

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

In the matter of an Application for a writ of Certiorari under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka

Mr. J.M. Wimalagoonaratne
Of 3rd Lane, off Angulana Station Road,
Angulana, Moratuwa.

PETITIONER

C.A. Application No.332/2000

Vs.

1. Mr. H.A.G. Hettiarachchi,
The Controller of Exchange,
Exchange Control Department,
Central Bank of Sri Lanka
Equity Two Building,
Janadhipathi Mawatha,
Colombo 01.
2. Deputy Secretary to the Treasury
Ministry of Finance and Planning
The Secretariat, Colombo 01.
3. The Hon. Attorney-General

Attorney General's Department
Hulftsdorp, Colombo 12.

RESPONDENTS

BEFORE : S. SRISKANDARAJAH, J (P/CA)
COUNSEL : K. Kanag- Iswaran PC with Avindra Rodrigo and Lakshman
Jayakumar,
for the Petitioner,
Y.J.W.Wijayathilaka PC ASG with MS Bari SSC,
for the Respondents

Argued on : 07.03.2011

Decided on : 22.02.2013

S.Sriskandarajah, J,

The Petitioner in this Application is challenging the order contained in the letter dated 16th of July 1997, addressed to the Petitioner, informing the Petitioner that the explanation submitted by the Petitioner in respect of the alleged contravention of the Exchange Control Act could not be accepted and, hence, an offence had been committed under Section 11(2) read with Section 51(1) of the Exchange Control Act. The 1st Respondent, acting in terms of Section 52(1) of the said Act, requested the Petitioner to pay a penalty of Rs.28,455/-. The Petitioner also challenged in this Application a decision conveyed to him on an appeal preferred by him against the aforesaid order to the Honourable Minister of Finance in terms of Section 52(7) of the said Act. The Petitioner is also seeking a writ of certiorari to quash the decision contained in letter dated 9th of March 2000 imposing a penalty, after considering his appeal in a sum of Rs.2,000/-.

The Petitioner submitted that in 1992, when the government decided to privatise the management of the national plantations, the George Stuart & Co., Ltd., incorporated, a legally owned subsidy, named George Stuart Management Services (Pvt) Limited for the purpose of managing one of the regional plantation companies, viz., Kotagala Plantations Limited. One of the shareholders of the said Management Services (Pvt) Limited was the Petitioner. According to the Petitioner, George Stuart Management Services (Pvt) Limited and Kotagala Plantations Limited entered into an agreement dated the 22nd of June 1992, whereby George Stuart Management Services (Pvt) Limited took over the management of Kotagala Plantations Limited. In 1995, the Public Enterprises Reform Commission decided to privatise Kotagala Plantations Limited. The George Stuart Management Services (Pvt) Limited, which was the managing company at the relevant time, sought the advice of the Merchant Bank Limited, decided to purchase the shares of the Kotagala Plantations Limited. George Stuart Management Services (Pvt) Limited entered into an agreement with prospective investors, viz., Mr. Naganathan Aiyathurai, Mrs. Mary Ong and Rovenco Company Limited and, by this agreement, shares held by the George Stuart Management Services (Pvt) Limited to be transferred to the said investors or to their nominees and assignees. The Petitioner submitted, the George Stuart Management Services Limited and he were made to believe that the shares in George Stuart Management Services (Pvt) Limited were being purchased by a consortium of persons comprised of both foreign and local residents. It is the contention of the Petitioner that he and the other shareholders handed over a signed share transfer form in blank to a member of the consortium, viz., Naganathan Aiyathurai, for the said forms to be completed by the purchasers of the shares on the specific understanding confirmed in writing by Mr. Aiyathurai, that the names of the transferees would be made known to the lessors in due course.

The Petitioner contended that the said transfer of the entirety of shares in George Stuart Management Services (Pvt) Limited was sold to Lankem Ceylon Limited, which is a company incorporated in Sri Lanka, and having its office at Nos.760, 762, Baseline

Road, Colombo 09. In these circumstances the Petitioner contended that they have not violated the provisions of Section 11(2) of the Exchange Control Act. Section 11(2) provides as follows:-

11(2). No person shall, except with the permission granted by the bank;

- (a) Transfer any registered security, either on its own behalf or on behalf of any other person to any person resident outside Sri Lanka or to any person acting as the nominee of any person so resident; or
- (b) Transfer any bearer security, either on his own behalf or on behalf of any other person, unless the bank is satisfied with the person to whom the security is to be transferred; and if the person is a nominee, the person for whom he has to act as nominee are resident in Sri Lanka.

The allegation levelled against the Petitioner and the other shareholders of the George Stuart Management Services (Pvt) Limited was that they had transferred 5,005 shares in George Stuart Management Services (Pvt) Limited to Mr. Naganathan Aiyathurai and/or Mrs. Mary Ong and/or Rovenco Company Limited, contravening the provisions of Section 11(2) of the Exchange Control Act, as the aforesaid persons are resident outside Sri Lanka, and the said shares were transferred without the permission of the Central Bank.

When the aforesaid allegations were made, investigations were conducted by a Parliamentary Consultative Committee appointed to inquire into the sale of Kotagala Plantations Limited on or about July 1995 one Mr. Aiyathurai, a Malaysian national and one Mr. Mutusamy, a Sri Lankan national met the Chairman of the George Stuart Company and discussed investing in George Stuart Management Services (Pvt) Limited and, in view of the discussion, a Memorandum of Understanding was entered

into on the 4th of August 1995 between the George Stuart Company Limited on one hand and Mr. Mutusamy and Mr. Aiyathurai on the other. According to the Memorandum of Understanding, the investors had agreed to pay Rs.100m in stages as consideration for the transfer of a total of 5,005 shares in George Stuart Management Services (Pvt) Limited and to arrange for the issue of a guarantee from an acceptable bank for a sum of Rs.5m on behalf of George Stuart Management Services (Pvt) Limited to the Public Enterprises Reform Commission. Accordingly, on the 4th August 1995, Mr. Aiyathurai made available to George Stuart Management Services (Pvt) Limited a Pay Order for Rs.5m from the Commercial Bank, which George Stuart Management Services (Pvt) Limited deposited with PERC. On 2nd November 1995, Mr. Aiyathurai furnished George Stuart Management Services (Pvt) Limited with a Pay Order in favour of the Secretary to the Treasury from ABN Amro Bank for Rs.17.2m as 10% of the down payment required to purchase Kotagala Plantations Limited shares and, on the same day, 2nd November 1995, Mr. Aiyathurai paid a further Rs.7m by means of an ABN Amro Bank Pay Order to George Stuart Management Services (Pvt) Limited, as part payment, for the purchase of George Stuart Management Services (Pvt) Limited shares. For the said payment, Mr. Aiyathurai and his wife, Mary Ong, had obtained inward remittances into Sri Lanka. These two, Mr. Aiyathurai and his wife are foreign nationals. None of the said inward remittances had been routed through a share investment external rupee account (SIERA) as requested by the governmental regulations published in the gazette notification No.721/4 of 29/06/1992 and gazette notification No.720/1212 of 24/06/1992 in respect of investments by non-residents in companies incorporated in Sri Lanka. The aforesaid persons had not made any declaration of residence outside Sri Lanka, as stipulated in the aforementioned gazettes, even though Mr. Aiyathurai, Mrs. Mary Ong and Rovenco Company Limited were non-resident foreign nationals. The aforesaid gazette notification contained a format of declaration that had to be furnished by the foreign national in case of purchase of shares in Sri Lanka. In 1996, the share holding in George Stuart Management Services (Pvt) Limited was as follows:-

1. 40% held by Rovenco Company Limited incorporated in Thailand;
2. 60% transfer in blank but, in fact, the sum purchased was paid by Mr. Naganathan Aiyathurai and Mrs. Mary Ong and Rovenco Limited.

On the 1st of April 1996, a MOU was entered into between Lankem on one part and Mr. Aiyathurai, Rovenco and Mrs. Mary Ong on the other, for the sale of the entirety of the shares in George Stuart Management Services (Pvt) Limited to Lankem for the sum of Rs.400m. Thereafter 60% of shares had been transferred by handing over transfer forms which Mr. Aiyathurai received from George Stuart Limited and others, which did not carry the transferee name, as it was kept blank. The balance 40%, as shares, had been transferred by Rovenco Company Limited by filling in new transfer forms signed by Mr. Aiyathurai and Mrs. Mary Ong, as its Directors.

From the above transactions, it is evident, that the shareholders of George Stuart Management Services (Pvt) Limited had transferred 100% of shares to persons resident outside Sri Lanka though transfer forms for 5005 shares issued in blank, but they were, in fact, transferred to Mr. Aiyathurai, Mary Ong and Rovenco Company Limited. As the transfer forms do not contain the names of the transferee and was issued blank, indicates that the transferees were aware of the transaction and the consequence to transfer to non-residents. In these circumstances the Respondent's decision, that the said conduct contravenes the provisions of Section 11(2) of the Exchange Control Act, cannot be considered as illegal or unreasonable. Before arriving at the said conclusion an inquiry was conducted into the sale of George Stuart Management Services (Pvt) Limited, shares by the Department of Exchange Control, and a fair hearing was given to the Chairman of George Stuart Company and its Directors, and the evidence revealed the shares were purchased by Mr. Aiyathurai, Mary Ong and Rovenco Company

Limited, and all these persons are foreign nationals. In the above circumstances the Petitioner cannot complain that the said decision of the 1st Respondent dated 16th July 1995 and/or the decision made in appeal by the Honourable Minister of Finance dated 9th March 2000 were illegal or unreasonable and, therefore, I dismiss this application without cost.

President of the Court of Appeal