

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

In the matter of an application under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka for an application for a Writ of Prohibition.

1. Wellington Joseph Parakrama Rajapaksha
No. 18A, Silva Lane, Rajagiriya.
2. Jayasekera Mudiyansele Madiriyagedara
Wijeratne Banda
No. 301/6A, Mihindu Mawatha,
Makola North, Makola.
3. Emmanuel Godfrey Anton
No. 40, 27th Lane, Colombo 03.
4. Don Wijitha Kumara Wijethunge
No. 126/3, Himbutana, Angoda.

Petitioners

Case No: C. A. (Writ) 2014/2004

Vs.

1. S. A. C. S. W. Jayatilleke
Director General of Customs,
Department of Customs,
Times Building, Colombo 01.
2. E. M. Abeyratne
Deputy Director of Customs,
Department of Customs,
Times Building, Colombo 01.
3. Lanka Kables & Conductors (Private) Ltd
Lot 26, E. P. Z. of BOI, Wathupitiwala.

Respondents

Before: Janak De Silva, J.

N. Bandula Karunarathna, J.

Counsel:

A. S. M. Perera P.C. with Neville Ananda for the Petitioners

Suranga Wimalasena, SSC for the 1st and 2nd Respondents

Sanjeewa Jayawardena, P.C. with Lakmini Warusewithana for the 3rd Respondent

Decided on: 08.06.2020

Written Submissions tendered on:

Petitioners on 21.03.2019

1st and 2nd Respondents on 02.05.2019

3rd Respondent on 02.05.2019 and 14.06.2019

Argued on: 08.06.2020

Janak De Silva J.

The 3rd Respondent is a BOI company registered under the Companies Act of Sri Lanka. On or about 03.06.2004, it sought to export six containers to Polycab Wires (Pvt) Ltd which is a company registered in India.

The customs officers stopped the six containers and after inspection, released one of them containing copper cables stranded compacted/shaped. The other 5 containers were said to contain 4 mm PVC insulated copper wire core. As the customs investigations into these five containers revealed that the description and the classifications of the contents therein were false and misleading, a customs inquiry was conducted by the 2nd Respondent. At the said inquiry one Mr. K. C. Gandhi, a Director of the 3rd Respondent, informed on behalf of the 3rd Respondent that the 3rd Respondent is not challenging the position taken up by the prosecution and that the 3rd Respondent is agreeable to a settlement and moved that the case be summarily decided and appealed that the goods be released on a minimum penalty to enable the company to minimize the loss (P3).

Thereupon, the 2nd Respondent made the following order:

1. I declare that forfeiture of 5x20 FCLL containing 918,412 km of PVC coated copper wire in terms of section 57 of the Customs Ordinance (Chapter 235) and order the release of same on recovery of a mitigated forfeiture of Rs. 6,000,000/- (six million only) to the exported for exportation subject to the conclusion that it should be processed and exported under the correct classification and description, in terms of section 163 of the Customs Ordinance.

2. I impose a penalty of Rs. 100,000/- (one hundred thousand only) on Lanka Kables and Conductions (Pvt) Ltd in terms of section 130 of the Customs Ordinance.
3. I order the release of 1x20 FCL containing 17,843 kg to be exported for exportation.

The 3rd Respondent on 09.07.2004 (P5A) appealed to the Minister of Finance to consider a mitigation of the penalty under section 163 of the Customs Ordinance.

On or about 24.07.2004, the 1st Respondent directed the Director of Customs (Imports and Tariff) to refer samples of the cables, sought to be exported, to the ITI and SLSI for testing and report on the correct classification. The Petitioners claim that the two reports from those two organizations confirmed that the exporter has misclassified the items.

The Petitioners state that without the knowledge or request of the 1st Respondent or the Petitioners who were the persons who investigated into the misclassification, officers of the 'D' branch had referred a sample to the Ceylon Electricity Board (CEB) on 23.09.2004. Upon receiving the report from CEB, the Petitioners claim that the Director of Customs (Imports and Tariff) reported to the 1st Respondent that the cargo in question is classifiable under HS 8544.99 whereas at the customs inquiry, the order at P3 was made on the basis that the cargo is classifiable under HS 7408.19.

Thereafter, the 1st Respondent directed the 2nd Respondent on or about 30.09.2004 to review his order which was declined by the 2nd Respondent on the basis that the relevant circumstances do not warrant a review of his order. Thereafter, by minute dated 08.10.2004 (P9) the 1st Respondent directed that the order made by the 2nd Respondent on 01.07.2004 (P3) be set aside and directed the release of the goods to the 3rd Respondent.

The Petitioners contend that this order by the 1st Respondent is ultra vires, illegal and arbitrary and seek a writ of certiorari to quash the determinations made by the 1st Respondent by his minute dated 08.10.2004 setting aside the order made by the 2nd Respondent on 01.07.2004 and to allow the release of the good to the exporter (3rd Respondent).

The 3rd Respondent has raised a preliminary objection on the locus standi of the Petitioners to institute and maintain this application. It is submitted that in order to satisfy the requirement of locus standi, the Petitioners are required to at the outset satisfy court that, the purported order made by the 2nd Respondent is lawful and legal, inasmuch as, Petitioners purported right to claim rewards arise only from a lawful forfeiture. It is further submitted that in the event the Petitioners fail to satisfy their locus standi, that itself will render this application be dismissed in limine without any further consideration of the merits. Reliance was place on *Toyota Lanka (Pvt) Ltd., and Another v. Jayathilaka and Others* [(2009) 1 Sri.L.R. 276].

In my view, that is not the correct test for establishing standing. What is impugned in this application is the order made by the 1st Respondent (P9). Court must consider whether that order P9 is lawful or unlawful and not whether it is right or wrong. That is done by applying the accepted grounds for judicial review, namely, illegality, irrationality and procedural impropriety. The order made by the 2nd Respondent (P3) does not bear any seal of invalidity upon its forehead until and unless its validity is determined before a Court of law or a tribunal having the jurisdiction to do so. The 1st Respondent set it aside thereby affecting the interest of the Petitioners in terms of section 153 of the Customs Ordinance. Hence, the Petitioners have the required standing to make this application.

All parties have made extensive submissions on what should be the correct classification. Yet, as pointed out above, all that this Court must consider is whether the 1st Respondent's order (P9) is lawful or unlawful.

The 1st to 3rd Respondents have cited section 2 of the Customs Ordinance and submitted that the 1st Respondent has the power to set aside or revise the order P3 made by the 2nd Respondent. Section 2 of the Customs Ordinance reads:

"There may be appointed a Director-General of Customs (hereinafter referred to as the "Director-General") and other officers and servants for the management and collection of the Customs, and the performance of all duties connected therewith; on such salaries and allowances as may be provided in that behalf, and there may be required of every person now employed or who shall hereafter be employed in the service of the Customs, such securities for his good conduct as the Minister may deem necessary, and the Director-General shall, throughout Sri Lanka, have the general superintendence of all matters relating to the Customs."

In *Navaratne v. Director-General of Customs and Others* [(2003) 3 Sri.L.R. 310], this Court held that the Director-General of Customs has the power to revise and/or set aside an order made by an inquiring officer. In that case, such a course of action was held to be lawful as the inquiring officer did not correctly apply the provision of section 47 of the Customs Ordinance to the established facts. The above statement was cited with approval by the Supreme Court in *W. G. Chandrasena and Another v. Dr. Neville Gunawardena, Director-General of Customs and Others* [S.C. Appeal 31/2016, S.C.M. 19.10.2018].

The facts in this case are different. Mr. K. C. Gandhi, a Director of the 3rd Respondent, specifically submitted at the customs inquiry that they are not contesting the position of the prosecution but only pleaded for the mitigation of minimum penalty.

Although the 3rd Respondent sought to contend before Court that such a representation was obtained by duress, Court is not inclined to accept its truthfulness. That is a position taken up after obtaining legal advice whereas in P5a written to the Minister of Finance, no such allegation has been made.

In fact, by P5a, the 3rd Respondent moved for further mitigation under section 163 of the Customs Ordinance. In *Lanka Jathika Sarvodaya Shramadana Sangamaya v. Heengama Director General of Customs and Others* [(1993) 1 Sri.L.R. 1 at 21] Kulatunga J. held:

“It is true that the application for mitigation was subject to an unusual condition namely, without prejudice to the petitioner’s right to challenge in Court the forfeiture of the goods. It is unusual because a mitigation can be made on the assumption that the forfeiture is valid but unduly severe.”

Hence, when section 163 of the Customs Ordinance is invoked, the Director General of Customs can only mitigate a forfeiture or penalty if it is deemed such forfeiture or penalty is unduly severe [*Bangamuwa v. S. M. J. Senaratne, Director General of Customs and Another* (2000) 1 Sri.L.R. 106, *Jaward v. Director General of Customs and Others* (2005) 2 Sri.L.R. 219]. The validity of the forfeiture cannot be questioned.

Accordingly, I hold that when the 3rd Respondent by P9 invoked the provisions of section 163 of the Customs Ordinance, the 1st Respondent did not have power to set aside the order of forfeiture made by the 2nd Respondent and release the goods to the 3rd Respondent by resorting to section 2 of the Customs Ordinance. Section 163 of the Customs Ordinance is a special provision and supersedes the general application of section 2 of the Customs Ordinance. For all the foregoing reasons, I hold that the 1st Respondent acted ultra vires in making the order dated 08.10.2004 (P9). Accordingly, I issue a writ of certiorari quashing the decision of the 1st Respondent dated 08.10.2004 (P9), setting aside the order made by the 2nd Respondent on 01.07.2004 and to allow the release of the goods to the exporter (3rd Respondent). Application is allowed with costs of the Petitioners to be paid by the 3rd Respondent.

Judge of the Court of Appeal

N. Bandula Karunarathna J.

I agree.

Judge of the Court of Appeal