marked as P7 is arbitrary, illegal, unreasonable, *ultra vires* and violates the principles of natural justice. Therefore, the Petitioners have invoked the Writ jurisdiction of this Court seeking the following substantive reliefs, *inter alia*,

“(b) Issue a Writ of Certiorari, quashing the purported order made by the 2nd Respondent in Customs Case No. RCT/2018/15/CCR/3436, dated 20.12.2019, produced marked ‘P7’

(c) Issue a Writ of Certiorari quashing the purported letter dated 6.2.2020 issued by the 3rd Respondent to the 1st Petitioner [P9A], including the order/directions/intimations therein, to wit:

(d) Issue a Writ of Certiorari quashing the purported letters dated 6.2.2020 [“P9B”, “P9C” and “P9D”] issued by the 3rd Respondent to the 2nd to 4th Petitioners, including the order/directions/intimations therein to wit:

(e) Issue a Writ of Prohibition, restraining the 1st and/or 2nd Respondents or any of their servants and/or agents from taking any further steps in pursuance of and/or on the basis of the purported Order [“P7”] of the 2nd Respondent in Customs Case No. RCT/2018/15/CCR/3436;

(f) Issue a Writ of Prohibition, restraining the 1st and/or 2nd and/or 3rd Respondents or any of their servants and/or agents from taking any further steps in

pursuance of and/or on the basis of the purported letters dated 6.2.2020 sent by the 3rd Respondent to the Petitioners [P9A, P9B, P9C and P9D];

(g) Issue an Interim Order staying the operation of the Order dated 20.12.2019 produced marked ["P7"], pending the final determination of this application,

(h) Issue an interim order restraining the 1st/ and/or 2nd/or 3rd Respondent or any of their servants and/or agents from taking any further steps in pursuance of and/or on the basis of the purported letters dated 6.2.2020 sent by the 3rd Respondent to the Petitioners [P9A, P9B, P9C and P9D], pending the final determination of this Application.”

The learned Counsel appearing for the Petitioners in his oral submission argued that the allegation against the 1st Petitioner in the case brief at the preliminary stage was that the 1st Petitioner illegally disposed Semi Extensible Sack kraft papers to the local market, misusing the TIEP scheme. However, when leading evidence subject to cross-examination and re-examination, the inquiring officer framed charges based on the evidence of the witness called Kottachchi on a new basis that was not originally there in the case brief. The Petitioners allege that the inquiring officer changed the basis of the allegation that they have not accounted for everything that has been imported under the TIEP scheme. Therefore, the Petitioners argue that there is a violation of the principles of Natural justice as they were not informed of the new allegations.

The learned DSG in the statement of objections set out that, the charges are framed at the end of the inquiry as evidence that was not revealed during the preliminary inquiry and can be revealed when parties are called for evidence for a fact-finding inquiry under Section 8(1). Therefore, it is in accordance with the law to frame charges based on facts that were not there in the case brief at the commencement of the inquiry, and there is no necessity for the final charge to be based on the case brief.

This Court is in agreement with the argument of the learned DSG appearing for the Respondents that an inquiry under Section 8(1) of the Customs Ordinance is a fact-finding inquiry. In the case of *U A Nissanka v. Chulananda Perera, Director General of Customs and others*,¹ C.P. Kirtisinghe, J. citing the cases *C. Czarnikow Sugar Ltd v P.S.M. Charles Director General of Customs and another*² and *Tennakoon v Director General of Customs and another*³ held that “*the Section 8 Inquiry under the Customs Ordinance is a fact-finding inquiry which is a precursor to a formal inquiry*”.

The findings of the inquiry and the charges are set out in the document marked as P5. It is evident from P5 that after conducting a fact-finding inquiry the Petitioners have been awarded an opportunity to show cause to the said findings and charges by way of written submissions. The Petitioners had filed their written submissions marked as P6. In P6 the Petitioners have made the same argument that the charges are not drafted based on the case brief of the Customs inquiry. Addressing this argument, in the order

¹ CA (Writ) Application No: 377/2016 CA Minutes of 28.07.2022.

² C.A Writ 144/2018 CA Minutes of 16.10.2020.

³ C.A 856/2000 CA Minutes of 08.09.2003.

marked as P7 the Inquiring officer had emphasized that an inquiry under Section 8(1) of the Customs Ordinance is a fact-finding inquiry and the case brief is a simple introduction to the investigation and not a charge sheet. The Inquiring officer has further stated that the findings that are listed after careful analysis of the facts revealed are based on the evidence led at the inquiry. It is clear that the Petitioners have been awarded an opportunity to present their case by way of written submissions and the inquiring officer has taken the Petitioners' argument into consideration. Further, in the case of *Kuruwita Manchester Textile Mills Ltd and Another v Director- General of Customs*, it was held that,⁴

“It is to be remembered that this inquiry is not a judicial inquiry. But is an administrative inquiry that is being conducted for the mere purpose of ascertaining the veracity and or credibility of the statements that had been recorded in terms of the Customs Ordinance.”

Considering the nature of the inquiry and the fact that there is no statutory requirement for the Respondents to frame the charges based only on the case brief, this Court sees no merit in the argument of the Petitioners that there is a violation of the principles of natural justice. Therefore, this Court is of the opinion that there is no violation of the principle of natural justice as the Petitioners have been awarded an opportunity to present their case after framing charges against them.

⁴ (2003) 3 SLR 158.

The Petitioners allege that the inquiring officer, the 2nd Respondent, proceeded to issue the charges, disregarding the evidence led on behalf of the 1st Petitioner, and the charges have been issued without due and proper analysis of evidence and an explanation supported by any reason. However, the Respondent argues that the charges were framed after evaluating all the evidence led on behalf of the Petitioners. The reasons for the findings in the document marked a P5 are clearly set out in the observations of the inquiring officer marked as 1R5. When taking into consideration the observations of the inquiring officer marked as 1R5, this Court agrees with the learned DSG appearing for the Respondents that charges have been framed after proper analysis of the evidence led before the inquiry. Furthermore, during the oral submissions, the learned Counsel appearing for the Petitioner argued that the observations were not given to them and they were not aware of the existence of such document. In the order marked P7, the inquiring officer has stated that the observations have not been issued to the Petitioners as it is a statutory requirement for the Petitioners to request the same after making the necessary payments. This Court observes that at the end of each inquiry, the Petitioners have requested the uncertified copies of the inquiry and the inquiring officer has instructed the officer assisting the inquiry to issue the same after recovering the due charges. One cannot simply argue that they were unaware of the existence of a document and therefore this Court is not inclined to accept the argument of the learned Counsel appearing for the Petitioners that they were not given the observations of the inquiring officer.

The Petitioner states that no allegations were made at the preliminary stage of the inquiry on violation of Section 129 of the Customs Ordinance, and the only allegation was that the 1st Petitioner violated Sections 50(1) and 50(2) of the Customs Ordinance. The Petitioners state that only the 2nd to 4th Petitioners were charged under Section 129 and not the 1st Petitioner, and if the 1st Petitioner has not committed an offence under Section 129, its employees cannot be charged for the same. In reply to this in the statement of objections, the Respondents have stated that Section 129 of the Customs Ordinance refers to the intention to defraud the state, and that can only be imputed on a natural person. Hence, the inquiring officer has imposed a penalty on the 2nd to 4th Petitioners. Section 129 of the Customs Ordinance reads as follows,

“Every person who shall be concerned in importing or bringing into Sri Lanka any prohibited goods, or any goods the importation of which is restricted, contrary to such prohibition or restriction, and whether the same be unshipped or not, and every person who shall unship or assist, or be otherwise concerned in the unshipping of any goods which are prohibited, or of any goods which are restricted and imported contrary to such restriction, or of any goods liable to duty the duties for which have not been paid or secured, or who shall knowingly harbour, keep, or conceal, or shall knowingly permit, or suffer, or cause, or procure to be harboured, kept, or concealed, any such goods, or any goods which have been illegally removed without payment of duty from any warehouse or place of security in which they may have been deposited, or into whose hands and

possession any such goods shall knowingly come, or who shall assist or be concerned in the illegal removal of any goods from any warehouse or place of security in which they shall have been deposited as aforesaid, or who shall be in any way knowingly concerned in conveying, removing, depositing, concealing, or in any manner dealing with any goods liable to duties of Customs with intent to defraud the revenue of such duties or any part thereof, or who shall be in any way knowingly concerned in any fraudulent evasion or attempt at evasion of such duties or any part thereof, shall in each and every of the foregoing cases forfeit either treble the value of the goods, or be liable to a penalty of one hundred thousand rupees, at the election of the Director-General”

When examining Section 129 of the Customs Ordinance it is clear that Section 129 refers to the intention of a person. In the case of *Geeganage v. Director General of Customs*,⁵ this Court observed that,

“In any event, the petitioner had been found guilty of an offence under section 129 of the Customs Ordinance - component element of which offence is knowledge or rather, mens rea.”

In the case of *Kuruwita Manchester Textile Mills Ltd and Another v. Director- General Of Customs*⁶ where charges cannot be maintained against the General Manager of the

⁵ (2001) 3 SLR 179

⁶ 12003] 3 Sri L.R 158

1st Petitioner company in that case merely on behalf of the company, Shiranee Tilakawardena, J. (P/CA) (as she then was) held that,

“However it is clear that the Company was all times represented through the 2nd petitioner at the inquiry and he had accepted to show cause on behalf of the Company during the inquiry. Therefore though the Company has a separate legal entity distinct from its members and share holders the 2nd petitioner has been employed as the representative of the Company in this case. In any event, as the Company has no physical existence in its affairs it is clearly 100 managed by its agents, in this case the 2nd petitioner and therefore it can be concluded that the charges framed against the 2nd Petitioner on behalf of the Company were valid.”

Considering the above-stated facts, this Court sees no fault in imposing forfeiture on the 1st Petitioner under Section 50A of the Customs Ordinance and imposing a penalty on the 2nd to 4th Petitioners in terms of Section 129 of the Customs Ordinance without imposing a penalty on the 1st Petitioner.

It is the argument of the Petitioners that by referring to a document in folio 408, the order marked as P7 states that the Petitioners have failed to provide valid reasons for the shortage of 4,786 kg of 70 GSM sack Kraft paper and 198,632 kg of 80 GSM sack Kraft paper resulting in a revenue loss of Rs. 6,569,770/-. However, no such document has been produced before the inquiry as evidence and they have not provided an opportunity to submit a full explanation thereby violating the principles of natural justice. The document referred to as folio 408 has been marked as 1R24. In the

observations of the inquiring officer marked as 1R5, the document marked as 1R24 has been prepared in terms of Section 134 of the Customs Ordinance to indicate the single value of the quantities in question. Section 134 refers to how value is to be ascertained in cases where any penalty, the amount of which is at any time to be determined by the value of any goods, is directed to be sued for under the Customs Ordinance. Even though the revenue loss of Rs. 6,569,770/- has not been calculated and presented in the inquiry itself, the quantities in question (4,786 kg of 70 GSM sack Kraft paper and 198,632 kg of 80 GSM sack Kraft paper) have been presented by the document marked as P40 during the inquiry. Furthermore, as discussed above the Petitioners were given an opportunity by allowing them to show cause by way of written submissions after presenting the findings of the inquiry by the document marked as P5. Considering the above-stated circumstances this Court is not inclined to accept the argument of the Petitioners that there is a violation of the principles of natural justice by not producing the document marked as 1R24.

The Petitioners further argue that the Respondents have failed to mention the specific condition or the specific provisions of the TIEP Regulations they have violated for them to be charged under Section 50A of the Customs Ordinance. In the statement of objections, the Respondents have stated that the inquiring officer has indicated that the Petitioners have violated the relevant regulations stipulated in the Extraordinary Gazette notification No. 1053/11 dated 11.11.1998 (marked as P2A/1R1). The reasons for the Petitioners to be charged under the Customs Ordinance are twofold. The first

one was failing to export or give valid reasons to account for 4,786 kg of 70 GSM sack Kraft paper and 198,632 kg of 80 GSM sack Kraft paper imported under the TIEP scheme and the second one was submitting export data without using the conversion ratio approved by the Customs with the recommendation of the Ministry of Industries as required under the TIEP regulations. In the observations marked as 1R5, the inquiring officer has emphasized that the 1st Petitioner has failed to keep proper records as required in terms of the TIEP 1 scheme. Even though the inquiring officer has not provided the specific provision of the regulation that has been violated, this Court is of the opinion that no prejudice has been caused to the Petitioners as they have been provided with exactly what they have to show cause by the document marked as P5.

Considering all the above-stated facts and circumstances this Court finds that this is not a fit and proper case to invoke the writ jurisdiction of this Court. Therefore, this Application is dismissed. No costs ordered.

Application Dismissed.

JUDGE OF THE COURT OF APPEAL

M. T. Mohammed Laffar, J.

I agree.

JUDGE OF THE COURT OF APPEAL