

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

Rican Lanka (Private) Limited
No.7, Sulaiman Terrace,
Colombo 5.

C.A. Writ Application 440/2008

Petitioner

Vs.

1. The Director General of Customs
Sri Lanka Customs,
Customs House,
Bristol Street,
Colombo 1.
2. The Director (Preventive Unit)
Sri Lanka Customs,
Customs House
Bristol Street,
Colombo 1.
3. K.A. Dharmasena
Assistant Director of Customs
Sri Lanka Customs,
Customs House,
Bristol Street,

Colombo 1.

RESPONDENTS

BEFORE : **S. SRISKANDARAJAH, J (P/CA)**

COUNSEL : S.A.Parathalingam PC with M.U.M, Ali Sabry
for the Petitioners,
Viveka de Silva SC
for the Respondents.

Argued on : 17.10.2011

Decided on : 18.06.2012

S.Sriskandarajah.J,

The Petitioner Company commenced its business in 1996 to manufacture material component related to manufacture of garments. It states that its sister company called Ceylon Textiles Industries (Pvt) Limited, registered under the Board of Investment of Sri Lanka, took over the Wellawatte Weaving Mill from the Government of Sri Lanka and was operating the said factory at No.50/22, Mayura Place, Colombo 06. The BOI subsequently terminated the agreement with the said Ceylon Textiles Industries (Pvt) Limited and requested to quit and vacate the premises where the said contract was conducting its business for the purpose of utilizing the said land for a massive investment project. On a settlement reached by the Ceylon Textiles Industries (Pvt) Limited and the BOI, in the District Court of Colombo, the said company vacated the said premises. In terms of the agreement entered into between Ceylon Textiles

Industries (Pvt) Limited and the BOI, the said company was entitled to export the articles, equipment and the iron and copper structural items to export through its sister company, viz., the Petitioner. The Petitioner purchased copper tubes, sheets, pipes, wire bars and conductors running into several thousand kilograms lying at the said premises under a sales contract entered into between the Ceylon Textiles Industries (Pvt) Limited and the Petitioner. The Petitioner, having secured a buyer of these articles, sought approval from the BOI to export 20,000 kg of metal pieces and 7,000 kg of copper alloy bars. These items were stacked into a container and, after following all the formalities and proceedings by the relevant authorities, including the Sri Lanka Ports Authorities of the Sri Lanka Customs, and loaded into a vessel on the 29th of September 2005. When the vessel was about to sail from Colombo Port, the Petitioner was informed that the Bill of Lading cannot be issued as the Sri Lanka Customs had put on hold the said container.

It is the position of the Respondent that upon a physical verification of the goods attempted to be exported by the Petitioner, it was found to be copper waste and scrap, contrary to the description and classification stated in the CUSDEC.

The Respondents contended that the goods in question had been mis-described in the CUSDEC as copper alloy wire bars and metal pipes, whereas they should have been described as copper scrap and further, they had been mis-classified in the CUSDEC as H.S. Code 7403.79 and 7411.10, whereas the correct H.S. Code is 7404.00. The Respondent's contention is that the Petitioner, by the said misdescription in the CUSDEC, has attempted to avoid the payment of cess which was required to be paid in terms of an order under Section 14 of the Sri Lanka Export Development Act No.40 of 1979, published in the Gazette Extra-ordinary No.1404/28 dated 5/08/2005. By this act, the Petitioner had evaded a sum of Rs.1,394,998/-, being cess payable on the goods in question that were attempted to be exported illegally. The Respondents also submitted, an investigation was conducted and statements had been recorded, including the

Managing Director and several other employees of the Petitioner Company and, after the conclusion of the said investigation, an Inquiring Officer had been appointed to hold an inquiry under Section 8(1) of the Customs Ordinance.

While the inquiry was pending, the Inquiring Officer, after considering the facts and circumstances of the case, made an order to release the goods in question on a Bank Guarantee of Rs.2.5M and Corporate Guarantee in Rs.3.5M. It is an admitted fact that several witnesses had been called to give evidence at the inquiry and the prosecution called Mr. Kumaranayaka, the Investigating Officer, Mr. Radindra Prasad, the Manager, Invoices Services of the BOI, and one Mr. H.M. Jayawarena, Verification Officer of the BOI. The Chairman of the Petitioner Company and the Legal Consultant to the BOI, Mr. H.K. Seneviratne were called as witnesses and they testified before the Inquiring Officer. The Inquiring Officer, by his order dated 12th November 2007, has exonerated the Petitioner from all the charges levelled against it.

The Petitioner submitted to Court that by its letter dated 12th September 2007, addressed to the 2nd Respondent, it had made a request to release both the said Bank Guarantee and the Corporate Bond, as the Petitioner was exonerated from all the charges by the Inquiring Officer.

The 1st Respondent submitted that he had received a complaint against the exoneration of the Petitioner and there was a necessity to review the proceedings of the inquiry to ascertain whether there had been any lapse or error on the part of the prosecution or Inquiring Officer. The 1st Respondent submitted, exercising the powers vested in him under Section 2 of the Customs Ordinance, he set aside the order of the Inquiring Officer made on 12th November 2007 and ordered to hold a fresh inquiry, and the said decision was conveyed to the Petitioner by the 2nd Respondent by his letter dated 6/02/2008.

The 1st Respondent, the Director-General of Customs, has exercised his general power under Section 2 of the Customs Ordinance as the Collector of Customs, and all matters relating to Customs has acted, in this instance, as an Appellate Body, to revise the order of the Inquiring Officer, made on 12.11.2007. It has to be noted that the inquiry held in this respect was under Section 8 of the Customs Ordinance, and the said inquiry is an inquisitorial process, whereby the Inquiring Officer, with the assistance of the Prosecuting Officer, called for witnesses and evidence which led to ascertain whether there is any Customs offence committed by the Inquiring Officer to charge anyone who committed or concerns with any Customs offence. In this regard the Prosecuting Officer and the Inquiring Officer, at the time of inquiry, was having all the material before them and witnesses and documents that they are relying on to commence the investigation, and there is no restriction for the Prosecuting Officer or the Inquiring Officer to limit the number of witnesses or documents that have to be led in the inquiry. In the circumstances there is no allegation against the Inquiring Officer or the Prosecuting Officer that they have acted in a manner that is prejudicial to the Customs or that they have acted in favour of the Petitioner. It is presumed that all official acts have been done according to law and the Inquiring Officer has acted well within his purview to inquire into the allegations that were levelled against the Petitioner, and after the conclusion of the inquiry, he has come to a conclusion that the charges levelled against the Petitioner were not proved and he has exonerated the Petitioner from all charges. The Inquiring Officer has given reasons for his decision. In those circumstances, if the Director-General of Customs or any other officer is dissatisfied with the decision of the Inquirer, could have sought a judicial review of the proceedings to review the decision of the Inquiring Officer; but without doing so, the Director-General of Customs cannot revive or sit in appeal against the order of the Inquiring Officer otherwise than by mitigation of any forfeiture.

In this application the Director-General of Customs has stated, the reason for his decision to revise the order of the Inquiring Officer, and that it transpired that the

prosecution has failed to lead the evidence of 2 material witnesses, viz., Mr. K.M. Karunaratna and Mr. N.M.R.R. Perera who had made statements during the course of the investigation and whose evidence should have been led at the inquiry.

The above observation of the Director-General of Customs shows that the names of the witnesses and the statements were before the Inquiring Officer and the Prosecuting Officer, but both of them have thought it fit that those evidence are either not material or relevant to the said proceedings and hence they have not led those evidence in the course of the inquiry. The position of the Director-General of Customs to re-open an inquiry by setting aside the decision of the Inquiring Officer will lead to a practice where there will not be an end to any Customs inquiry.

As the Customs inquiry under Section 8 was properly conducted and concluded, and the decision was communicated by the Inquiring Officer, to set aside the said order of the Inquiry Officer dated 12/11/2007, to hold a fresh inquiry is ultra vires the powers of the Director-General of Customs in the absence of fresh evidence, therefore, I set aside the decision contained in letter dated 6/02/2008 to set aside the order dated 12/11/2007 of the Inquiring Officer and to hold a fresh inquiry under the provisions of the Customs Ordinance. This Court also directs the 1st, 2nd and 3rd Respondents to release the Bank Guarantee and the Corporate Guarantee submitted by the Petitioner. The application of the Petitioner is allowed without cost.

President of the Court of Appeal