

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

*In the matter of an Application for
mandates in the nature of Writs of
Mandamus and Prohibition in terms of
Article 140 of the Constitution of the
Democratic Socialist Republic of Sri
Lanka.*

C A (Writ) Application

No. 158 / 2016

Sena Mills Refineries Pvt Limited,
40,
New Kelani Bridge Road,
Orugodawatte.

PETITIONER

-Vs-

1. Chulananda Perera,
Director General of Customs,
Customs House,
Colombo 11.

2. M Sudath J de Silva,
Superintendent of Customs,
Chief Assistant Preventive Officer,
Preventive Division,
Customs House,
Colombo 11.

RESPONDENTS

Before: Vijith K Malalgoda PC J (P/CA)

P Padman Surasena J

Counsel: Romesh de Silva PC with Suren de Silva for the Petitioner

Milinda Gunathillake DSG with Suranga Wimalasena SSC for the
Respondents

Argued on: 2016-10-05, 2016-10-17, 2016-11-21, 2016-12-05,

Written Submissions tendered on: 2016-12-22

Decided on: 2017 - 02 - 06

JUDGMENT

P Padman Surasena J

1. BACK GROUND

The Petitioner claims that it is a company carrying on the business of refining Crude Palm oil and other by products obtained in the said refining process producing value added products in Sri Lanka. He also claims that he is an importer of Crude Palm Fatty Acid.

The Petitioner has imported Crude Palm Fatty Acid in 2012 which was classified under H S Code 3823.19.90, as per documents produced marked **P 2A** and **P 2B**.

The Nomenclature Committee of Sri Lanka customs in September 2014 had come to the conclusion that the Crude Palm Fatty Acid that was imported by the Petitioner should be classified under sub heading 1518.00. This is so stated in the letter sent by the 1st Respondent dated 2014-09-11, addressed to the Petitioner. This letter is produced marked **P 3**. It states inter alia as follows:

".....The question the committee had to decide was whether the commodity was

- (a) Palm Oil as claimed by investigating officers; or
- (b) a derivative of Palm Oil; or
- (c) a mixture of several chemical substances.

The committee noted that none of the analysis reports identified the commodity in question as "Palm Oil". All stated that various samples referred contained fatty acids and fats approximately in 1:3 ratio. Under those circumstances, the Committee had to classify a commodity which was a mixtures of fatty acid and oil (which is derived from Palm Oil). Such mixture fall classified in heading 15.18.

Having carefully considered all the analysis reports indicating the composition of the commodity samples, the committee finally decided to classify the commodity (which was a mixture of about 25% fatty acids and 75% fatty oils) in sub heading 1518.00....."

It is the submission of the learned counsel for the Petitioner that the Petitioner has imported approximately 17,000 Metric Tonnes of Crude Palm Fatty Acids during the period 2012 November - 2016 March without any problem. This includes¹

- i. approximately 7,000 Metric Tonnes imported under the HS code 3823.19.90 from 2012 November to 2014 September; and
- ii. approximately 10,000 Metric Tonnes imported from 2014 September to date under the HS classification 1518.00.

In the year 2016 the Petitioner has imported six consignments of "Crude Palm Fatty Acid." Details of the declarations made to the customs by the Petitioner pertaining to the said six consignments are as follows.

- 1) 'Cusdec' No 40850 dated 2016-03-08 (marked as **P 4A**)
- 2) 'Cusdec' No 44555 dated 2016-03-15 (marked as **P 4B**)

¹ Paragraph 11 of the Petition.

- 3) 'Cusdec' No 49987 dated 2016-03-24 (marked as **P 4C**)
- 4) 'Cusdec' No 52691 dated 2016-03-29 (marked as **P 4D**)
- 5) 'Cusdec' No 057476 dated 2016-04-05 (marked as **P 4E**)
- 6) 'Cusdec' No 59887 dated 2016-04-07 (marked as **P 4F**)

It is the submission of the learned President's Counsel who appeared for the Petitioner that the detention of some of these shipments by the Respondents has no legal basis and that it was done due to an animosity the 2nd Respondent has had with the Petitioner. Learned President's Counsel also submitted that the 2nd Respondent, acting mala fide, was pressurizing the Petitioner to settle this matter with a view of obtaining a reward² for himself.

2. PRAYERS

It is the position of the Petitioner that the continued detention of the three consignments details of which are:

- 1) Cusdec No 52691 dated 2016-03-29 (marked as **P 4D**)
- 2) Cusdec No 57476 dated 2016-04-05 (marked as **P 4E**)
- 3) Cusdec No 59887 dated 2016-04-07 (marked as **P 4F**),

² which customs officers who make successful detections are paid.

would ex facie amount to, illegal, arbitrary, ultra vires and unreasonable action on the part of the Respondents. He therefore submitted that such an action would amount to an abuse of power on the part of the Respondents.

It is in these circumstances that the Petitioner has prayed for

- i. a writ of Mandamus to compel the 1st and/ or the 2nd Respondent to release forthwith, the shipments imported under 'Cusdecs' bearing Nos. 52691, 57476 and 59887 and the Corporate Guarantee dated 2016-03-11 (marked **P 4G**)
- ii. a writ of prohibition to restrain the 1st and/or 2nd Respondent and or its servants and agents from carrying out any further inquiry into the aforesaid six shipments.

3. ARGUMENTS FOR THE PETITIONER

Learned President's Counsel appearing for the Petitioner, in the course of his submissions before this Court advanced the following arguments.

- 1) The Petitioner had been importing the identical substance called 'Crude Palm Fatty Acid' since the year 2012. The Respondents therefore knew that the said substance has 25% Free Fatty Acid.

Nevertheless the Respondents allowed the Petitioner to import that substance at earlier occasions without any objection being raised.

2) The Petitioner never imported Palm oil and is not importing Palm oil.

Therefore the standards applicable to Palm oil cannot be applicable to the product that the Petitioner has imported.

3) The Petitioner has imported this product to be used as a raw material

to produce edible Palm oil by refining it at his plant. It is thereafter that the said product would be released to the consumers³.

4) The Respondents initial position that this is a question of

classification was subsequently changed into a case of Petitioner importing prohibited items. The said move shows the mala fides on the part of the Respondents.

4. TASK

The task of this Court in this case is to decide whether this Court should issue the writs above referred to, prayed for by the Petitioner. In more elaborate terms, the said task is to decide whether the detention of the

³ Paragraphs 55,57 & 103 of part 1 of the written submissions filed by the Petitioner.

three consignments above referred to, by the Respondents, constitutes any ground for the issuance of

- i. a writ of Mandamus to secure the release of the three consignments detained by the Respondents.
- ii. A writ of Prohibition to restrain Respondents from carrying out any further inquiry into the aforesaid six shipments.

5. ANALYSIS OF ARGUMENTS

I. 'Cusdec' No 40850 dated 2016-03-08 (marked P 4A)

The 1st consignment that was detained is the consignment pertaining to 'Cusdec' No. 40850 dated 2016 - 03 - 08 marked **P 4A** in which the Petitioner had described the goods imported as "Crude Palm Fatty Acids". The Respondents had obtained samples from the said consignment and had forwarded the said samples to the Department of Animal Science of the faculty of Agriculture of University of Peradeniya and Bureau Veritas Consumer Products Services Lanka (Pvt) Ltd. for the purpose of testing, analysis, identifying the product and reporting.

Subsequently the customs officials (after obtaining samples from that shipment), had released the said consignment [imported under 'Cusdec' 40850 (**P 4A**)] on a Corporate Guarantee produced marked (**P 4G**).

II. 'Cusdec' No 44555 dated 2016-03-15 (marked P 4B) and 'Cusdec' No 49987 dated 2016-03-24 (marked P 4C)

The next two consignments imported by the Petitioner under 'Cusdec' No. 44555 dated 2016-03-15 produced marked (**P 4B**) and 'Cusdec' No. 49987 dated 2016-03-24 produced marked (**P 4C**) which arrived on 2016-03-15 and 2016-03-24 respectively, were not detained by the Respondents.

III. Laboratory Reports marked R 10 and R 11.

The laboratory reports received by the Respondents on the samples drawn from the 1st consignment [pertaining to 'Cusdec' No. 40850 dated 2016-03-08 marked **P 4(A)**] have been produced marked **R 10** and **R 11**.

The analysis report prepared by the Department of Animal Science of the Faculty of Agriculture of University of Peradeniya dated 2016-03-30 produced marked **R 10**, in its overall conclusion⁴ states as follows:

⁴ found under the heading 3.0 of the said report.

".....Based on the above results it can be concluded that all these samples are **Palm Olein or Palm Oil** having comparatively **high amount (16.3%) of free fatty acids**....."

It is relevant to note that the said report (**R 10**) in its heading "2.0 discussion" states as follows:

".....since the average moisture content of oil samples is $0.17 \pm 0.01\%$ it can be concluded that oil samples are having acceptable moisture percentage recommended for Palm Kernel Oil and Palm Oil (should be less than 0.5% in both types of oils according to the Food Act No. 26 of 1980 in Sri Lanka).".

"..... The average free fatty acid content of oil samples is $16.3 \pm 1.4 \%$. According to the Food Act No. 26 of 1980 in Sri Lanka, free fatty acid content of Palm Kernel Oil and Palm Oil should not be more than 0.25% and 0.1% (expressed as palmitic acid), respectively. The high level (more than the accepted level) could be due to two reasons; enzymatic or hydrolytic cleavage of ester bonds in triacylglycerol molecules (main lipid class in palm oil and palm kernel oil) in oil during processing or it could be also due to adulteration of Palm Olein or Palm Oil with fatty acids. The

maximum allowable free fatty acids content set by the Palm Oil Refiners Association in Malaysia in Crude Palm Oil is 5% and <0.1% in refined bleached deodorized oil (due to removing of free fatty acids). Hence the oil submitted by the Sri Lanka Customs exceeding those limits as well.”

The test report prepared by Bureau Veritas Consumer Products Services Lanka (Pvt) Ltd. which is produced marked **R 11** also in its conclusion has confirmed that according to their test results the tested samples belong to Palm oil category⁵.

IV. 'Cusdec' No 52691 dated 2016-03-29 (marked P 4D),

'Cusdec' No 057476 dated 2016-04-05 (marked P 4E)

And

'Cusdec' No 59887 dated 2016-04-07 (marked P 4F)

It is important at this stage to make an observation of the respective dates appearing on the documents mentioned below.

⁵ Page 5 of the Test Report marked **R11**

- The analysis report prepared by the Department of Animal Science of the Faculty of Agriculture of University of Peradeniya produced marked **R 10** is dated 2016-03-30;
- The test report prepared by Bureau Veritas Consumer Products Services Lanka (Pvt) Ltd. produced marked **R 11** is dated 2016-03-26;
- 'Cusdec' No 52691 (marked P 4D), is dated 2016-03-29;
- 'Cusdec' No 057476 (marked P 4E) is dated 2016-04-05; and
- 'Cusdec' No 59887 (marked P 4F) is dated 2016-04-07.

Thus, it could be seen that the test report prepared by Bureau Veritas Consumer Products Services Lanka (Pvt) Ltd. (produced marked **R 11** dated 2016-03-26) was available before the Respondents had received the above three 'Cusdecs'.

Similarly, the analysis report prepared by the Department of Animal Science of the faculty of Agriculture of University of Peradeniya (produced marked **R 10** dated 2016-03-30) was available just one day after the Respondents received the 'Cusdec' No 52691 dated 2016-03-29 (marked **P 4D**) and several days before they received 'Cusdec' No 057476 dated 2016-04-05 (marked **P 4E**) and 'Cusdec' No 59887 dated 2016-04-07

(marked **P 4F**).

Therefore, this Court has no reason to doubt the position of the Respondents that during the time they were processing the consignments pertaining to 'Cusdecs' bearing Nos. 52691 (**P 4D**), 57476 (**P 4E**) and 59887 (**P 4F**) pertaining to subsequent importations, the report marked **R 11** dated 2016-03-29 (**P 4D**), and the report marked **R 10** dated 2016-03-30 had been made available to them.

As the Petitioner in 'Cusdecs' bearing Nos. 52691 (**P 4D**), 57476 (**P 4E**) and 59887 (**P 4F**) too, has declared that the product he has imported is "Crude Palm Fatty Acid" and as the reports marked **R 10** and **R 11** have stated that the products the Petitioner had previously imported are Palm Olein or Palm oil having comparative high amount (16.3%) of Free Fatty Acids, this Court cannot fault the Respondents for entertaining reasonable and justifiable suspicions that the consignments pertaining to the above shipments also contained adulterated palm oil. It is this suspicion that has led the Respondents to detain the said three consignments relating to 'Cusdecs' No 52691 (**P 4D**), 57476 (**P 4E**) and 59887 (**P 4F**).

It is the position of the Respondents that it has become necessary to investigate whether

- I. the detained consignments contained adulterated Palm oil;
- II. if so whether, the said consignments contained a food item that is unfit for human consumption; and
- III. therefore, whether such consignments contained products that were food items whose importations has been prohibited under the Food Act No. 26 of 1980.

As such the Respondents submitted that the detention of the said consignments imported under 'Cusdecs' bearing Nos. 52691 (**P 4D**) 057476 (**P 4E**) 59887 (**P 4F**) is fully justifiable and within the law and that it is necessary for them to do so in order to facilitate the ongoing investigations. Most importantly, it is also their position that the substance contained in theses consignments cannot be released as they are most likely to be injurious to the health of the consumers.

6. LEGAL POSITION

It would be in order to set out at this juncture, the relevant legal provisions relied upon by the Respondents to show that the importation of the substance contained in the consignments pertaining to 'Cusdec' No 52691 dated 2016-03-29 (**P 4D**), 'Cusdec' No 057476 dated 2016-04-05 (**P 4E**) and 'Cusdec' No 59887 dated 2016-04-07 (**P 4F**) are illegal.

Section 2 of the Food Act is as follows.

2. " No person shall manufacture, import, sell, expose for sale, store or distribute any food -
- (a) that has in or upon it any natural or added deleterious substance which renders it injurious to health;
 - (b) that is unfit for human consumption;
 - (c) that consists in whole or in part of any unclean, putrid, repugnant, decayed, decomposed or diseased animal substance or decayed vegetable substance or is insect infested;
 - (d) that is adulterated;
 - (e) that has in or upon it any added substance in contravention of the provisions of this Act or any regulation made thereunder; or

(f) in contravention of the provisions of this Act or any regulation made thereunder.”

Thus, it could be observed that it is not open for anyone to import any item that falls under the definition of ‘food’ in the Act, if that item *inter alia* is unfit for consumption or is adulterated.

Definition of ‘Food’

The word ‘Food’ is defined in Section 33 of the Food Act as ‘any article manufactured, sold or represented for use as food or drink for human beings and includes any article which ordinarily enters into or is used in the composition or preparation of food.’

The above definition clearly shows that any article which ordinarily enters into or is used in the composition or preparation of food also comes under the definition of the word ‘food’.

Since it is the Respondents position that the product imported by the Petitioner is an adulterated Palm oil, it would be helpful for this Court to look at the definition of the word “adulteration”.

Definition of “adulteration”

According to section 33 of the Food Act the definition of the word "adulterated" is as follows:

"Adulterated" means the addition of a substance as an ingredient in the preparation of food or subtraction of any constituent from such food or subjection of such food to any other process or any other treatment so as to –

- a) render the food injurious to health; or
- b) affect its character, value, composition, merit or safety.

Customs Ordinance

According to section 12 of the Customs Ordinance the goods enumerated in the table of prohibitions and restrictions in Schedule B shall not be imported or brought into or exported or taken out of Sri Lanka save in accordance with the conditions expressed in the said Schedule.

The relevant section of the said Schedule B is as follows;

"... Articles the exportation of which is restricted by any enactment or any legal order now in force or hereafter to be enacted, or any rules, regulations, notifications, proclamations, or orders made or issued

thereunder, except in accordance with such enactment, rules, regulations, notifications, proclamations or orders. ...”

Regulations made under Imports and Exports (Control) Act

The Minister has made regulations which has been published in the Gazette Extraordinary bearing No. 1844/49 dated 2014-01-08 as has been provided for in section 20 (2) (b) of the Imports and Exports (Control) Act No. 01 of 1969. This regulation has been produced marked **R 21**. Regulation 3 therein states that no importer shall import the articles set out in column III of the Schedule 1(A) and 1(B) hereto unless they conform to Sri Lanka Standards set out in the corresponding entry in column IV of that Schedule.

Regulations made under Food Act

The Minister has made regulations which has been published in the Gazette Extraordinary No. 1589 / 34 dated 2009-02-20 as has been provided for in section 32 of the Food Act No. 26 of 1980. This regulation has been produced marked **R 24**. Regulation 2 therein states that the items specified in Column I of the schedule therein and the SLS number allocated to such item by the Sri Lanka Standards Institution shall be deemed to be

the standards applicable for the assessment of the quality of food items under the Food Act in the absence of any standards being specified for such item under the said Act. Subject to the two provisos to the said section. The SLS number allotted to Palm oil is SLS 720.

7. WHAT IS THE SUBSTANCE PETITIONER HAS IMPORTED ?

Having in mind the above legal regime which governs the importation of goods into this country, it would now be necessary for this Court to ascertain the identity of the substance the Petitioner has imported.

This Court must bear in mind that it is the consignments relating to the three 'Cusdecs' namely the 'Cusdec' No 52691 dated 2016-03-29 (marked **P 4D**), the 'Cusdec' No 057476 dated 2016-04-05 (marked **P 4E**) and the 'Cusdec' No 59887 dated 2016-04-07 (marked **P 4F**) are the subject matter of this application. The expectation of the Petitioner from this proceeding, is to secure the release of the said consignments.

Responding to the position taken up by the Respondents, it is the submission of the learned President's Counsel for the Petitioner that the

conclusions arrived at, in the reports above referred to, are applicable only if the Petitioner has imported Palm oil for direct consumption.

Further it is his submission that the Petitioner has declared the substance he has imported as 'Crude Palm Fatty Acid' and not as 'Palm oil' in all of the three 'Cusdecs' above referred to⁶. Therefore it is his submission that it is no secret that the said substance has 20.2% 'Free Fatty Acids' as has been declared at an earlier occasion in **P2 A** also.

It is relevant to observe in this regard that the petitioner has agreed before this court on 2016-06-01 to draw samples from the consignments presently under detention in his presence. Pursuant to that agreement samples drawn from the consignments presently under detention were forwarded to several laboratories named by the Nomenclature Committee for the purpose of obtaining analysis reports.

The identities of those laboratories (both in Sri Lanka and overseas) and their subsequent reports are as follows;

- I. Government Analysts Department - its analysis report dated 2016-07-08 produced marked **R 14A**

⁶ 'Cusdec' No 52691 dated 2016-03-29 (marked P 4D), 'Cusdec' No 057476 dated 2016-04-05 (marked P 4E) and 'Cusdec' No 59887 dated 2016-04-07 (marked P 4F).

- II. Bureau Veritas Consumer Products Services Lanka (Pvt) Ltd. - its analysis report dated 2016-07-05 produced marked **R 15**
- III. Eurofins, Dr. Specht Laboratorien of Hambu, Germany through Bureau Veritas - its analysis report dated 2016-07-028 produced marked **R 16**
- IV. SGS Lanka (Pvt) Ltd. - its analysis report dated 2016-07-29 produced marked **R 17**
- V. Department of Animal Science of the Faculty of Agriculture of University of Peradeniya - its analysis report dated 2016-07-14 produced marked **R 18**
- VI. Industrial Technological Institute - its analysis report dated 2016-07-20 produced marked **R 19**

According to the report **R 14A**, which is a report by the Government Analyst, the analytical results had revealed that the samples are having analytical characters associated to palm oil.

The report marked **R 15** prepared by Bureau Veritas Consumer Products Services Lanka (Pvt) Ltd. states "... Based on the test findings of both fatty acids and triglycerides profiles, the submitted sample appears to be Palm oil with 16.2 % of free fatty acid.."⁷

The report produced marked **R 16** which is the report submitted by Eurofins, Dr. Specht Laboratorien of Hamburg, Germany states inter alia "... The calculation of the above data (fatty acid profile and triglycerides) by chemometric software ('oilinspector') determining the authenticity of oil showed with the highest probability: 100% Palm oil..."⁸.

The report produced marked **R 17** which is the report submitted by SGS Lanka (Pvt) Ltd. has also identified the sample it has tested to be Palm.

The report produced marked **R 18** which is the report submitted by the Department of Animal Science of the Faculty of Agriculture of University of Peradeniya states "... Based on the above results it can be concluded that all these samples are Palm oil or Palm olein having unacceptable levels of Free Fatty Acids that are not suitable for human consumption ..."⁹.

⁷ Vide 'Comment' in the page 3 of the report marked **R 15**.

⁸ Vide 'JUDGMENT' in page 3 of the report marked **R 16**.

⁹ Vide 'Overall Conclusion' at page 4 of the report marked **R 18**.

The report marked **R 19** is a report prepared by the Industrial Technology Institute (ITI) which confirms that the Free Fatty Acid contents in the sample they analyzed is in the range of 11.8% - 18.7%.

In the light of the findings in the above reports it is the position of the Respondents that the description given by the Petitioner to the commodity he had imported is incorrect and that the product he had imported at this instance is Palm oil which does not conform to the standards set out in law.¹⁰

It would also be appropriate at this juncture for this Court to embark on an exercise to consider some of the important evidence that the Respondents have collected from the further investigations conducted in Malaysia.

The document marked **R 1** submitted by the Respondents describes the various Palm oil Products and Categories thereof. This document is a publication by the Palm Oil Refiners Association of Malaysia. According to that publication (**R 1**) the only products produced in Malaysia by the Palm oil Refiners are the products appear in the following list.

I. RBD Palm Olein (RBD PL)

¹⁰ Paragraph 20 of the statement of objections.

- II. RBD Palm Oil (RBD PO)
- III. RBD Palm Stearlin (RBD PS)
- IV. Palm Fatty Acid Distillate (PFAD)
- V. Palm Acid Oil (PAO)
- VI. Crude Palm Olein (CPL)
- VII. Crude Palm Stearin (CPS)

Thus it is clear that there is no product by the name of "Crude Palm Fatty Acid" produced in Malaysia by their Palm oil refiners. Further the Petitioner has not adduced any acceptable material to show that such a product i.e. a product by the name of "Crude Palm Fatty Acid" is really a product that is produced in Malaysia.

Further, it is interesting to note that consequent to a request of assistance¹¹ made by the Respondents in the course of the further investigations carried out by them, the Director General of Malaysian Palm Oil Board which is the regulatory body on Palm oil production and export in Malaysia, has confirmed¹²

¹¹ by the letter dated 2016-05-10 produced marked **R 12**

¹² by the letter dated 2016-06-08 produced marked (**R 20**)

- i. that "Crude Palm Fatty Acid" (CPFA) is not listed in the Customs Tariff Codes for Oil Palm Products or used in the oil palm industry in Malaysia.
- ii. that series of investigations conducted by the Malaysian Palm Oil Board, pursuant to the request by the Respondents for Assistance for investigation on the export to Sri Lanka by Able perfect sdn. Bhd. Malaysia to Sena Mills Refineries Pvt. Ltd. Sri Lanka, has revealed that the "Crude Palm Fatty Acid" (CPFA) could be a blend of RBD Palm Olein and Palm Fatty Acid Distillate.

It is relevant to recall that the Petitioner himself in the declaration he had made [‘Cusdecs’ bearing Nos. 52691 (**P 4D**), 057476 (**P 4E**) and 59887 (**P 4F**)] has stated the exporter of the product as Able perfect sdn. Bhd. of Selangor, Malaysia. Thus the fact that the questionable product was exported by Able perfect sdn. Bhd. of Selangor, from Malaysia is not a disputed fact.

It is also pertinent to note that the Department of Animal Science of the Faculty of Agriculture of University of Peradeniya, pursuant to a request¹³ made by the Respondents, has submitted its report on the,

- i. Acceptability of the nomenclature declared as Crude Palm Fatty Acid,
- ii. Genuineness of the analytical report submitted by the Petitioner,
- iii. Relationship between the analytical report and the manufacturing process submitted by the Petitioner,
- iv. Reasons for having a higher percentage of Free Fatty Acids in the product as revealed by the prior reports¹⁴
- v. Health implications that could result in when having higher percentage of Free Fatty Acids in oil.

The said report dated 2016-05-14 has been produced marked **R 13**. It is relevant to note that the said report has confirmed that the claim by the 'Able Perfect Sdn Bhd' on behalf of the Petitioner, that the product Crude Palm Fatty Acid is extracted from top of the distillation column during the distillation process is not scientifically acceptable. This report has further

¹³ By letter dated 2016-05-04 produced marked **R 9**

¹⁴ Reports submitted by University of Peradeniya and Bureau Veritas Consumer Products Services Lanka (Pvt) Ltd.

confirmed that during physical distillation process, Free Fatty Acid is removed from the Crude Palm Oil and separated as Palm Fatty Acid Distillate which usually contains minimum amount of 70 % Free Fatty Acids and the remaining refined Palm oil is further purified to produce Refined Bleached Deodorized (RBD) Palm oil¹⁵.

The document produced marked **R 29 B** which is a certified translation of the brief report submitted to Sri Lanka Customs by Malaysian Palm Oil Board pertaining to "Crude Palm Fatty Acid" being exported from a company by the name of "Able perfect Sdn. Bhd." to "Sena Mills Refineries Pvt Ltd, Sri Lanka" (Petitioner) is another important document which sheds considerable light on the issue under dispute.

It is important to note the following revelations the above report has made.

They are as follows;

- i. Able Perfect Sdn. Bhd. is a licensee of Malaysian Palm Oil Board operating in Telok Panglima Garang, Selangor.
- ii. An investigation conducted has shown that Able Perfect Sdn Bhd exported 1936 Metric Tonnes of Crude Palm Fatty Acid (CPFA) products to Sena Mills between January to March, 2016.

¹⁵ Sub heading 2.0 of the report dated 2016-05-14 marked **R13**.

- iii. Able Perfect Sdn Bhd has failed to provide evidence on the source of Crude Palm Fatty Acid (CPFA), although it has informed Sri Lanka Customs that Crude Palm Fatty Acid (CPFA) is obtained from a byproduct of the process of doubling fractions of Bleached and Deodorized Palm oil (RBDPO).
- iv. Able Perfect Sdn Bhd has confirmed that the said supply of Crude Palm Fatty Acid (CPFA) was purchased from a company called Sawit Raya Sdn Bhd.
- v. Nevertheless, the record of purchases submitted by Able Perfect Sdn Bhd has shown that the company Sawit Raya Sdn Bhd has only supplied Palm Fatty Acid Distillate (PFAD) and Refined Bleached Deodorized Palm Oil (RBDPL) products to Able Perfect Sdn Bhd.
- vi. No product named as Crude Palm Fatty Acid (CPFA) has been purchased from the company Sawit Raya Sdn Bhd.
- vii. Further investigations conducted has shown that there was no supply of Crude Palm Fatty Acid (CPFA) to Able Perfect Sdn Bhd and their factory has never produced any Crude Palm Fatty Acid (CPFA) products.

Learned counsel for the intervenient Respondents drew our attention to the document produced by the Petitioner with his counter affidavit marked **CA 1**. The said document explaining the classification 15.18 is suggestive of the fact that such substances are used in industries which manufacture paints, varnishes, imitation leather, anti-rust paints, insulating varnishes and the like which are obviously inedible.

8. CONCLUSION

Indeed, it is useful at this stage also to recall that the Nomenclature Committee had stated in the letter dated 2014-09-11 produced marked **P 3** that none of the analysis reports had identified the substance that the Petitioner had then imported to be Palm oil. Thus the action of the Respondents classifying that substance under that category at that time is not something which brings surprise to this Court.

Further, the mere fact that the Respondents had classified a substance that the Petitioner had imported at one point of time does not necessarily mean that the Respondents must continue to give the same classification to whatever the substance the Petitioner may import at subsequent occasions

merely because he has described the subsequently imported substance also in the same manner. It must also be borne in mind that there is no material for this Court to satisfy that the substance the Petitioner has been importing at all times is the same.

Similarly, the fact that the Respondents had opted to classify the substance the Petitioner had imported at one point of time (HS Code 3823.19.90) also does not necessarily mean that the Respondents will have to continue to adopt the same course of action even after they had detected that the substance the Petitioner had imported, has contravened the law of this country.

On the other hand, it is useful here to recall that any article which ordinarily enters into or is used in the composition or preparation of food also comes under the definition of 'food' as per section 33 of the Food Act. This becomes relevant as it is the position of the Petitioner that he imports this substance to be used as raw material at his oil refinery.

It is appropriate to recall at this point that submissions were made by the learned President's Counsel who appeared for the Petitioner that the

detention of the three consignments by the Respondents was done due to an animosity the 2nd Respondent has had with the Petitioner and that the 2nd Respondent was pressurizing the Petitioner to settle this matter with a view of obtaining a reward for himself. Thus the Petitioner has made allegations of *mala fide* on the part of the Respondents.

The phrase '*mala fides*' meaning of which being 'in bad faith' points to the state of mind with which the Respondents are alleged to have acted. This means that according to the petitioner, there is an underlying reason for the Respondents to have certain vested interests in this matter. It is therefore the duty of the Petitioner to satisfy this Court that the Respondents in fact had acted in this manner.

It is relevant in this regard, to note that this Court in the case of Faleel Vs. Susil Moonesinghe¹⁶ has stated as follows.

"..... *Mala fides* in narrower sense would include those cases where the motive force behind an administrative action is personal animosity, spite, vengeance, personal benefit to the authority itself or its friends, but the

¹⁶ 1994 (2) SLR 301

plea of *mala fides* has to be substantiated to the satisfaction of a Court. Merely raising a doubt is not enough. There must be something specific, direct and precise to sustain the plea of *mala fides*. The burden of establishing mala fides is very heavy on the person who alleges it and the very seriousness of the allegation of *mala fides* demands proof to a very high degree of credibility. ...”

When considering the totality of the material adduced, it is the view of this Court that the Petitioner has failed to discharge the said burden and hence has not been successful in proving to the satisfaction of this Court, his position that the Respondents had acted mala fide.

Cumulative effect of the evaluation of material the parties had adduced before this Court is the establishment to the satisfaction of this Court the following facts namely;

- I. that the substance contained in the detained six shipments cannot be categorized as "Crude Palm Fatty Acid".

- II. that the analysis reports indicate that they could be adulterated palm oil.
- III. that the Petitioner was allowed to import the substances he had earlier imported because that substance was not Palm oil.
- IV. that the Nomenclature Committee had decided to categorize the substance at that time because none of the then reports had identified that substance to be Palm oil.
- V. that it is not possible to conclude that the Petitioner has been importing the identical substance at all times.
- VI. that the Petitioner has not been able to produce any material before this Court or the Custom authorities that he sells palm oil under some brand.
- VII. that no one knows or is able to find out what the Petitioner would do to the stocks of the substance he had imported, if it is released to him.
- VIII. that since according to the analysis reports this substance has been identified as palm oil, the importation of that substance in its present form is a violation of law and hence releasing such substance to the Petitioner would also be a violation of law.

Therefore, the necessary inference that this Court could draw under the above circumstances, is that the actions taken by the Respondents to detain the three suspicious consignments in order to deal with it according to law, is well within the law as the substance the Petitioner has imported at this instance could reasonably be suspected to be adulterated Palm oil. If the said substance is conclusively found to be adulterated Palm oil, such an importation would contravene the provisions in the applicable laws and regulations above referred to.

One must also bear in mind that section 43 of the Customs Ordinance demands that any goods imported or brought into Sri Lanka contravening prohibitions and restrictions enumerated in the table of prohibitions and restrictions in Schedule B of the Customs Ordinance be destroyed or disposed of as Director General may direct.

Thus, this Court under these circumstances cannot prohibit or restrain the Respondents from carrying out any further inquiry into the importation of the aforesaid consignments. Similarly, this Court also cannot order the release of the said questionable consignments which is the subject matter of the aforesaid inquiry.

In these circumstances and for the foregoing reasons we decide to refuse this application. Hence this application must stand dismissed with costs.

JUDGE OF THE COURT OF APPEAL

Vijith K Malalgoda PC J

I agree,

PRESIDENT OF THE COURT OF APPEAL

In these circumstances and for the foregoing reasons we decide to refuse this application. Hence this application must stand dismissed with costs.

JUDGE OF THE COURT OF APPEAL

Vijith K Malalgoda PC J

I agree,

PRESIDENT OF THE COURT OF APPEAL