

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

Dialog Telecom PLC,
475, Union Place,
Colombo 7.

Petitioner

CA Writ Application No. 464/2008

Vs.

Sarath Jayathilake,
Director General of Customs,
Customs House,
Times Building,
P. O. Box 578, Colombo 1.

And another

Respondents

Before : L.T.B. Dehideniya J.

Counsel : Sanjeewa Jayawardane PC with Suren de Silva for the
Petitioner

: Janak de Silva DSG for the Respondent

Argued on : 27.07.2015 and 09.10.2015

Decided on : 06.05.2016

L.T.B. Dehideniya J.

The Petitioner Company instituted this application seeking for a
mandate in the nature of a writ of *certiorari* and a writ of *prohibition*. The

facts briefly are as follows. The Petitioner imported computer software from India which was recorded in several Compact Disks. The petitioner, at the Customs, declared the value of the transaction as Indian Rs. 990/- which is the cost of the carrier media, the CDs. After a post audit inquiry, Custom officials found that the royalty or the licenses fee is involved and the real transaction value of the software is Euro 322,958. Thereafter the custom held an inquiry and ordered the Petitioner to pay a sum of Rupees Two Million as mitigated forfeiture of the goods. Being aggrieved by the said decision, the Petitioner moved this Court to quash the decision by way of a writ of *certiorari* and to issue a writ of *prohibition* to prevent the customs from proceeding to implement the said decision.

The State objected to this application on several grounds. One of the objections raised by the state is that there is an alternative remedy provided by the statute itself and the Petitioner has already exercised that right by instituting an action in the District Court and therefore writ does not lie. Section 154 of the Customs Ordinance provides for an action to be instituted in the competent court of civil jurisdiction, the Petitioner has already exercised this right by instituting an action in the District Court of Colombo. I will consider this objection first.

The petitioner admitted in the petition that an action was instituted in the District Court of Colombo under section 154 and marked and produced a copy of the plaint with the petition. The petitioner is seeking for a declaration from the District Court that the impugned order of the custom to be declared unlawful and/or contrary to the provisions contained in the Customs Ordinances. The petitioner is asking this Court to issue a writ of *certiorari* to quash the said decision. The Petitioner is seeking the same relief from both courts. The objection has to be considered in this context.

The Petitioner submits that this Court is vested with the writ jurisdiction under Article 140 of the Constitution and it is not ousted by the Customs Ordinance. The respondent do not argue that the writ jurisdiction of this Court is ousted by section 154, but since there is an alternative remedy provided by the same statute, and that remedy is by way of an action in a competent Court of Law, and the writ jurisdiction being a discretionary remedy of Court, a writ does not lie.

In the case of *Ishak V Laxman Perera, Director General Of Customs and others* [2003] 3 Sri L R 18 this issue has been discussed in detail and held that except in an exceptional circumstances, a writ does not lie since there is an alternative remedy.

It is a case where some money has been send out of the country. The facts are not the same as this case and it was held that the forfeiture in that case was an automatic forfeiture by operation of law and there was no determination in that case and therefore the forfeiture is not amenable to writ jurisdiction. But in that case, the issue whether the section 154 of the Customs Ordinance would exclude the invocation of the writ jurisdiction has been considered. Her Ladyship Justice Shiranee Thilakawardane went on to discuss the availability of a writ in a case where there is an alternative remedy and held that;

Another matter that has been urged by the respondents in this case is that as a specific remedy has been set out in Section 154 of the Customs Ordinance that this would exclude the invocation of the writ jurisdiction as an alternative remedy was available in law.

"Where there is an alternative procedure which will provide the applicant with a satisfactory remedy the Courts will usually insist

on an applicant exhausting that remedy before seeking judicial review. In doing so the Court is coming to a discretionary decision." *"Where there is a choice of another separate process outside the Courts, a true question for the exercise of discretion exists. For the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being properly regarded as being a remedy of last resort. It is important that the process should not be clogged with unnecessary cases, which are perfectly capable of being dealt with in another tribunal. It can also be the situation that Parliament, by establishing an alternative procedure, indicated either expressly or by implication that it intends that procedure to be used, in exercising its discretion the Court will attach importance to the indication of Parliament's intention"*.

Applying the provisions of Section 154 of the Customs Ordinance it is clear that there is an existent remedy provided in terms of the aforesaid section in the District Court of competent civil jurisdiction. This was followed in several cases: (Fernando v DharmasinW) (Gunasekera v Weerakoon (5) (Rodrigo v The Municipal Council, Galle (6) and (Samarakoon v Tikiribanda (7)). In other words where there was an alternative remedy that was adequate for the adjudication of the matter that was being challenged by the aggrieved party except under exceptional circumstances this Court would not invoke the writ jurisdiction of the Court. This is all the more important in this case in the circumstances that the petitioner himself has claimed that he has already invoked the jurisdiction of the District Court of Colombo in case No. 27132/MR and that such is on the identical facts that

has been canvassed before that Court of competent civil jurisdiction.

In this context, the President's Counsel appearing for the petitioner has cited the case of Somasunderam Vanniasingham v Forbes and Another and suggested that it represents a new approach to the rule relating to alternative remedies in exercising writ jurisdiction.

The respondents submit that this case has no application to the point urged by them. In that case the Court held that there is no rule requiring the exhaustion of administrative remedies. The point urged by these respondents is that there is an alternative statutory remedy for the petitioner before a Court of law and not the availability of any administrative remedy. In these circumstances this Court finds that as there is an alternative, adequate remedy provided in Section 154 of the Customs Ordinance, and as the petitioner himself has already instituted action admittedly in the competent Court of civil jurisdiction, the Court would not exercise its discretion in favour of the issue of its writ jurisdiction,

The writ jurisdiction has not been excluded completely when there is an alternative remedy but unless there are exceptional circumstances, it was excluded. In the present case there are no exceptional circumstances. The Petitioner declared the value of the of the carrier media of the software as the transaction value of the imported goods, where the custom officials found that a royalty or a licenses fee is involved in the transaction and the true value of transaction is Euro 332,958. (I do not propose to discuss the merits because the matter is pending before the District Court for adjudication.) There are no exceptional circumstances for the Petitioner to invoke the writ jurisdiction of this court.

In these circumstances this Court finds that as there is an alternative, adequate remedy provided in Section 154 of the Customs Ordinance, and as the petitioner himself has already instituted action admittedly in the competent court of civil jurisdiction, the Court would not exercise its discretion in favour of the issue of its writ jurisdiction, in all the circumstances of this case, this application is dismissed. No costs.

Judge of the Court of Appeal