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

Singer (Sri Lanka) Limited
320, Dr. Colvin R De Silva Mawatha,
Colombo 02.

PETITIONER

C.A 67/2008 (Writ)

Vs.

1. Sarath Jayathilake
Director General of Customs
Customs House, Times Building,
P.O.Box 518, Colombo 1.

2. V. S. Sudusinghe
Deputy Director of Customs
Customs Investigations Bureau
Customs House, Times Building,
P.O.Box 518, Colombo 1.

3. Sisira De Silva
Superintendent of Customs
Customs Investigations Bureau
Customs House, Times Building,
P.O.Box 518, Colombo 1.

4. Samantha Gunewardene
Chief Preventive Officer
Customs House, Times Building,
P.O.Box 518, Colombo 1.

5. K. Yoganathan
Superintendent of Customs
Post Clearance & Audit (PCAB)
Customs House, Times Building,
P.O.Box 518, Colombo 1.

6. W. A. U. Abayawardena
Superintendent of Customs
Post Clearance & Audit (PCAB)
Customs House, Times Building,
P.O.Box 518, Colombo 1.

7. Controller of Exchange
Central Bank of Sri Lanka
Janadhipathi Mawatha,
Colombo 1.

RESPONDENTS

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

COUNSEL: M. A. Sumanthiran with Viran Corea and
S.A. Beling for the Petitioner
Janak de Silva D.S.G., for Respondents

ARGUED ON: 28.03.2013

DECIDED ON: 03.09.2013

GOONERATNE J.

The Petitioner in this Writ Application is Singer (Sri Lanka) Limited. In the petition it is pleaded that the Petitioner Company placed an order for a consignment of 2821 units of Colour Television as described in paragraph 7 of the petition. The said consignment arrived in the Port of Colombo on 28th November 2007, but was detained by the 6th Respondent for a detailed examination (P5). Petitioner pleads that the CIF value of the total number of units would be approximately Rs. 20 million. The point that needs to be decided is pleaded from paragraph 10 onwards of the petition of the Petitioner Company, that on 3rd December 2007 the Petitioner Company was informed by the Customs Department that clarification was needed on the payment of 'Royalties' in relation to the units contained in the consignment. There had been some letters addressed to the customs Department explaining the position of the Petitioner Company on the question of 'Royalty' payments (P7, P8 P9, P11 & P14). Further several appeals were also made by the Petitioner Company. Petitioner also makes reference to P12, (internal correspondence of the Customs Department) wherein a minute in P12 state to release the goods on a bank guarantee.

Petitioners in their submissions demonstrate that the Customs Officials had entertained certain doubts regarding payment, of 'Royalties' and as a result this application had to be filed. It is pleaded that despite many efforts taken by the Petitioner Company the Respondents continue to unfairly, maliciously and unlawfully detain the above consignment without intimating the reasons as in Section 51 A(1)(b) of the Customs Ordinance. The Petitioner seeks as their main relief a Writ of Certiorari to quash the decision of the Respondents to detain the above consignment as described in sub paragraph 'e' of the prayer to the Petition and a Writ of Mandamus to release the above consignment to the Petitioner.

Petitioner Company maintains it has made a correct declaration to the Respondents regarding 'Royalties' and license fees to be paid by the Petitioner. Further it is pleaded that Respondents have failed and refused to comply with the mandatory requirement of the law as contained in Section 51A of the Customs Ordinance. The said 51A contemplate an amendment to the value only and no provision for forfeiture or seizure of goods. Detention of the good is ultra vires the powers of the Respondent under the Customs Ordinance. Petitioner also pleads that the seizure notice issued after filing of the instant application is ultra vires the powers granted by statute.

Perusal of the objections of the Respondents, inter alia it is pleaded that:

(a) Customs Department investigation reveal an exchange control violation in addition to Customs Ordinance Violation.

(b) "Singer" on the product is a trademark belonging to the intellectual property owner M/s. Singer Asia Limited (worldwide licensor of 'Singer trademark.

(c) Consignment detained under the provisions of the Customs Ordinance.

(d) A more detailed version is contained in paragraph 10 of the objections and same need to be incorporated for better understanding of the main issue.

(i) The officers attached to the Post Audit Branch (PCAB) of the Customs visited the importer's premises in the course of the customs investigation on the day of the detailed examination of the 7 containers, containing colour televisions bearing "SINGER" trademark;

(ii) The importer produced a copy of the royalty agreement related to "SINGER" trademark which was in its possession at the time of the PCAB officers visit to Singer Sri Lanka. Neither this agreement nor the information of the royalty payment was submitted to Customs at the time of the importation of the above television. They said the royalty agreement came into force with effect from October 1st 2005;

(iii) According to the said royalty agreement the licensee must pay 1% of the net revenue of the importer as a license fee to the licensor M/s. Singer Asia Ltd in Cayman Islands. The license was obtained by the licensee M/s Singer Sri Lanka/importer for the right to use the "SINGER" trademarks on and in connection with the products in Sri Lanka. In terms of the license agreement currently in force the licensee/petitioner must pay license fee/royalties to the licensor M/s Singer Asia Ltd in Cayman Islands. Also the detailed cost structure of the two models of

televisions submitted by the importer during investigations reveal that the value of the royalty amount payable by the importer with regard to the goods being valued by the customs (television);

(iv) Customs investigation carried out with HSBC bank revealed that the licensee/Petitioner had illegally remitted several millions of rupees in foreign exchange in the past to a company which is incorporated outside Sri Lanka namely Singer Asia Holding Ltd which is related to the seller of the above televisions. Investigations further revealed that the importer had submitted a license agreement dated May 1, 2001 followed by Notice of Assignment of Trademark License Agreement dated May 1, 2001 to the bank and illegally remitted large sums of money in foreign exchange under the guise of royalties to a company in Netherlands namely Singer Asia Holdings Ltd since October 1st 2005. It should be noted according to license agreement in force M/s Singer Asia Ltd I n Cayman Islands is the licensor/beneficiary permitted in terms of the Exchange Control Act to receive the royalties as service payment.

(v) The HSBC bank admitted that they have remitted the money according to the expired agreement since October 1st 2005. The HSBC bank has admitted in the statement that they were never provided with the current agreement which came to force with effect from 1st October, 2005 until the Customs Investigations commenced into this fraudulent financial transactions.

(vi) In terms of the law, the licensee/Petitioner did not have to make any payment to the licensor M/s Signer Asia Holdings Ltd since the royalty agreement between Signer Asia Holdings Ltd (licensor) and M/s Signer Sri Lanka (licensee) had expired. However the Petitioner and the relevant bank jointly engaged in this fraud and violated the laws of the country. Therefore the foreign payment made to M/s Singer Asia Holdings Ltd in Netherlands under the guise of royalties is not royalty payments and clear contravention of the provisions of the Exchange Control Act. The bank has admitted that they had violated the provisions of the Exchange Control Act.

(vii) The Finance Manager of the Petitioner/importer had admitted in his statement that the Petitioner pays 1% of the resale value of all the branded items sold by the importer to a foreign Company namely Singer Asia Holdings Ltd which is related to the seller. This payment information was suppressed deliberately to customs by the importer by making false declaration at (f) and (j) of column 16 of the related customs VDF to evade customs duties.

(viii) Any part of the sale proceeds of the imported goods which, directly or indirectly, accrues back to the seller is an addition in terms of Article 8(d) of Schedule E of the Customs Amendment Act No. 2 of 2003 and should be added to the Customs Value for the purposes of determining value for duty. However the importer had not only failed to declare the value of the sale proceeds that accrued to the seller in the VDF, which is required to be submitted in terms of the Customs Ordinance, related to Customs declaration number 127102 (marked P4) but also has made a false declaration with regard to the value as 0 (Zero). Also the importer had made false declaration in the same VDF as 0 (Zero) with regard to the value of the royalty payment (royalties) which it must pay to the licensor in terms of the current Royalty agreement in force with effect from 1st October 2005.

The important point that was argued in this case is the question of payment of 'Royalty'. Petitioner maintain it is not payable, but the Customs Department take the contrary view. There are some forceful arguments presented on behalf of the Petitioner Company that in terms of the license agreement P10, the Petitioner has agreed to pay Royalty payment, on the turnover of goods sold and for services provided under the trade name of the company. As such Royalty payments attach to the use of the company name and not on the value of the

goods. This seems to be the more simplified argument of the Petitioner Company. Further the final 'Royalty' payment could only be assessed on the nett sales. Petitioner strongly urge that license fees do not include all license fees paid, but applies only to license fees that are related to the goods being valued and a condition of the sale. The position of the Petitioner is that it does not pay Royalties as a condition of the sale of the goods being valued.

Petitioner has also referred to Sections 51 A, 51A(1), 52 of the Customs Ordinance and emphasis the fact that the Respondents have not acted in terms of Section 51A of the Customs Ordinance and Respondents cannot in the circumstances of the case act under Section 52.

The said Section 51 A reads thus:

51A (1)

(a) Whenever an officer of customs has reason to doubt the truth or accuracy of any particulars contained in a bill of entry or a declaration made under section 51 or the documents presented to him in support of a bill of entry under section 47, the officer of customs may require the importer or his agent or any other party connected with the importation of goods, to furnish such other information, including documentary or other evidence in proof of the fact that the declared customs value represents the total amount actually paid or is payable for the imported goods as adjusted in accordance with Article 8 of Schedule E.

(b) After the receipt of further information or in the absence of any response, if the officer of customs still has reasonable doubt as to the truth or accuracy of the declared

customs value, it shall be deemed that the customs value of the imported goods in question cannot be determined under the provisions of Article 1 of Schedule E and the importer, if so requests, shall be informed by the officer in writing of the grounds for such doubt and be afforded an opportunity to be heard.

(c) The officer of customs may thereafter proceed to determine the customs value in accordance with the other provisions of Schedule E and amend the value as appropriate.

The said section 52 reads thus:

If upon examination of the goods so entered it shall appear to the officers of the customs that the same are not valued according to the true value thereof, it shall be lawful for such officers to detain such goods, and within two days from the day on which such goods shall be finally examined for duty by the proper officers to take such goods for the use of the Republic; and the Collector shall, from the daily collection of the port, or by an advance from the Treasury, cause the amount of such valuation, together with the duties paid upon such goods, to be paid to the importer or proprietor of such goods in full satisfaction for the same, and shall dispose of such goods for the benefit of the Republic, and if the proceeds of such sale shall exceed the sums so paid and all charges incurred by the Republic, such surplus shall be deemed to be a forfeiture and disposed of as provided for in section 153.

Petitioner refer to the case of Fonterra Brands Lanka (Private) Ltd.Vs Director General of Customs & Another 2008 BLR 346 CA 801/07.

"If there are two statutory provisions in a statute which are capable of two different meanings and one provision leads to enormous inconvenience and another provision does not the one which leads to least inconvenience to be preferred"

"It is a well recognized rule that in a statute imposing a pecuniary burden, if there is a reasonable doubt with regard to the construction of any burdensome provision, the construction most beneficial to the subject is to be adopted."

It is emphasized that in terms of Section 51A (1) (b) if doubts are entertained by the Customs Officers as to the declaration made, reasons need to be provided for the said doubt. In the instant case the Respondents have not complied with the above and refused to give reasons but have proceeded to seize the Petitioner's goods under Section 125 of the Customs Ordinance. Petitioner argues that the applicable section is Section 51A and not Section 52. Petitioner states that if the value declared is not appropriate the Customs Officer could amend the value (under Article 'E' as provided in Section 51(A)(2) of the Act). In the event of undervaluation there is no provision for a forfeiture of goods by operation of law. (Toyota Lanka Case S.C 49/2008 S.C minutes 30.6.2008).

I have noted with much interest that Article 8(1)(c) of Schedule 'E' of the statute, there shall be added to the price paid or payable for the imported goods, Royalties and license fees related to goods valued. The Buyer has to pay directly or indirectly. Respondents argue that Royalty and licence fees need to be reflected in R6 (value declaration form); Petitioner declares a 'nil' declaration for Royalties and license fees. On P10 agreement Petitioner has agreed to pay Royalty

for the Trade name and turnover of goods. Royalties is a condition of the sale of goods as stated in the Agreement and this court is inclined to agree with the learned D.S.G that the subject matter attracts royalty payments. To add to this some very important facts have surfaced in the material referred to in paragraph 10 of the Respondents' objections which are supported by documents R1 to R7. This gives the impression of an irregular practice adopted by the Petitioner Company and the Respondents are well within their powers to disclose same (supported by documents) and act in terms of the Customs Ordinance and it is not for the Petitioner to choose the Section and demonstrate to court that the Customs Department should act under this Section and not this. Where revenue and duty payable is concerned it is for the authorities concerned to take the required steps in terms of the available laws. This is not a matter of surmise.

It is noted that Section 51 of the Customs Ordinance has had several Sub sections apart from Section 51 itself. Section 51 requires the submissions of value declaration form. The customs Department according to the scheme of the Statute, if in doubt could seek clarification in different circumstances. Section 51A contemplates when in doubt as to the accuracy of information, and steps could be taken to amend the values (before or after UDF)/ Section 51A(1)(a), if in doubt further information could be called. Section 51A (1(b), If the doubt continues

importer should be informed in writing and an opportunity to be heard. Section 51A(1) (c) Customs Department after inquiry amend the value. Section 51A (b) provides an appeal to the Director General of Customs. Section 51A(7) goods to be released on security pending investigation unless fraud is apparent.

It would not be possible to interpret or explain every aspect of valuation, but in the instant case this court gets the impression that the Petitioner Company had been given all opportunities to explain, but the material that surfaced in paragraph 10 of the objections (not properly explained by Petitioner) of the Respondent are more than sufficient to conclude that it is an irregular practice adopted on the part of the Petitioner and thereby Petitioners' conduct would be unmeritorious. In these circumstances this court should not extend the writ jurisdiction in favour of the Petitioner Company.

However having considered the case of each party, the main relief sought in this Writ Application, after so many years and in view of the interim relief granted by this court on or about 28th January 2008, the entire consignment had been released to the Petitioner Company on a bank guarantee. As such on one hand it remains only an academic question. On the other hand it is a futile exercise having regard to all the fact and circumstances of this case. Certiorari will not be issued to quash a particular exercise of powers if it be futile to do so

because it is no more operational or it has had its effect. A writ will not issue where it would be vexatious or futile (1958) 61 NLR 491, 496. The court will have regard to the special circumstances of the case before it, issue a Writ of Certiorari. The Writ of Certiorari clearly will not issue where the end result will be futility, frustration, injustice and illegality. Marsoof J. in Ratnasiri Vs. Ellawala (2004) 2 SLR 180; 208, Marsoof J. followed Soza J.'s word cited Pg. 90 citing H. W. R. Wade Administrative Law 5th Ed. Pg. 546-591 Even Mandamus had been refused by courts on many occasions based on futility.

I do agree with leaned Deputy Solicitor General that even Writ of Prohibition cannot be issued in the absence of a clear, understandable prayer. No doubt the prayer as regards the Writ of Prohibition is worded in its widest form. This should not prevent a proper customs inquiry or an investigation. As such this court is not inclined to grant the substantial remedy of Certiorari/Prohibition and Mandamus. As such we reject such relief and dismiss the application for the writs prayed for by the Petitioner Company.

It must be noted that certiorari is a discretionary remedy and this court has the power to withhold it if it thinks fit. This court will do so in the case of an unmeritorious Petitioner, even though there has been a clear violation of

natural justice – Wade Administrative Law 4th Ed. Pg. 455; L. H. de Alwis J. Wickremasinghe Vs. Ceylon Electricity Board 1982 (2) SLR 607; 613.

In all the above facts and circumstances this court is not inclined to grant the relief prayed for. As such we dismiss this application with costs.

Application dismissed.

JUDGE OF THE COURT OF APPEAL

H.N.J. Perera J.

I agree.

JUDGE OF THE COURT OF APPEAL