

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

C.A 760/2008 (Writ)

Onril (Pvt.) Limited,
Divulapitiya Road,
Dissagewatte, Katana.

PETITIONER

Vs.

1. The Director General of Customs
Department of Customs,
Times Building, Colombo 1.
2. Coconut Development Authority
54, Nawala Road,
Narahenpita, Colombo 5.
3. D. J. U. Purajasinghe
Chairman,
Coconut Development Authority,
54, Nawala Road, Colombo 5.
- 3A. Keerthi Weerasinghe
Chairman
Coconut Development Authority,
54, Nawala Road, Colombo 5.
- 3B. Sugath Handunge,
Chairman
Coconut Development Authority,
54, Nawala Road, Colombo 5.
4. Board of Investment of Sri Lanka
West Tower, World Trade Centre,
Echelon Square, Colombo 1.

5. Dammika Perera
Chairman/Director General
Board of Investment of Sri Lanka
West Tower, World Trade Centre,
Echelon Square, Colombo 1.
- 5A. M. M. C. Ferdinando,
Chairman/Director General
Board of Investment of Sri Lanka
West Tower, World Trade Centre,
Echelon Square, Colombo 1.
6. M. Ravindra Kumara
Chief Exports Officer
Department of Customs
Sri Lanka Customs, Colombo 1.
7. S. Luckman
Assistant Controller
BIO Diversity Division
Department of Customs,
Sri Lanka Customs, Colombo 1.
8. Hon. Attorney General
Attorney General's Department 5t,
Colombo 12.

RESPONDENTS

BEFORE: Anil Gooneratne J. &
H. N. J. Perera

COUNSEL: Romesh de Silva P.C., with Sudath Caldera for the Petitioner
Janak de Silva D.S.G. for 1st, 6th, 7th and 8th Respondents
Palitha Kumarasinghe P.C. with Priyantha Alagiyawanna, Ananada
Ranawaka for the 2nd and 3rd Respondents

ARGUEDON: 20.03.2013

DECIDED ON: 24.07.2013

GOONERATNE J.

Petitioner was registered as a BOI company. Copy of the agreement is produced marked P2. The main line of business of the Petitioner Company is manufacturing coir based products as described in paragraph 4 of the Petition, and exported to European Countries and the Middle East. It is stated that coir yarn is an essential item for its business and due to short supply and unavailability of coir yarn in the local market it was necessary to import same with the approval of the 4th & 2nd Respondents. Petitioner states with the approval, imported coir yarn from India. In paragraphs 19/20 of the petition it is pleaded that prior to granting approval the Petitioner Company had imported a certain quantity of coir yarn, and the said paragraph make reference to discussion with 2nd & 4th Respondents.

In the course of the hearing it was stressed by learned President's Counsel for the Petitioner Company that the 4th Respondent (BOI) authorized the Petitioner Company to import coir on a duty free basis, and 'CUSDEC' declaration

P5 had been produced. The case of the Petitioner is that the Company had no problem and had imported coir yarn until the importation of the last consignment of coir yarn, suddenly the customs officers had visited the Petitioner's warehouse and had sealed the premises. The Petitioner relies on the following factual circumstances.

- (a) Goods imported were coir yarn
- (b) BOI approved the 'CUSDEC' and consequently coir yarn imported.
- (c) Coir yarn cleared through customs from the port and kept in the warehouse of the Petitioner Company .

The Customs Department wants to initiate an inquiry to ascertain whether the goods imported violates the provision of the Plant Protection Act. Petitioner argues it has no power to do so.

In fact this seems to be the issue to be decided in this Writ Application. The position of the Petitioner Company in brief is that the company has got the necessary approval from the BOI. As such the role of the Customs Department is limited to ascertain only whether the goods imported conform to the goods described in the 'CUSDEC'. In any event the Customs Department has no power to inquire to a question of contravention of the Plant Protection Act. A stay order has been issued by this court and same has been extended from time

to time and had been extended till the date of delivery of judgment. The Petitioner also impress that all documentation including approvals for importation has to be processed by the BOI. The learned President's Counsel for the Petitioner has cited two important cases to prove the Petitioner's point of view. I had the benefit of perusing same.

In the judgment of, Ceylon Quartz Industries (Private) Limited Vs. Director General of Customs S.C 79/2002, I have noted the gist of the judgment which could be incorporated as follows. The two questions on which leave was granted in the above case, are:

1. Can the Customs interpret the nature of the goods that can be exported under and in terms of the Agreement X8?
2. Is the power of the Customs restricted to verifying whether the goods exported confirm to the goods said to be exported by the exporter?

The Supreme Court held:

1. The Customs cannot interpret the nature of goods that can be exported under and in terms of the Agreement X8.
2. The power of the Customs be restricted to verifying whether the goods exported confirm o the goods said to be exported by the exporters.

Petitioner relies also in the judgment of Vallibel Lanka S.C Appeal 26/2008.

Petitioner advert to the legal position that it is settled law that when an Act is self contained and provides for a procedure to deal with violations, there is no provision to act in terms, of the Customs Ordinance.

Petitioner contends that the Customs Ordinance does not apply to contraventions of the Plant Protection Act.

The position of the 1st, 6th & 7th Respondents differ somewhat to that of 2nd & 3rd Respondents. The 1st, 6th & 7th Respondents resist the application of the Petitioner, whereas the other Respondents do not seriously contest the Petitioner but prefer not to offend the provisions of the Customs Ordinance and in fact no relief is sought against them. As such only a limited role is played by the 2nd & 3rd Respondents.

The Customs Department officials only admit the customs declaration marked P7. The limited objections filed by these Respondents reveal that the Bio - Diversity Unit of the Sri Lanka Customs initiated an inquiry to ascertain whether the Petitioner has imported any prohibited items. The relevant statute i.e the Plant Protection Act No. 35 of 1979 and regulations made therein are produced marked R1A & R1B. Another document R2 is produced. It is a document issued by the Deputy Director of Customs which authorize certain officials of the Customs Department to enter and search the premises in question

as referred to therein. It is pleaded that thereafter the Customs Department conducted investigations upon entering the premises of the Petitioner Company. The 7th Respondent recorded a statement of the General Manager of the Petitioner Company (R3). In R3 it is admitted that Petitioner had not obtained the prior approval or consent of Director General of Agriculture.

The above facts were confirmed by the Director General of Agriculture (vide R4). Therefore steps were taken to secure the goods. It is the position of the 1st, 6th & 7th Respondents that the Customs Department is bound to enforce statutes relating to Bio Diversity at the point of import or export. These Respondents rely on documents R5, R6 & R7. In the objections filed by above Respondent it is specifically pleaded that by agreement P2 the Petitioner is exempted only from operation of Section 10 of the Customs Ordinance and not exempted from the Plant Protections Act No. 35 of 1995. By P2 the Petitioner and the 4th Respondent only agreed to the importation of new plant, machinery and equipment under certain conditions and the importation of used equipment. This court also observe that most of the averments in the limited objections have been included as above in the objections filed of record on behalf of 1st 6th & 7th Respondents.

The objections on behalf of the 2nd & 3rd Respondents, it appears that certain approvals had been granted to import coir yarn by the Petitioner at various stages subject to approval of any relevant authority. (R10, 2R13, 2R14 & 2R16). The entirety of the objections filed by the 2nd & 3rd Respondents indicate that approvals has been granted to the Petitioner and requests made to fulfill certain conditions, i.e purchase from the local market etc. All that has been done subject to the required approval or sanction of the Customs Department. There is no single document produced by the 2nd & 3rd Respondents that gives the impression that approval or sanction of the Customs Department is not required. At every turn approval granted subject to the final approval of the Department of Customs.

I would incorporate paragraphs 8 & 9 of the objections of 2nd & 3rd Respondents which clarify the position that it is always necessary to get the final approval or that the Department of Customs needs to grant the final authority for such imports.

8.

- (a) The 2nd Respondent recommended the importing of the said Coir Yarn subject to specific condition that the Petitioner should obtain the necessary approval from relevant authority.

- (b) In terms of the Regulations made under the Plant Protection Ordinance as amended, the importing of coconut and Coconut Plants are prohibited and and/or restricted.
- (c) According to Section 13(2) of the Plant Protection Act No. 35 of 1999, the said regulation marked 'P9' is still in force;
- (d) Plant Protection Act has defined the word plant as "all members of the plant kingdom, whether living or dead, or any part or parts thereof and includes seeds".
- (e) Thus, according to regulation No. 10 of "P9" and Plant Protection Act No. 35 of 1995, the Petitioner should have obtained a license from Director of Agriculture before importing the said coir yarns;
- (f) "Plant" means all members of plant kingdom, whether living or dead, or any part or parts thereof and includes seeds.

9.

- (a) One of intention to the Plant Protection Act and the Regulations imposed therein is to prevention or spreading of pests, weeds and diseases injurious to, or destructive of plants in Sri Lanka;
- (b) Such prevention could be done only if the imports are tested for harmful microbiology and quarantine of the imported plants and products;
- (c) Bio Diversity Unit of Sri Lanka Customs is equipped to carry out such microbiological tests and the Sri Lanka Customs is entitled to carry out such microbiological tests.
- (d) For the protection of local coconut cultivations and industry, the 2nd and 3rd Respondent has no objection whatsoever for such research or tests by Sri Lanka Customs or any other lawful authority.

(e) These Respondents stress the need for such tests for importation of all plants in order to prevent the spreading of pests in the Country and outbreak of various pests related diseases and infections.

The two judgments cited on behalf of the Petitioner has no direct application to the case in hand. In fact same applies under different circumstances which are very much different to the case presented to this court by each party. It is a question of interpretation of the statute and the applicability of the provisions of the Customs Ordinance. To make it clear I would incorporate the portion of the judgment in S.C Case No. 26/2008 the Vallibel Lanka (Pvt. Limited Case.

Learned DSG strenuously contended that the GST Act as amended by Act No. 26 of 2000 draws a clear distinction between imported goods and other goods and puts the imported goods directly in a different category and vests the administration of the said Act on imported goods in the Director General of Customs. It is on this basis counsel argued that the intention of the legislature was that the GST on imported goods be brought under the regime of the Customs Ordinance. In view of the finding that "MV Induruwa Valley" was not imported into Sri Lanka, the application of Act No. 26 of 2000 does not arise. In any event, it is noted that in terms of the said Act, the charging, levying and collection of GST could be made as if it were a Customs duty whilst the recovery of tax in default on

the other hand is vested with the Commissioner General of Inland Revenue by virtue of Sections 39 to 49 in Chapter VIII of the GST Act No. 34 of 1996 as amended. Thus, when the GST Act makes general provisions in respect of certain matters and makes specific provision with respect to "recovery" the latter must prevail over the general. The special jurisdiction with regard to "recovery" must therefore be exercised by the Commissioner General of Inland Revenue and not by the Director General of Customs.

This court is of the view, which are fortified by the position of the Customs Department that agreement P2 exempt the Petitioner only from operation of Section 10 of the Customs Ordinance, and does not exempt the operation of Act No. 35 of 1999 and its regulations. Though the Customs Department cleared the goods at a certain point, it cannot preclude any further investigations by the Department of Customs, if there is a necessity to do so. The Customs Ordinance would always empower the authorities of the Customs Department to decide on the lawful importation of articles or goods. Merely because the 'CUSDEC' for importation of coir yarn was endorsed by the 4th Respondent cannot preclude any investigations by the 1st, 6th & 7th Respondents i.e whether coir yarn imported are imported according to law. The provisions of Plant Protection Act and its regulations (R25) would not prohibit the provisions of the Customs Ordinance being applied to any import of goods/articles etc.

To add to the above the contents of documents R4 & R5 would not support the case of the Petitioner. Nor can this court consider documents R6, R7 & R8 (though being internal circulars on the Customs Department) lightly since it would in a way support International Customs & Treaties on various aspects, and also to consider the subject matter of this application.

In all cases involving imports of goods, there is no doubt that the Customs Ordinance would apply and any violation of those provisions has to be dealt according to law. What goes to the root of the matter is the question of lawful importation. The Customs Ordinance is so designed to cater to all kinds of violations and the burden would shift to the Petitioner to establish and prove lawful importation. Even if the state is called upon to prove importation, the Petitioner would not be relieved of the burden of proving lawful importation. A mere authority obtained under another statute cannot be the final authority in cases involving import of goods/articles. In terms of Sections 12, 43, 125 & 152 of the Customs Ordinance goods could be seized at any point of time if same is illegally imported contrary to the above sections of the Customs Ordinance. The degree of required proof had been discussed in 'Govindasamy's case 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.*

In all the above facts and circumstances the material placed before this court by the Petitioner cannot assist the Petitioner to invoke the writ jurisdiction of this court. The approval granted to the Petitioner are all subject to

the final authority of the provisions of the Customs Ordinance. This is not a fit case to interfere by granting the writs prayed for by the Petitioner. As such this application is dismissed without costs.

Application dismissed.

JUDGE OF THE COURT OF APPEAL

H. N. J. Perera J.

I agree.

~~JUDGE OF THE COURT OF APPEAL~~