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 Certiorari and Mandamus in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. A. H. M. C. M. Nazeer
   567, Main Street, Bakinigahawela, Bibile.

2. M. M. R. Fareed
   477, Dematagoda Road, Colombo 09.

Petitioners

Vs.

Case No. C. A. (Writ) Application 83/2014

1. Jagath Wijeweera
   Director General of Customs,
   Customs Headquaters,
   40, Main Street, Colombo 11.

2. J. P. Chandrarathna
   Deputy Director of Customs,
   Customs Headquaters,
   40, Main Street, Colombo 11.

Respondents

Before: Janak De Silva J.

N. Bandula Karunarathna J.

Counsel:

A.M. Jiffry for the Petitioners

Milinda Gunathilaka SDSG for the Respondents

Written Submissions tendered on:

Petitioners on 03.05.2019

Respondents on 03.05.2019

Argued on: 09.05.2019

Decided on: 09.08.2019

Janak De Silva J.

The 1st Petitioner on his own admission is a regular air traveller and a businessman engaged in the business of importing varied goods in terms of orders placed with him by various businessman. The 1st Petitioner claims that on 23.01.2014 the 2nd Petitioner sought his assistance to collect gold from his brother Mohommed Jawahir, a businessman based in Dubai and bring them back safely to Colombo. He had travelled to Dubai on the same day and returned to Colombo the next day 24.01.2014 with the gold

This version of the 1st Petitioner does not corroborate the statement he made to the Customs (R2) wherein it is stated that he went to Dubai to bring mobile parts and that he met one Ramalingam there who requested him to take 10 gold pieces to Colombo and from there to Mumbhai.

The customs intercepted the 1st Petitioner on his arrival in Colombo on 24.01.2014. There is a dispute whether this was after he had entered the "Green Channel" without submitting a customs declaration or after he made the customs declaration.

In any event, a customs inquiry was held in terms of section 8(1) of the Customs Ordinance (Ordinance) by the 2nd Respondent on the same day and the 1st Petitioner was represented by an attorney-at-law. At the end of the inquiry the 2nd Respondent framed the following charges and called upon the 1st Petitioner to show cause:

1. I called (sic) upon Mr. A.M.C.M. Nazeer to show cause as to why I should not declare forfeit 10 no's gold slabs weighing 10,000 grams, valued at Rs. 50,000,000/= more fully described in the inventory filled (sic) folio 14-16 in terms of Section 12, 43, 107A (1) of the Customs Ordinance (chapter 235) read with Import and Export Control Act No. 01 of 1969 and Exchange Control Act (Chapter 423).
2. I also called(sic) upon Mr. A.M.C.M. Nazeer to show cause as to why I should not impose a further forfeiture of Rs. 150,000,000/= as the treble (sic) value of the goods or Rs. 100,000/= at my election in terms of Section 129 of the Customs Ordinance for being knowingly concern (sic) to the offence of smuggling 10 no's gold slabs.

Thereafter the counsel for the Defense on behalf of the suspect made the following submission:

> "Importation of goods in this nature in commercial quantity technically amounts to violation of law. However, in similar cases (particularly has declared the goods) the practice followed by the department is release (sic) the goods on imposition of penalty in terms of sec 166(B) of the Customs ordinance. Therefore, it is respectfully requested to make an order proportionate to the violation committed by the passenger."

This is clearly an admission of guilt. Once the agent of the 1st Petitioner makes an admission he is bound by it.

An admission of fact made by counsel is binding on the client [Coomaraswamy, *The Law of Evidence*, Vol. I, page 129]. It is sometimes permissible to withdraw admissions on questions of law but admissions on questions of fact cannot be withdrawn [*Uvais v. Punyawathie* (1993) 2 Sri.L.R. 46].

However, in *Sivaratnam and others v. Dissanayake and others* [(2004) 1 Sri.L.R. 144 at 148] Amaratunga J. sought to explain the principle as follows:

> "The decision in Uvais v Punyawathie (supra) is authority for the proposition that a fact specifically admitted at the trial and relied on by the opposite party in deciding how he should present his case cannot be withdrawn or departed from at the stage of the appeal. See also Mariammai v. Pethurupillal. Fernando, J.'s judgment in Uvais's case makes it very clear that what is not permitted is the withdrawal of an admission in circumstances where such withdrawal has the effect of subverting the fundamental principles of the Civil Procedure Code in regard to pleadings and issues. That judgment is not authority for the broader proposition that an admission once made cannot be withdrawn at all. An admission made in a written statement may be subsequently withdrawn with the permission of the Judge. Muhammad Altof All Khan v Hamid-ud-din. Section 183 proviso of the Code of Criminal Procedure Act, No. 15 of 1979 explicitly demonstrates that an admission can be withdrawn. Thus, the law's refusal to allow the withdrawal of an admission is a matter depending on the circumstances of each case."

No attempt has been made in these proceedings to withdraw the above admission made by counsel.

Thereupon the 2nd Respondent declared the forfeiture of 10 no's gold slabs in terms of sections 12, 43, 107A (1) of the Customs Ordinance (chapter 235) read with Import and Export Control Act No. 01 of 1969 and Exchange Control Act (Chapter 423).

The Petitioners are in this application seeking a writ of certiorari quashing the said order and a writ of mandamus compelling the Respondents to release the said gold.

Liable to Forfeiture vs Shall be Forfeited

The gold in question was seized by the Customs for the violation of sections 12, 43, 107A (1) of the Ordinance read with Import and Export Control Act No. 01 of 1969 and Exchange Control Act (Chapter 423).

Section 12 of the Ordinance specifies the prohibitions and restrictions imposed on specified goods from importation or exportation. Section 44 therein declares that "if any person exports or attempts to export or take our of Sri Lanka ...in contravention of the prohibitions and restrictions ... ***such goods shall be forfeited,*** and shall be destroyed or disposed of as the Director-General may direct". (emphasis added)

In *Palasamy Nadar v. Lanktree* (51 NLR 520 at 522) Gratiaen J. stated:

> "Section 46 (which is the present Section 44) provides that any goods exported or taken out of the Island contrary to certain specified prohibitions and restrictions "*shall be forfeited* and shall be destroyed or disposed of as the Principal Collector of Customs may direct." The Customs Ordinance is an antiquated enactment ... Some of its provisions declare that in certain circumstances goods "shall be forfeited" while in other circumstances they are merely "liable to be forfeited" .... I am prepared to concede that the draftsmen must be given credit for having intended the terms "forfeited" and "liable to forfeiture" to convey different meanings. **If the goods are declared to be "forfeited" as opposed to "liable to forfeiture" on the happening of a given event, their owner is automatically and by operation of law divested of his property in the goods as soon as the event occurs. No adjudication declaring the forfeiture to have taken place is required to implement the automatic incident of forfeiture ...**
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> A forfeiture of goods by operation of law would, of course, be of purely academic interest until the owner is in fact deprived of his property by some official intervention. Section 123 (present Section 125) of the Ordinance provides the machinery for this purpose ... When that is done, the goods "shall be deemed and taken to be condemned" and may be dealt with in the manner directed by law unless the person from whom they have been seized or their owner "shall, *within one month from the date of seizure* ... give notice in writing to the Collector ... that he intends to enter a claim to the ... goods ... And shall further give security to prosecute such claim before the Court having jurisdiction to entertain same." (Section 146) (this is the present Section 154) (emphasis added)

This decision which was made in 1949 was followed a good half a century later by the Supreme Court in *Lanka Jathika Sarvodaya Shramadana Sangamaya v. Heengama Director General of Customs and Others* [(1993) 1 Sri L.R. 1] where Kulatunge J. after making a detailed analysis of the Ordinance went on to state that (at page 13):

> "The Customs Law applicable to forfeiture and seizure of goods is relevant to a proper determination of the application before us. Forfeiture of goods is one of the consequences of a breach of the provisions of the Customs Ordinance. Some of the sections provide that in the event of such breach the goods *shall be forfeited* e.g. Sections 34(1), 43, 44, 50, 50A (1)(b), 52, 55, 65, 75, 100A (2), 107, 107A (1), 107A (2), 121, 131 and 142. Section 57 provides *that in the absence of any explanation* to the satisfaction of the Director General of Customs, the goods shall be forfeited. Sections 38 and 68 provide that the goods *shall be liable to forfeiture".*

This distinction that has been made in the Ordinance relating to instances where goods "shall be forfeited" and "shall be liable to forfeiture" is important as the Ordinance contains specific provisions in relation to goods which "shall be forfeited". This is in Section 154(1) which reads:

> "All ships, boats, goods and other things which shall have been or shall hereinafter 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 ... Unless the person from whom such ships, boats, goods and other things shall have been seized ... shall within one month from the date of seizure ... give notice in writing ... that he intends to enter a claim ... and further give cash security to prosecute such claim before the court having jurisdiction to entertain the same and otherwise to satisfy the judgement...If proceedings for the recovery of the ... 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 ..." (emphasis added)

In *A.H. Kothari v. K.P.W. Fernando* (74 NLR 463 at 466, 7) Court stated that:

> "The provision for seizure is s. 125, which enacts that "all goods which by this Ordinance are declared to be forfeited shall and may be seized by any officer of the Customs". It is clear from this section that the power is to seize what has already been forfeited by operation of law. It is not that goods are seized and then forfeited, but rather that goods are seized because they have become forfeited by law.
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> Of course, it commonly happens that a Customs Officer only suspects that goods have been imported contrary to law, and therefore only suspects that they have been imported contrary to law and therefore only suspects that they have been forfeited by law. But nevertheless, the Ordinance contemplates that there can be cases of the seizure of goods, which are not in law forfeited, and a seizure is not unlawful merely because it is subsequently found that the goods were lawfully imported.
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> The provisions of the Ordinance relating to the consequences of a seizure do contemplate that the Customs have power to seize goods upon the suspicion that they are unlawfully imported. Section 154 empowers the Customs to deal with all goods seized as forfeited, unless the person concerned within one month of the date of seizure gives notice to the Collector of intention to prosecute a claim to the goods, and unless proceedings are instituted within one month in a competent Court for the recovery of the goods."

Therefore, where the goods in question "shall be forfeited" in terms of the Ordinance as opposed to "liable to forfeiture", a party aggrieved must bring an action for declaration of title to the goods in question in the proper forum which is the District Court having jurisdiction in terms of Section 154 of the Ordinance. In *Lanka Jathika Sarvodaya Shramadana Sangamaya v. Heengama Director General of Customs and Others* (supra) Kulatunge J. accepts this view (at page 14) by stating:

> "Section 125 of the Ordinance *inter alia,* requires the customs to seize goods which are declared to be forfeited. Such seizure (in the sense of a physical act of seizure) is necessary to complete the ownership of the State to the goods – *Arumugaperumal v. The Attorney General.* Goods are seized when they are taken forcible possession of with the

intention that ultimate loss by forfeiture and condemnation would result from the seizure – *Palasamy Nadar v. Lanktree.* ***Section 154 provide for the manner of instituting proceedings for claiming seized goods. This is the only remedy available to the owner for challenging the validity of the seizure and alleged forfeiture.*** It has been held that unless an action is instituted in a competent Court to so challenge the seizure, the property in the goods will be lost to the owner *Palasamy Nadar v. Lanktree, Jaywardena v. Silva.* ***Article 126 of the Constitution has since provided an additional remedy in appropriate cases."*** (emphasis added)

This is the remedy that a person claiming title to goods seized as forfeited under the Ordinance must resort to and not the writ jurisdiction of the Court of Appeal since in such situations there is no decision made by the inquiring officer to forfeit the goods in question.

As stated by Gratiaen J. in *Palasamy Nadar v. Lanktree* (51 NLR 520 at 522):

> "If the goods are declared to be "forfeited" as opposed to "liable to forfeiture" on the happening of a given event, their owner is automatically and by operation of law divested of his property in the goods as soon as the event occurs. No adjudication declaring the forfeiture to have taken place is required to implement the automatic incident of forfeiture ..."

Thus, it is seen that in such situations there is no decision that can be quashed by a writ of certiorari for the goods are forfeited by operation of law and not by an order of the inquiring officer.

In fact, this position was upheld in *Bhambra v. The Director General of Customs and Others* [(2002) 3 Sri.L.R. 401] where Wijayaratne J. (with Tilakawardane J. agreeing) held (after considering Section 107A (1) of the Customs Ordinance as in this case) that:

> "In terms of such provisions an order of forfeiture is imperative and it is not left to the decision of the inquiring officer. Thus, it is not one amenable to writ jurisdiction of this court."

The same principle was restated by this Court in *Ishak v. Laxman Perera Director General of Customs and another* [(2003) 3 Sri.L.R. 18].

In this case as well there is no decision by the 2nd Respondent as he was merely stating the resultant position of law applied to the facts of this case.

Alternative Remedy

De Smith, Woolf and Jowell; *Judicial Review of Administrative Action* (5th Ed., page 813) reads:

> "Where there is an alternative procedure which will provide the applicant with a satisfactory remedy the courts will usually insist on an applicant exhausting that remedy before seeking judicial review. In doing so the court is coming to a discretionary decision."

It is further stated that (at page 814):

> "where there is a choice of another separate process outside the courts, a true question for the exercise of discretion exists. For the court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being properly regarded as being a remedy of last resort. It is important that the process should not be clogged with unnecessary cases, which are perfectly capable of being dealt with in another tribunal. It can also be the situation that Parliament, by establishing an alternative procedure, indicated either expressly or by implication that it intends that procedure to be used. In exercising its discretion, the court will attach importance to the indication of Parliament's intention."

The observations above refer to the existence of an alternative process outside court. The remedy provided by Section 154 of the Ordinance is in a court of law and as such these observations should apply with greater force as one cannot complain when the alternative remedy is in a court of law with all the incidents of impartiality inherent in its process.

In *Bhambra v. The Director General of Customs and Others* [(2002) 3 Sri.L.R. 401] this Court held that the failure of the petitioner to resort to an alternative remedy prescribed by section 154 of the Ordinance precludes the court from intervening and exercising its discretionary powers. This decision was cited with approval and followed by this Court in *Niroshana and another v. Gunasekera and another* [(2006) 3 Sri.L.R. 152].

For all the foregoing reasons, this application is dismissed with costs.

Judge of the Court of Appeal

N. Bandula Karunarathna J.

I agree.

Judge of the Court of Appeal