

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

Joe Cumine,
C/o. J. A. Nawaratne,
Mattegama, Bopitiya.

PETITIONER

C.A. 70/2008 (Writ)

Vs.

1. Dr. Nevil Gunawardena,
Director General.
Customs Department,
Customs House No. 11,
Colombo 11.
2. U. Liyanage
Assistant Director of Customs
Automated Data Processing Unit
Customs Department,
Customs House No. 11,
Colombo 11.
3. Hon. Attorney General
Attorney General's Department
Colombo 12.

RESPONDENTS

BEFORE: Anil Gooneratne J.

COUNSEL: K. Deekiriwewa with L.M. Deekiriwewa,
H.K. Herath & Rasangi Wedamuni for the Petitioner

F. Jameel D.S.G., for Respondents

ARGUED ON: 2.11.2012 & 30.11.2012

DECIDED ON: 30.07.2013

GOONERATNE J.

The Petitioner, Joe Cumine has sought a Writ of Certiorari and Mandamus to quash the order of forfeiture marked X7 and a Writ of Mandamus to compel the Respondents to release the vehicle in question as pleaded in the body of the petition.

In the petition it is stated that the Petitioner purchased a registered Diesel Toyota Land Cruiser Jeep (as described in paragraph 2 of petition) on or above 22.8.2004. As in X2 (registration BK) the vehicle was registered in the name of the Petitioner. X2 also indicates that the first registration of the vehicle was on 16.8.2002, and it is stated that the vehicle had been imported prior to 16.8.2002.

It is also pleaded that the above vehicle which was purchased as aforesaid was sold by the Petitioner on 7.12.2004 (barely 4 months after purchase) to Prasad Enterprises in Mawathagama. It was in fact a part exchange of his vehicle purchased on 22.8.2004 to a Nissan Caravan. The value and prices are described in paragraph 7 of the Petition. However on 17/12/2004/18-12/2004 (midnight) Customs Officers had seized the vehicle from the place it was parked, by seizure Notice X3 stating that import duty had not been paid. Consequently after the seizure the above mentioned 'Prasad Enterprises' did not want to have any part exchange of the vehicle in question as described above. As such Petitioner states he was left without a vehicle.

The Petitioner describe the procedure in registering an unregistered vehicle in paragraph 10 and the necessity to consider the forms called 'MTA2' & 'MTA6'. The real importer could be found by the imports documents and 'MTA2' form.

The appeal made to the Finance Minister by 'Prasad Enterprises' and the decision of the Minister is referred to in document X4 and paragraph 11 of the petition. There is some material to the effect that files had been misplaced in the Department of the Commissioner of Motor Traffic, and that registered owner

cannot be held responsible for such loss. There is some sense in that if in fact the necessary documentation cannot be found.

Petitioner complains of the order of forfeiture made by the 2nd Respondent and challenge its legality/propriety of the order. In this connection X5, X6 & X7 and inclusive of proceedings and order have been submitted, to court.

In order to clarify further the Petitioner's position, the following paragraphs in his petition are included.

1. The Petitioner states that according to the customs inquiry proceedings the petitioner is required to prove legal importation of the vehicle by proving duty had been paid. The petitioner states that in terms of the Customs Ordinance such a burden is not cast on the petitioner at the stage of the custom inquiry and/or at the stage of the prosecution and fraud or fraudulent evasion of duty has to be established by the Customs.

Further in order to justify the imposition of the forfeiture under section 129 of the Customs Ordinance the state must prove –

- (a) That the petitioner was in any way knowingly concerned in any manner dealing with any goods liable to duties of customs and
 - (b) That the petitioner did so with intend to defraud the revenue of such duties or any part thereof.
2. The petitioner further states that even in situations where customs could establish that fraud or fraudulent evasion is there, the goods will not be

forfeited under Section 129 of the Customs Ordinance but only the importer or the wrong doer (any person who got involved in defrauding customs duties) becomes liable to a forfeiture of a penalty under Section 129 of the Ordinance.

There it is crystal clear that the Customs have seized the above vehicle without there being a valid forfeiture and hence the forfeiture is ultra vires the rule making authority and therefore the petitioner is challenging the above forfeiture in these proceedings as a wrongful forfeiture that had affected the petitioner.

Further since there is no provision in the Customs Ordinance to forfeit goods which is in the hands of a bona fide purchaser customs are debarred from forfeiting the above vehicle.

3. The petitioner states that above illegal acts of the respondents have violated the Petitioner's legitimate rights/expectations and further states that the legitimate expectation is not limited to cases in violating a legitimate expectation of a hearing before some right or expectation was affected but is also extended to situations even where no rights to be heard was available or existed but fairness required a public body or official to act in compliance with its public undertakings and assurances.

The learned counsel for the Petitioner supported the case of the Petitioner inter alia on the footing that the Petitioner was a bona fide purchaser

who cannot be penalized in any way. Nor any element of fraud or evasion of statutory provision can be proved against the Petitioner. Further paragraph 19 of the Petition include several grounds to enable court to arrive at a conclusion in favour of the plaintiff.

The order at X7 impose the following penalties 1 – 6

1. I order the forfeiture of vehicle bearing registration number GS 3015 valued at Rs. 4.5 Million in terms of Sections 12, 43 and 125 of the Customs Ordinance read with Import and Export Control Act No. 1 of 1969.
2. I order the forfeiture of vehicle bearing registration number 65-6254 valued at Rs. 4 Million in terms of Sections 12, 43 and 125 of the Customs Ordinance read with Import and Export Control Act No. 1 of 1969.
3. I impose a penalty of Rs. 100,000/- on suspect Mr. Prasad Kulathunga in terms of Section 129 and 163 of the Customs Ordinance.
4. I order the release of suspect Mr. Joe Cummin with a warning to be careful in future transactions of imported vehicles in terms of Section 163 of the Customs Ordinance.
5. I impose a penalty of Rs. 100,000/- on Mr. D.I.Kumarage in terms of Sections 129 and 163 of the Customs Ordinance.
6. I impose a mitigated forfeiture of Rs. 25,000/- on Mr. R.G.N.I. Gunarathna in terms of Sections 129 and 163 of the Customs Ordinance.

3, 5 & 6 of the above order impose certain fines on three other persons who are not parties to this applications. This court observes that all of

them may have had a common objective of dealing with the vehicle in question, in whatever form. The order of court cannot be enforced in the absence of the above named persons. As such all of them would be necessary parties. The failure to make them parties would be fatal to this application. Writs have been rejected where the necessary parties have not been made Respondents. 74 NLR 163; Rawaya Publishes Vs. Wijedasa Rajapakse 2001 (3) SLR 213 at 216; 78 NLR 510/513/514. Every person whose rights or status could be adversely affected by granting a writ is a necessary party 1997 (1) SLR 145, 148. The learned Deputy Solicitor General in the course of the argument insisted this court to consider the absence of necessary parties as pleaded by the Respondent in their objections filed of record.

The learned Deputy Solicitor General also stressed on the fact of delay/futility and non compliance with Section 154 of the Customs Ordinance on the part of the Petitioner, and moved this court for a dismissal of the Petitioner's application since Writ of Certiorari is a discretionary remedy. It was also submitted on behalf of the Respondents that the vehicle in question had been forfeited by the Customs Department in terms of Section 8, 12, 43, 107, 129 & 152 of the Customs Ordinance. These are provisions which empower the Customs Officials to take all legal and necessary steps to inquire and impose fines and

forfeit the vehicle in question, which according to the statute fall within the table of prohibition and restriction in the relevant schedule of the Customs Ordinance. Learned Deputy Solicitor General also stressed that the burden of proof lies on the Petitioner to prove lawful importation of the vehicle in question and the Petitioner has not discharged that burden at all and as such the application should be dismissed. Further document 1R1 does not support the Petitioner since it shows non-payment of customs duty for the vehicle. As such this application is futile. Further registration of vehicle cannot cure the question of lawful importation.

Having read and perused the counter affidavit of the Petitioner I see various irrelevant position mentioned therein. This being a discretionary remedy of court the prime duty of the Petitioner is to satisfy this court on the available grounds to issue a writ. There is no proof of lawful importation of the vehicle in question. Petitioners own statement do not support the above. This court is not expected to go on a voyage of discovery. Based on inquiries and investigation, the Customs Department arrived at a decision on the question of lawful importation. To hold such a particular view based on material, is not an error of law on the face of the record. There is no room for technicality and to invite parties to abuse

statutory rules and provisions in the manner suggested in the pleadings of the Petitioner.

What goes to the root of the matter is the question of lawful importation which the Petitioner has failed to establish (Section 152 of the Customs Ordinance). Any goods inclusive of vehicles could be seized if same is illegally imported and in contravention of Section 12, 43, 125 & 152 of the Customs Ordinance. No doubt the Petitioner may have parted with the large sum of money to make the purchase from a 3rd party, who never had the name entered on this Registration Book. As such the Petitioner has taken upon himself all risks surrounding the transaction. I agree with the Respondent's view that any dispute in relation to the validity of the sale cannot be resolved by way of a Writ. There were no documents produced by the previous owners to prove payment of duties and levies. As such registration cannot cure the defect of illegal importation. The degree of required proof had been discussed in *Govindasamy Vs. Attorney General* 1980 2 SLR 278...

On 02.06.1973 customs officers seized 29 full bags of garlic and two open bags of garlic from the plaintiff's shop. After inquiry, the goods were declared forfeited as they were imported into the country unlawfully.

Plaintiff instituted this action to recover a sum of Rs. 38,630/- being the value of the garlic alleged to have been seized wrongfully from him. It was case of the plaintiff that the garlic was supplied by two local cultivators and therefore not imported and hence not liable to be seized.

Held:

- (i) The burden is on the State to prove that the garlic had been imported, before the plaintiff can be called upon to prove that it was lawfully imported.*
- (ii) The Customs Ordinance is a penal enactment which imposes severe penalties on those who violate its provisions. The State must therefore establish any breach of those provisions beyond reasonable doubt as in a criminal prosecution (Attorney General v. Lebbe Thamby 61 NLR 256 followed).*
- (iii) In terms of section 155 of the Customs Ordinance the plaintiff must be the owner of the goods.*

It is clear that once the State prove importation, the burden shifts to the opposing party to prove lawful importation.

At the customs inquiry the order made in that regard may call the Petitioner an 'innocent' party. As far as importation is concerned it cannot render importation legal. Vehicle was forfeited by operation of law. By document 1R2 vehicle has now been allocated to a Government Department. The Petitioner's failure to appeal or institute action for 65 days after forfeiture is also noted by this court as pleaded by the Respondent.

In all the above facts and circumstance, this court is not inclined to favour the Petitioner. The writ jurisdiction of this court cannot be extended to grant the relief sought as prayed for in the petition of the Petitioner. As such this application is dismissed without costs.

Application dismissed.

JUDGE OF THE COURT OF APPEAL