

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an application for a
mandate in the nature of Writs of Certiorari
and Writ of Mandamus in terms of Article
140 of the Constitution.

A.N.M. Abee Kuhafa

No. 13/4, Ambagastenna, Wellambada

Presently at No. 2/B, Elanda Watta,

Ulahittuwala

Malwana.

Petitioner.

C.A. Writ Application No. 77/08 Vs.

C.A. 78/08 , CA 79/08 &

C.A. 80/08

1. The Director General of Customs
Times building
Bristol Street
Colombo-01.

2. The Assistant Director of customs
Revenue Task Force (RTF)
Times building
Bristol Street
Colombo-01.

3. The Hon. Attorney General
Attorney General's Department
Colombo-12.

Respondents.

BEFORE: Hon. Sathya Hettige P.C. J. President of the Court of Appeal
Hon. D.S.C. Lecamwasam J, Judge of the Court of Appeal

COUNSEL: Nizam Kariappar with M. I.M Iyanullah
For the petitioners
Arjuna Obeysekere SSC for respondents.

ARGUED ON: 22/07/2010 and 08/11/2010,

Written Submissions tendered on 06/09/2010

DECIDED ON: 10/02/2011

SATHYA HETTIGE P.C. J. (P/CA)

When the above applications were taken up for argument both the Counsel agreed that all the applications be consolidated and taken up for hearing together and application no. 77/2008 be taken up for hearing as the test case and the decision in CA 77/2008 will be applicable to all other 3 applications and will be binding on all parties in CA 78/08, CA 79/08, and CA 80/08.

The petitioner in this application is seeking

- a) A Writ of Certiorari to quash the decision of the 1st and or the 2nd respondents to confiscate the goods referred to in the Bill of Lading and the decision to auction the items referred to in the document marked P 7
- b) A Writ of Mandamus direct 1st and or 2nd respondents to release the goods

When this matter was for hearing learned counsel for the petitioner , however, informed court that he would be confining himself to the relief seeking a Writ of Certiorari only as the goods have been already sold by the respondents.

The petitioner states that he imported a wooden box containing 920 Kilograms of Cardamom by sea cargo in August 2007 along with a washing machine and complains that he did not get communication of the arrival of the consignment regarding which he called over at bonded warehouse of Trico International Colombo on 28th of November 2007. The petitioner was informed that the Customs opened the Cargo and had been detained at the said bonded warehouse .

It is further stated that the petitioner was informed by the Customs to obtain a Certificate of Fumigation from the Department of Agriculture and while the petitioner was taking steps to get the quantity of cardamom fumigated, the petitioner requested the 1st and 2nd respondents in writing to release the documents pertaining to the Cargo detained by the Customs. The petitioner complains that he became aware that the goods had been confiscated and were to be auctioned.

The petitioner's case is based on two grounds

- a) The respondents action to confiscate the cargo and auction the goods is illegal since the goods were not liable to be confiscated
- b) The decision to confiscate was made by the respondents in violation of principles of natural justice in that the petitioner was neither informed of the decision nor was he given a hearing before the decision was made.

It should be stated that the goods imported by the petitioner were listed in the cargo manifest as 'unaccompanied passenger baggage' and categorized as personal baggage, on examination by the Sri Lanka Customs it was found that the cargo boxes contained large quantity of cardamom among other goods.

It transpired in the course of hearing of this matter that upon examination of the

Goods imported by the petitioner on 19/10/2007 in the presence of M/s Trico Maritime (Pvt) Limited, the following items of goods were found,

- a) 1215 kgs. of cardamom
- b) One unit of washing machine
- c) Three pairs of ladies shoes, two pairs of men's shoes one pair of ladies' half shoes two pairs of gents' slippers'

- d) Twenty two ventilating fans- KDK brand
- e) Thirty emergency lamps.

It was argued by the respondents that the import of cardamom in commercial quantities is subject to prior approval being granted under the provisions of Gazette notification No. 165/2 dated 02/11/1981 which is marked R 5 issued by the Department of Agriculture.

It was contended by the learned Senior State Counsel that the petitioner has failed to obtain the permission from the Department of Import and Export when importing goods in commercial quantities and thereby violated the provisions of Import and Export Control Act and the Exchange Control Act. The goods were imported by the petitioner in violation of the provisions contained in section 107 A of the Customs Ordinance and in fact the petitioner could not have imported the goods into the country as unaccompanied passenger baggage under the Regulations made under section 107 A of the Customs Ordinance marked R4.

Section 107 A of the Customs Ordinance reads as follows :

"Any passenger arriving in Sri Lanka may be searched and his baggage landed, examined and delivered by such officers and in accordance with such regulations as the Minister may prescribe by Notification published in the Gazette; and if any prohibited, restricted or uncustomed goods are found concealed in the baggage of any passenger arriving in Sri Lanka ... the same shall be forfeited together with the contents of the packages.."

On a perusal of the Regulations (R4) made under section 107 A of the above provisions personal baggage of a passenger who is

ordinarily resident in Sri Lanka is exempt from Customs duty provided

- a) such goods are bona fide are for personal use and
- b) The goods in respect of a single item, are not in a commercial quantity as determined by the Director General of Customs.

It should be noted that the goods imported by the petitioner are **declared to be forfeited** by operation of law in terms of the provisions contained in section 107 A of the Customs Ordinance and if the goods are imported in violation of the above provisions the law provides that the goods declared to be forfeited be seized by the Customs Officers.

It is obviously clear that section 107 A of the Ordinance provides that "***any prohibited, restricted and or uncustomed*** goods found concealed in the baggage of any passenger arriving in Sri Lanka such goods shall be forfeited. The petitioner in this application failed to adduce any evidence to establish that he obtained prior approval from the authorities to bring such large quantity of cardamom into the country.

However, It can be seen that the petitioner's complaint is that respondents failed to give the petitioner a hearing before the goods were seized and prior to the forfeiture of goods in violation of principles of natural Justice. It was argued by the respondents that since the goods are forfeited by operation of law there is no requirement to give a hearing in terms of the law.

Mr Obeysekere submitted that, despite the fact that there is no legal requirement to give a hearing in terms of the law, the respondents informed the petitioner to call over and collect the

goods by the letter dated 07/09/2007 marked R 2 (a) and however, the said letter was returned since the address given by the petitioner was a bogus and fictitious address and there was no such person by the name of the petitioner resident in that area.

Learned Senior State Counsel drew the attention of court to the reported case of **Palasamy Nadar v Lnktree** 51 NLR 524 wherein Greatian J held

“ I agree with the learned Solicitor General that the Customs Ordinance nowhere requires the authorities to notify the owner of the fact that his goods have been seized or of the grounds seizure.(some such provision is made, I find, in the Customs Consolidation Act of England -39 and 40 Vic. C. section 207) Be that as it may it stands to reason any communication which is in fact made to the owner should be unambiguous should leave no room for misunderstanding on the point.”

It also transpired in the course of hearing that the petitioner failed to inform the shipping agent of any change of address of the petitioner or any change of details to the cargo manifest and the respondents had no correct address to correspond. It is seriously noted by court that as to why the petitioner failed to provide the correct address of the petitioner to correspond with if the petitioner genuinely imported the goods in question according to law.

I agree with the submissions of Mr. Obeysekere SSC that the petitioner has failed to obtain the prior approval and comply with the provisions of the Customs Ordinance as amended before importation of goods in question and the respondents have given adequate hearing to the petitioner before forfeiture of goods.

It is pertinent to note that importation of goods in commercial quantities which are prohibited under the Customs Ordinance without prior approval and the declaration of the said goods as personal items is a serious matter that this court has to consider. The petitioner's dishonest intent in doing so does not warrant and entitle the petitioner to the grant of a discretionary remedy.

It has been decided in several judgments of this court that the grant of Writs of Certiorari and Mandamus are discretionary remedies.

In **P.S Bus Company v. Ceylon Transport Board** 61 NLR 491 the court held that ,

" A prerogative Writ is not issued as a matter of course and it is in the discretion of court to refuse to grant it if the facts and circumstances are such as to warrant a refusal. A writ ,for instance , will not issue where it would be vexatious and futile."

In the case of **Bisomenika V C R de Alwis** the court observed and said that "**a Writ of Certiorari is issued at the discretion of court. It cannot be held to be Writ of right or issued as a matter of course..."**

I have carefully considered the material in this case and I hold that the respondents have acted within their powers under the Customs Ordinance.

In the circumstances of this case and having considered the oral and written submissions of both counsel I am of the view that the petitioner is not entitled to the relief sought and the petitioner's application should be refused.

Accordingly, I refuse and dismiss this application and CA No. 78/08, CA 79/08 and CA 80/08 without costs.

PRESIDENT OF THE COURT OF APPEAL

D,S.C. Lecamwasam,

I agree.

JUDGE OF THE COURT OF APPEAL.