

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

**C. A. (WRIT) Application
No. 334/2014**

In the matter of an application for mandates in the nature of Writs of Certiorari, Prohibition and Mandamus in terms of Article 140 of the Constitution of the Republic of Sri Lanka.

N. B. Foods (Private) Limited
No. 152, 4th Cross Street,
Colombo 11

PETITIONER

VS

1. Jagath P. Wijeweera,
Director General of
Customs

1A) K. A. Chulananda Perera
Director General of
Customs,

1B) P.S.M. Charles,
Director General of
Customs

2. M. Puvuharan,
Additional Director
General of Custom
(Revenue & Services)

2B) K. D. Nicholas,
Additional Director of
Customs (Revenue &
Services)

2C) U. Liyanage,
Additional Director of
Customs (Revenue &
Services)

3. Thilak Perera,
Additional Director
General of Customs
(Enforcement)
- 3A) A. Kulendran,
Additional Director
General of Customs
(Enforcement)
- 3B) Vipula Senanayake,
Additional Director
General of Customs.
4. R.P.D.T Seneviratne,
Additional Director
General of Customs
(Regional)
- 4A) Lesley Gamini
Additional Director
General of Customs
(Regional)
- 4B) U Liyanage.
Additional Director
General of Customs
(Regional)
- 4C) K.A. Dharmasena
Additional Director
General of Customs
(Regional)
5. R. Rajendran,
Additional Director
General of Customs
(Corporation)
6. K.A Dharmasena
Central Investigation
Directorate
Deputy Director of
Customs

6A P.Stanley Senaratne,
Director of Customs,
Central Investigation
Directorate

(6A Substituted Respondent)

7. M.M. Arthur Silva,
Dwputy Director of
Customs, Central
Investoigation
Directortae,

1st to 7th Respondents are
from:

Sri Lanka Customs,
Customs House,
Charmers Query, Main
Street, No. 40,
Colombo 11

8. Hon. Attorney general
Attorny General's
Department
Colombo 12

9. Dr. P. B. Jayasundera,
Secretary of the Treasury
and Secretary to the
Ministry of Finance

10.S.R. Attygale, Deputy
Secretary to the
Treasury.

11.R. Semasinghe, Director
General, Department of
Trade, and Tariff and
Investment Policy

11A) K.D.N. Ranjith
Asoka, Director General,
Department of Trade,
Tariff and Investment
Policy

11 B) K.A.Vimalenthirarajah
Director General,
Department of Trade, and
Tariff and Investment
Policy

(11B Substituted Respondent)

9th to 11B Respondents are
from:

Ministry of Finance and
planning,
The Secretariat,
Colombo 1

12. The Government Printer,
Department of Government
Printing, Dr. Danister de
Silva Mawatha,
Colombo 08

13. Hon. Ravi karunanayake,
Minister of Finance

13A. Hon. Minister Mangala
Samaraweera, Ministry of
Finance, the Secretariat,
Colombo 01

(13A Substituted Respondent)

RESPONDENTS

BEFORE : **M. M. A. GAFFOOR, J.**

COUNSEL : K. Deekiriwewa with L.A.
Deekiriwewa for the Petitioner

Farzana Jameel A.S.G. for the
Respondents

WRITTEN SUBMISSION
FILED ON : 05.07.2018 (by both Parties)

ARGUED ON : 10.05.2018

DECIDED ON : **01.11.2018**

M. M. A. GAFFOOR, J.

The Petitioner stated inter alia that it is a limited Liability Company incorporated under the Companies Act and is engaged in the importation of all kinds of eatables, commodities.

According to the Petitioner, he had imported a consignment of potatoes and in his ordinary course of business had submitted the Customs Declaration (sometimes referred to as 'Cusdec'- also known as Bill of Entry – collectively marked as “X4”) pertaining to the consignment on 13.08.2014 and the vessel arrived on 15.08.2014. However prior to arrival of the vessel on 14.08.2014 the Ministry of Finance had made an order (by gazette No. 1875/30 – marked as “X6”) under Section 2 of the Special Commodity Levy Act, No. 48 of 2007 varying the existed rate of Rs.5/- per kilo gram to Rs.15/- which came to effect on 15.08.2014 and thereby by the Hon. Minister had enhanced the existed rate of Rs.5/- per Kilo gram that prevailed at the time of submission of entry to the Director General of Customs by Rs.10/- per Kilo gram.

The Petitioner submitted that according to the computers of the Customs Department at the time of submission of the Bill of Entry on 13.08.2014 the rate that prevailed for potatoes was Rs.5/- per kilo gram and Sri Lanka Customs has accepted and acted upon it and issued the Customs Assessment Notice and the account was updated and only the "passed for delivery" seal was awaiting under Section 47 of the Customs Ordinance. He further stated that thereafter the arrival of the vessel when the (consignee) Petitioner wanted to take delivery the consignment, Customs insisted that he should pay the differences of Special Commodity Levy based on the new order which came under on to effect on 15.08.2014 not by way of an additional entry. Thereafter, since the item imported is an item perishable in nature, tendering a bank guarantee as demanded by Customs Petitioner opted to clear the consignment at a stage where the he is not required to pay at all any amount as an additional levy on the strength of Section 6 of the Special Commodity Levy Act.

The Petitioner's position is that under Section 3 of the Protection of Government Revenue (Special Provisions) Act No. 1 of 2006 the importation or exportation to be the date of presentation of Bill of Entry. That Section further states notwithstanding anything to the contrary contained in any of the laws specified in Part II of the schedule hereto, for the purpose of levying or charging any tax, duty, surcharge, levy or other charge on the importation or exportation of goods into or from Sri Lanka, the date of importation or exportation, as the case may be, shall be the date of delivery to the Director-General of customs, of the Bill of Entry relating to the goods on which such tax, duty, surcharge, levy or other charge is levied or charged. And the Custom Ordinance comes under Part II of the aforesaid Act.

Therefore, the Petitioner stated in his petition that the Section 16 of the Customs Ordinance had been superseded by the Section 3 of the Protection of Government Revenue (Special Provisions) Act. And he **argue** that ***Section 6 of the Special Commodity Levy Act No. 48 of***

2007, where any commodity item is made to an order under Section 2, the rate payable in respect of such commodity item shall be such rate as is applicable to such item at the time of submission of the Bill of Entry.

The Petitioner further argue that the questioned gazette notification ("X6") is not published in the electronic form of the gazette in the official website of the Government Printers in terms of Section 9 of the Electronic Transaction, Act No, 19 of 2006.

Therefore, the Petitioner has sought the following main reliefs:-

- a) A Writ of Certiorari to quash the order/decision or determination dated 10.09.2014 made by the 7th Respondent marked "X8".
- b) Interim relief restraining the 2nd to 7th Respondents from demanding and encharging the bank guarantee already tendered in respect of the final consignment under the Customs Case No. CIB/NV/129/2014 until the final determination of this application.

In this appeal, the Respondents position is that there is no Bill of Entry received on 13.08.2014 and importation did not take place on 14.08.2014. And also an Electronic Bill of entry was received on 14.08.2014 and the vessel carrying the petitioners goods arrived on 17.08.2014; the hard copy of the Bill of Entry was submitted on 22.08.2014. Therefore, the Learned State Counsel for the Respondents **argued** that ***despite the provisions of Section 3 of the Protection of Government Revenue (Special Provisions) Act, the date of the Bill of Entry can be considered only in respect of goods which have been actually imported in to Sri Lanka.***

The State Counsel for Respondents further argued that according to Section 16 of the Custom Ordinance, the time of importation shall be the time of which the ship importing such goods has actually come within the limits of the port. And she stated that in any event the Special Commodity Levy Act No. 48 of 2007 does not provide for the determination of the time of importation.

The Petitioner's first argument was that there is no excess quantity of potatoes which has been underlined as contemplated by the Respondents. The Petitioner's version is that the actual quantity he had been imported was 1425 bags X 20 kg of potatoes which means 28,500 Kg (According to **"X12"/"1R1b"**). He further stated that he had not exceeded the allowable or permissible weight of 31 200 kg and there was no excess quantity which was undeclared.

The Departmental orders namely DOPL 925 of 23.04.2014 (marked as "X13" along with the Counter Affidavit) says 4% weight tolerance will be given since there is moisture on the surface of the potato. Therefore, the petitioner states there was no evidence to establish that there was an excess of 1290 kg of potato.

The Respondents position regarding the following issue was that the weight was actually 31, 290 kg and the excess quantity was released as a mitigated forfeiture in a sum of Rs. 400 000/-. However, according to the DOPL 925 of 23.04.2014 at a meeting held with the Secretary to the Treasury on 10.04.2014 a decision had been taken to grant a tolerance in ascertaining the cargo weight of items specified therein.

The Respondent further stated that, under Section 47 of the Custom Ordinance any person importing any goods inwards whether for the payment of duty or whether such goods are free of duty such person shall deliver a Bill of Entry of Customs. Further in the said entry such person shall declare the information required by law including the

correct quantity of the goods and such person shall pay the duties and dues which are applicable on the goods.

The Respondents position is that the declared weight is 30 000 kg and the actual weight is 31 290kg; the difference is 1290kg. Accordingly, the percentage of the difference between the actual quantity and declared quantity exceeds the 4% limit. Therefore, Respondents strongly argued that this was regarded as a violation of section 47 of the Custom Ordinance.

This Court carefully considered these two arguments. Now, I would like to deal with an argument raised by the Petitioner, that the Custom Ordinance superseded by the Protection of Government Revenue (Special Provisions) Act No. 1 of 2006.

Section 3 of the Protection of Government Revenue (Special Provisions) Act No. 1 of 2006 states that:

“Notwithstanding anything to the contrary contained in any of the laws specified in Part II of the Schedule hereto, for the purpose of levying or charging any tax, duty, surcharge, levy or other charge on the importation or exportation of goods into or from Sri Lanka, the date of importation or exportation, as the case may be, shall be the date of delivery to the Director-General of Customs, of the bill of entry relating to the goods on which such tax, duty, surcharge, levy or other charge is levied or charged.”

The marginal note to Section 3 specifically states the date of exportation or importation to be the date of presentation of Bill of Entry.

Petitioner's position is that prior to the enactment of the above Act No 1 of 2006 the above issue was governed purely under Section 16 of the Custom Ordinance.

I observe that accordingly in terms of Section 3 of the Protection of Government Revenue (Special Provision) Act No. 1 of 2006 the date of importation is the date of submission of entries (Bill of Entry) relating to the goods to the Director General of Customs and on which such tax, duty, surcharge, levy or other charge is levied or charge.

To wit duty or any other levy has to be paid based on the imposed date of importation in terms of the said act by operation of law or those respective consignment irrespective of the date of arrival of the ship and the date of discharging of the goods because Section 16 of the Customs Ordinance had been superseded by the Section 3 of the Protection of Government Revenue (Special Provisions) Act No. 1 of 2006.

Sri Lanka Customs when computing applicable levies had taken into consideration the actual arrival of the vessel within the limits of port at which such ship in due course be reported and such goods be discharged, because that date and precise time was taken as the time of importation. Therefore, I am of the opinion that, when Section 16 of the Customs Ordinance was full in force Sri Lanka Customs accepted the *Cusdec* prior to the importation (actual arrival of the ship and actual date of unloading of the goods) merely as a trade facilitation and in such situations if there had been a duty variation prior to the arrival of the ship as in this case the consignee is required to pay the difference of the duty by way of an additional entry not as a forfeiture or mitigated forfeiture or fictitious mitigation.

However, with the promulgation of the Act No. 1 of 2006 since it states that Notwithstanding anything to the contrary contained in the Customs Ordinance the date of importation is the date of submission of *Cusdec* to the Director of Customs and duty should be paid based on that date, the concept of actual arriving of the ship and unloading of goods is alien and that cannot exist to substantiate the date of importation.

Therefore, the Petitioner quoted a decision, in the case of **Vallibel Lanka (Pvt) Limited vs Director-General of Customs and Three Others** (2008) 1 SLR 219, Sripavan, J. held in the supreme court that,

“The Court cannot give a wider interpretation to Section 16, merely because some financial loss may in certain circumstances be caused to the State. Considerations of hardships, injustice or anomalies do not play an useful role in construing fiscal statutes. One must have regard to the strict letter of the law and cannot import provisions in the Customs Ordinance so as to supply any assumed deficiency.”

In contrast, the Respondent’s position is Section 3 of the said act does not set out the definition of “time of importation” But only refers to the “date of importation”. And also the early or premature submission of a Bill of Entry will not be considered as a valid basis for applicability of levies, if the goods have no arrived in Sri Lanka. Therefore, Respondents argued that, a Bill of Entry shall be submitted and processed only in respect of goods in respect of which the actual importation has taken place.

Therefore, I am of the opinion that any other interpretation of Section 3 quoted above would result in permitting a person to submit a Bill of Entry prematurely and, evading the changes or revisions of duty and thereby doing exactly what the Act intended to prevent, namely the protection of government revenue. Thus the only reasonable interpretation of Section 3 is that it is regarded as operational only after the importation of the goods.

I would like to quote the following rule of interpretation. **General Principles of Interpretation – Maxwell 12th Ed. Pgs. 28 & 29**

If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences.

"The safer and more correct course of dealing with a question of construction is to take the words themselves and arrive if possible at their meaning without, in the first instance, reference to cases..."

Where the language is plain and admits of but the meaning, the task of interpretation can hardly be said to arise..."

The interpretation of a statute is not to be collected from any notions which may be entertained by the court as to what is just and expedient: words are not to be construed, contrary to their meaning, as embracing or excluding cases merely because no good reason appears why they should not be embraced or excluded.."

Hence, I move for a Purposive rule of interpretation to show the solid intention of the parliament. As I mentioned in above, when Section 16 of the Customs Ordinance was full in force Sri Lanka Customs accepted the *Cusdecs* prior to the importation (actual arrival of the ship and actual date of unloading of the goods) merely as a trade facilitation and in such a situations if there had been a duty variation prior to the arrival of the ship as in this case the consignee is required to pay the difference of the duty by way of an additional entry not as a forfeiture or mitigated forfeiture or fictitious mitigation.

In ***Desmond Perera and others vs. Karunaratne, Commissioner of National Housing and others***, (1994) 3 SLR 316, the Court had taken a purposive approach to interpret Ceiling on Housing Property Law No. 01 of 1973, his Lordship held that:

"...Where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be." (At page 323)

In **Wickremaratne vs. Samarawickrema and Others** (1995) 2 SLR 212, S. N. Silva, J. held that:

"The basic rule of interpretation is that the legislative objective should be advanced and that the provisions be interpreted in keeping with the purpose of the legislature, Interpretation should not have the effect of defeating the objective of the Legislature and of detracting from its purpose."

Further, I am mindful that the Writ Order is a matter of **ex debito justitia** from this Court.

In the case of **Alphonso Appuhamy vs Hettiarachchi** 77 NLR 131, court held that:

"When an application for a prerogative writ or an injunction is made, it is the duty of the petitioner to place before the Court, before it issues notice in the first instance, a full and truthful disclosure of all the material facts; the petitioner must act with uberrima fides."

In **Jayaweera vs. Assistant Commissioner of Agrarian Services Ratnapura and Another**, (1996) 2 SLR 70, the Court of Appeal held that:

"A Petitioner who is seeking relief in an application for the issue of a Writ of Certiorari is not entitled to relief as a matter of course, as a matter of right or as a matter of routine. Even if he is entitled to relief, still the Court has discretion to deny him relief having regard to his conduct, delay, laches, waiver, submission to jurisdiction - are all valid impediments which stand against the grant of relief."

In **Collettes Ltd. vs. Commissioner of Labour and Others**, (1989) 2 SLR 06, the Court held that:

“It is essential, that when a party invokes the writ jurisdiction or applies for an injunction, all facts must be clearly, fairly and fully pleaded before the court so that the court would be made aware of all the relevant matters.”

In the Case of **Mendis vs. Land Reform Commission and others**, S.C. Appeal No. 90/2009, S.C Mts. dated 12.02.2016, Gooneratne, J.held that:

“Even if such grounds to issue a Writ of Certiorari and Mandamus could be established, court has also to consider whether the Petitioners-Petitioners are disentitled to the relief prayed for even if the grounds of issuing a writ are satisfied, due to the discretionary nature of the remedy. It is common ground that courts are reluctant and had on numerous occasions refused to issue prerogative writs if it could be established and Petitioners are guilty of/and or disentitled to the remedy, based on (a) Laches/undue delay (b) Willful suppression/misrepresentation of material facts (c) Acquiescence (d) Grave public/administrative inconvenience (e) Futility (f) Availability of alternative remedy (g) Locus standi.”
(Page at 12)

In the light of the above reasons, this Court is not satisfied to grant any relief as prayed for in the prayer to the Petition. Therefore, I dismiss this application with Costs.

Application dismissed.

JUDGE OF THE COURT OF APPEAL