

**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 *Writ of Certiorari* under article
140 of the Constitution of the Democratic
Socialist Republic of Sri Lanka**

1. Muttiah Sasidaran,
73/14, Saman Uyana,
Kumarage Watte,
Pelawatta.
2. D.P. Jayalath Krishan Peiris,
499/1/5, Eldeniya West,
Kadawatha.

PETITIONERS

CA/WRIT/127/2014

CA/WRIT/128/2014

Vs,

1. K.L.G. Thilak Perera,
Additional Director General of Customs
(Enforcement)
Sri Lanka Customs,
40, Main Street,
Colombo 11.
2. Jagath P. Wijeweera,
Director General of Customs,
Sri Lanka Customs,
40, Main Street,
Colombo 11.

RESPONDENTS

**Before: Vijith K. Malalgoda PC J (P/CA) &
H.C.J. Madawala J**

Counsel: Srinath Perera PC, for the Petitioners

F. Jameel SDSG, for the Attorney General

Argument on: 03.09.2015

Written Submissions on: 13.05.2016

Order on: 14.10.2016

Order

Vijith K. Malalgoda PC J

Petitioners to the two applications CA 127/14 and CA/128/14 namely Muttiah Sasidaran and D. P. Jayalath Krishan Peiris have come before this court seeking a writ of *Certiorari* to quash the decision of the 1st Respondent communicated by letters dated 28.11.2013 and 06.01.2013 nominating a sum of Rs. 15,000,000/- and 12,000,000/- respectively as cash security to prosecute claims referred to by the Petitioners.

As revealed during the arguments before this court, the two Petitioners along with three others were directed to attend a customs inquiry with regard to the importation of two containers said to have contained Sulphate Turpentine Oil and Rosin Rasin acid, but later discovered that the said containers did not contain Sulphate Turpentine Oil and Rosin Rasin Acid as declared in the customs declaration but it contained 310 barrels of Ethyl Alcohol.

At the conclusion of the said inquiry in addition to the other orders made, the inquiry officer had made the following orders against the two Petitioners.

5. Impose a further forfeiture of Rs. 101,081,950.62 being treble the value of the goods on Mr. D.P.J.K. Peiris in terms of section 129 of the Customs Ordinance and mitigated the same to Rs. 15,000,000/- in terms of section 163 of the Customs Ordinance.
6. Impose a further forfeiture of Rs. 101,081,950.62 being treble the value of the goods on Mr. M. Sasidaran in terms of section 129 of the Customs Ordinance and mitigated the same to Rs. 15,000,000/- in terms of section 163 of the Customs Ordinance.

The two Petitioners who were not satisfied with the said forfeiture, acting under section 154 of the Customs Ordinance gave notices to the 2nd Respondent by letters dated 07.11.2013 that they intend to enter claims against such forfeiture through their lawyers. By the said letters they have further requested the second Respondent to nominate a reasonable amount in cash security.

It is further revealed that the Petitioner in application CA 128/2014 D.P. Jayalath Krishan Peiris had paid Rs. three million out of the said forfeiture under protest.

In response to the above request by the two Petitioners, the 1st Respondent had written to the Attorneys at law of the two Petitioners, two separate letters nominating sum of Rupees fifteen Million and Twelve Million respective as cash security in order to prosecute such claims.

The Petitioners have appealed against the said nomination on the basis that the said nomination was excessive, unrealistic and arbitrary and requested the second Respondent to nominate a reasonable amount, but the said request was turned down by the 1st Respondent by his letters dated 06.01.2014.

The two Petitioners have come before this court seeking a writ of Certiorari to quash the said decision of the 1st Respondent communicated to them by the said two letters as referred to above by filing two applications before this court CA 127/14 and CA 128/14.

- Since the two applications referred to the one and the same custom inquiry and the decisions seek to quash was made against the two Petitioners in the said inquiry, the parties to the two applications agreed to have both matters argued together and to have a single judgment in both matters.

During the arguments before us the Petitioners took up the position that the cash security nominated by the 2nd Respondent was excessive, unrealistic, arbitrary illegal and/or ultra-vires the powers vested in the 1st and/or 2nd Respondent to nominate such cash security under section 154 of the Customs Ordinance and that the normal practice in the Customs Department had been to nominate such cash security calculated in a sum of 10% of the value of the forfeiture imposed.

As against the said position taken up by the two Petitioners before this court, the arguments raised by the Respondent were two fold.

Firstly they argued that the Petitioners were not entitled under section 154 of the Customs Ordinance to institute action since section 154 permits only the owner or claimant of the goods seized to enter a claim.

Secondly the Respondents submitted that even if the Petitioners were not entitled in law to act under 154 of the Customs Ordinance, if a request is made by a party under section 154, nomination of cash security equivalent to the value of the forfeiture is lawful and reasonable.

When considering the two positions taken by the Petitioners and the Respondent before this court, it is important to first consider the provisions of section 154 of the Customs Ordinance.

Section 154 of the Customs Ordinance reads thus,

154 (1) All ships, boats, goods and other things which shall have been or shall hereafter be seized as forfeited under this Ordinance, shall be deemed and taken to be condemned, and may be dealt with in the manner directed by law in respect to ships, boats, goods and other things seized and condemned for breach of such Ordinance, unless the

person from whom such ships, boats, goods and other things shall have been seized, or the owner of them, or some person authorized by him, shall, within one month from the date of seizure of same, give notice in writing to the Director-General or other chief officer of Customs at the nearest port that he intends to enter a claim to the ships, boats, goods, or other things seized as aforesaid, and shall further give cash security to prosecute such claim before the court having jurisdiction to entertain the same and otherwise to satisfy the judgment of the court and to pay costs in such sum as the Director-General or proper officer of Customs at the port where or nearest to which the seizure was made shall consider sufficient. If proceedings for the recovery of the ship, boat, goods or other things so claimed be not instituted in the proper court within thirty days from the date of notice and security as aforesaid, the ship, boat, goods, or other things seized shall be deemed to be forfeited and shall be dealt with accordingly by the Director-General or other officer of Customs.

- (2) If after the institution of proceedings in the proper court, the claimant shall give cash security to restore the things seized or their value in such sum as the Director-General or proper officer of Customs at the port where or nearest to which the seizure made shall consider sufficient, the ship, boat, goods or other things seized may, if required, be delivered up to the claimant at the discretion of the Director-General or Director.
- (3) After institution of proceedings in the proper court in respect of any ships, boats, goods or other things the court, may, on the application of the Director-General of Customs and if the claimants do not object thereto, authorize such Director-General to dispose of such ships, boats, goods or other things and deposit the proceeds of sale in court. Where the claimants object to the disposal of such ships, boats, goods or other things the court may require the claimants to deposit cash security, equal to the market

value (as assessed by such Director-General) of such ships, boats, goods or other things in court.

As referred to above section 154 (1) provides for all ships, boats, goods and other things that shall have been forfeited or shall have been seized as forfeited under the Customs Ordinance, shall be taken to be condemned and dealt with in the manner directed by law for the breach of such Ordinance.

However the Petitioners of the two applications before this court, does not complain of any item being seized or forfeited from them but as identified previously in this judgment, they have only been ordered a further forfeiture under section 129 of the Customs Ordinance.

Section 129 of the Customs Ordinance does not refer to any seizure but only refers to “person concerned in importing prohibited or restricted goods, whether unshipped or not, and persons unshipping, harboring or having custody of such goods to forfeit treble the value or one hundred thousand rupees.

Section 145 (2) of the Customs Ordinance refers to recovery of penalties as follows,

145 (2) All penalties and forfeitures incurred under this Ordinance and any interest thereon may be sued for and recovered by an action instituted in the name of the Attorney-General in the District Court within the local limits of whose jurisdiction the party liable to such penalty or forfeiture resides. Section 3,4,6,7,8,12,13,14,15 and 23 of the Debt Recovery (Special Provisions) Act No 2 of 1990 shall, *mutatis mutandis*, apply to the institution, and hearing of every such action.

Under the said section, recovery of penalties and forfeitures in a sum of money will only be by way of action instituted in the name of Attorney-General and seizure and forfeiture of ships, boats, goods

and other things under section 154 of the Customs Ordinance cannot be considered as recovery under section 145 of Customs Ordinance.

In the said circumstances this court does not observe any nexus between section 129 and 154 of the Customs Ordinance for the Petitioners to give notice under section 154 since nothing such as ships, boats, goods and other things have been seized as forfeited from them

However as revealed before this court, the two petitioners even though they were not entitled under the provisions of section 154 to file action in the relevant court to enter claims against the forfeiture as concluded above, requested the 2nd Respondent to nominate a reasonable amount in cash security in order to file action in the relevant court.

In this regard the Petitioners have further submitted before this court that the normal practice of the Customs Department had been to nominate 10% of the value of the forfeiture.

When the above position taken up by the two Petitioners were carefully analyzed, along with the provisions of section 154 it is important to consider the following portion of the said section to understand the role played by the 2nd Respondent,“and condemned for breach of such Ordinance, unless the person from whom such ships, boats, goods and other things shall have been seized, or the owner of them or some person authorized by him, shall within one month from the date of seizure of the same give notice in writing to the Director General or other Chief officer of Customs at the nearest port that he intends to enter a claims to the ship, boat, goods or other things seized as aforesaid, and shall further give cash security to prosecute such claim before the court having the jurisdiction to entertain the same and otherwise to satisfy the judgment of the court and to pay cost in such sum as the Director-General or proper officer of Customs at the port where or nearest to which the seizure was made shall consider sufficient”....

According to the above provisions it is clear that at the time the notice of claim is submitted, the seized items such as ships, boats, goods, and other things are in the custody of the Director-General and/or the other officers of Customs and the security is given for the purpose of “satisfy the Judgment of the court and to pay cost” as identify by the above section.

As submitted by the Respondents before this court, in the absence of any seized items from the Petitioners, the 2nd Respondent is entitled in law to interpret the term “satisfy the judgment of Court” as the total forfeiture due from each Respondents and inform the Petitioners to deposit the total amount due as further forfeiture from the each Petitioners as the cash security in order to prosecute the said claim.

When analyzing the provisions of the above sections along with the submissions made by the Respondents above, this court has no reason to reject the above argument raised by the Respondents.

Considering the material discussed above, I see no merit in the argument, raised infavour of granting relief as prayed by the Petitioners. I therefore make order dismissing both applications filed by the two Petitioners before this court with cost fixed at 50,000/- on each application.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala J

I agree,

JUDGE OF THE COURT OF APPEAL