

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

And Now Between

1. M.M. Mohideen
2. M.F.M. Mohideen
3. M.A.M. Mohideen
4. M.M.M. Mohideen
5. F.K.M. Mohideen
6. Z.A.M. Mohideen
7. I.H.M. Mohideen
8. M.S.M. Mohideen

All carrying on business under the
name and style and firm Of 'Meezan
Foreign Trades" at 4th Floor,
Australian Building, 54, York Street,
Colombo.

PLAINTIFFS-APPELLANTS

C.A. 784/1998 (F)
D.C. Colombo 10339/M

Vs.

Director General of Customs
Sri Lanka Customs
Colombo 01.

DEFENDANT-RESPONDENT

BEFORE: Anil Gooneratne J.

COUNSEL: G. Goonewardena for the Appellant
Janak de Silva Acting D.S.G for Respondent

ARGUED ON: 17.10.2011

DECIDED ON: 14.12.2011

GOONERATNE J.

This was an action filed in the District Court of Colombo filed by 8 Plaintiffs carrying on business under the name and style and firm of “Meezan Foreign Trades” and the Defendant was the Director General of Customs. Action was filed under the provisions of the Customs Ordinance claiming the return of goods seized and or in the alteration for it’s value to be paid to the Plaintiff. The only matter argued in this appeal and in the original court was whether the Defendant named in the caption to the plaint is not a legal person and that action cannot be filed or maintained nomine officii on or about 10.11.1998 the learned District Judge of Colombo dismissed the plaintiff’s action with costs and held that Defendant named in

the caption is not a legal person and that Plaintiff cannot in the circumstances maintain the action.

Perusal of the original case record I find that several trial dates were granted (may be 15 trial dates) for various reasons for settlement etc. on the initiative of the plaintiff. Plaintiff was filed on 21.11.1990. Answer filed on 13.9.1991. Parties proceeded to trial on 15 issues, but issue No. 10 was tried as a preliminary issue and the case had been concluded on a preliminary issue based on written submission filed by both parties in the District Court.

The preliminary issue that was tried reads thus:

10 (a) Is the Defendant named in the action not a legal person?

(b) If so can the plaintiff maintain this action

The District Judge answered the above issues in favour of the Defendant

At the hearing of this appeal the learned counsel for Appellant inter alia submitted to this court that the Defendant is clearly identified and in terms of the Customs Ordinance Director General is the authority who could be sued. Counsel also submitted that the proxy of the Defendant was filed which was the proxy of the then Director General of Customs, Lalith Amarasinghe Heengama and sought to demonstrate that by such proxy, if any defect appearing, the authority to be sued is caused by tendering the

proxy of the named Director General of Customs, Lalith Amarasinghe Heengama. The learned Acting Deputy Solicitor General supported the judgment of the learned District Judge and demonstrated to court that only legal and natural persons could be sued and that the action as constituted cannot be maintained in court and the learned District Judge is correct in answering issue No. 10.

I had the benefit of perusing the written submission filed in this case. I would refer to same as cited by learned Deputy Solicitor General who has discussed the legal provisions from various aspects of the case. It is interesting to note the following line of decided cases which would assist this court to arrive at a decision in the disposal of this Appeal.

1. Ladamuttu Pillai vs. Attorney-General 59 NLR 313

This is a Supreme Court Judgment which was overruled by the Privy Council. Court held:

When one considers the Crown Lands Ordinance it is implied that the Land Commissioner is a corporation by implication. They held that Section 2 of the Land Redemption Ordinance, Section 90 of the Crown Lands Ordinance and section 2 of the Land Development Ordinance make it clear that the Land Commissioner is regarded as a corporation in regard to his statutory duties and functions. The fact that the Minister has 'general direction and control' does not absolve the Land Commissioner in the performance of his duties.

2. As stated the Privy Council in appeal reversed the above decision in, The Land Commissioner Vs. Ladamuttu Pillai 62 NLR 169

The Privy Council concluded that the Land Commissioner is not expressly created a Corporation Sole by any legislative enactment nor is it laid down that he may sue or be sued in a corporate name and that furthermore no legislative enactment seems to reveal any intention to incorporate. Accordingly, the Privy Council held that the ‘Land Commissioner’ was not a Corporation Sole and not amenable to be sued.

3. M. R. Singho Mahatmaya Vs. The Land Commissioner 66 NLR 94

The Supreme Court held that the Land Commissioner cannot be regarded as a corporation sole and therefore cannot be sued *nomine officii*. The Court followed the decision of the Privy Council in The Land Commissioner v. Ladamuttu Pillai (66 NLR 94).

4. The Superintendent Deeside Estate Maskeliya Vs. Liankai Thozhilar Kazhakam 70 NLR 279.

Where the Court held that “The Superintendent of Deeside Estate” is not a Corporation Sole, there is no one from whom the amount ordered can be recovered. It is a fundamental principle that a Court should not make an order which it cannot enforce”.

5. Sri Lanka Transport Board Vs. Colombo Metropolitan Bus Company Ltd. S.C (Spl.) LA 77/2007 S.C Minutes of 2.7.2008.

This case concerned an appeal made by Sri Lanka Transport Board against the judgment of the Court of Appeal. A preliminary objection was taken that Sri Lanka Transport Board has no legal personality in terms of Sri Lanka Transport Board Act No. 27 of 2005 and hence cannot maintain the appeal. Her Ladyship Bandaranayake J. (as she was then) after considering the decision of the Privy Council in The Land Commissioner v. Ladamuttu Pillai (62 NLR 182) held that for purpose of incorporating a legal person with

capacity to sue and be sued, there must be express provision (page 11). Her Ladyship after considering the provisions of Sri Lanka Transport Board Act No. 27 of 2005 held that there was no legal personality in the Sri Lanka Transport Board Act and dismissed the appeal by upholding the objection that was raised.

I appreciate the submissions of learned Deputy Solicitor General that court should not be called upon to make an order which cannot be enforced. If court permits a declaration who will be bound by it? If an injunction were to be granted who will be enjoined? I think there is lot of meaning that goes behind the above cases. Permitting an action to proceed nominee office or against a non legal person would result in a situation of non-enforcement. No court should make orders which cannot be enforced. The failure to sue a legal/juristic and or natural person is a material defect which cannot be caused by an amendment. The proper remedy would have been to withdraw the case and file fresh plaint.

However the learned District Judge's thinking in this case appears to be that the Plaintiff has not made an application to amend when such a defect was pleaded in the answer. I cannot agree with the District Judge's views on that aspect. But assuming for the sake of argument that an amendment to the pleadings would cure the defect? In this instance it is very apparent that Plaintiff has not even attempted to exercise that right. The following extract from the judgment of the District Court is reproduced

which would convey the failure of the Plaintiff to take action promptly though it is arguable whether it is possible at all. Even an application under Section 93 of the Civil Procedure Code may not be possible.

මෙම නඩුවේ 1991.09.13 වෙනි දින ඉදිරිපත් කර ඇති උත්තරය මගින් විත්තිකරුට නෛතික පුද්ගලයෙකු නොවන බවට විරෝධතා ඉදිරිපත් කර ඇත. එසේ නම් එකී උත්තරය 1991 වර්ෂයේ ඉදිරිපත් කර වහාම පැමිණිල්ල සංශෝධනය කිරීමට අවස්ථාවක් තිබී ඇති නමුත් එවන් අවස්ථාවක් පැමිණිල්ල ප්‍රයෝජනයට ගෙන නොමැත. ඒ අනුව බලන කල පැමිණිලි පහතය පැමිණිල්ල සංශෝධනය කිරීම සම්බන්ධයෙන් අසාමාන්‍ය ප්‍රමාදයක් සිදුකර ඇති බවට අධිකරණයේ මතයයි. තවද පැමිණිල්ල සංශෝධනය කිරීමට අවසර දෙනු ලැබුවහොත්, විත්තිකරුට නඩුව කලාවරෝධී වී ඇති බවට විත්ති වාචක ඉදිරිපත් කිරීමට ඇති අවස්ථාවක් ගිලිහී යන්නේය.

The authorities cited establish the position that a legal or a natural person can be sued, but not a non juristic person. Section 2 of the Customs Ordinance enacts that a Director General may be appointed. There is no indication in the Ordinance that legislature conferred a legal personality on the office of Director General of Customs. By Section 145 (2) of the said statute it is stated that all penalties, forfeitures incurred under the Statute may be sued for and recovered by an action initiated in the name of the Attorney General. An understanding of the Customs Ordinance makes it

clear as to who should be sued and who should not be sued. There need to be an express creation of a legal personality in the Statute itself. (held by the (Privy Council in the 62 NLR 169 case) In this instance it is not possible even to take up the position that the mistake was only in the description of the party in the caption. To begin with there is no legal personality or natural person entitled in law to sue, and be sued, in the plaint filed of record.

This is not a case where one could argue that there is no ambiguity as to identity of Defendant or that the Attorney-General acted for the Defendant and proxy refer to the name of Defendant. Court should be only concerned whether there is an express creation in the statute itself, which makes the Defendant a legal personality. I have to emphasis that in the case in hand, Defendant is not a legal person. No application was made to amend the caption. (possible to argue that such application cannot be made). In any event Section 93 of the Code would not permit an amendment to favour the Plaintiff-Appellant on the lapse of very many trial dates. Although cases cited by the Appellant viz. W.M. Mendis and Co. Vs. Excise Commissioner; Fonseka and another case of some relevance namely Divisional Forest Officer vs. Sirisena. The circumstances of those cases are entirely different to the case in hand. Further non of the above decided cases ever reject the dicta in the case of Land Commissioner Vs. Ladamuttu Pillai.

In other words court did not doubt the decision of the case reported above. 62 NLR 169. the present Supreme Court has approved and applied the principle in the Land Commissioner Vs. Ladamuttu Pillai case in an unreported case namely Sri Lanka Transport Board vs. Colombo Metropolitan Bus Col Ltd. S C (Spl) L.A 77/2007,. Minutes of 2..7.2008.

In all the above circumstances I am of the view that the District Judge has correctly arrived at a decision to dismiss Plaintiff's action. There is no legal basis to interfere with the judgment of the District Court. I affirm the judgment of the District Court and dismiss this appeal with costs fixed at Rs. 30,000/-

JUDGE OF THE COURT OF APPEAL