

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

In the matter of an Application for orders 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. Finest Tea Exports (Private) Limited
No. 269/1/A, New Road, Wewelduwa, Kelaniya.
2. M. F. M. Fariq
Director,
Finest Tea Exports (Private) Limited,
No. 269/1/A, New Road, Wewelduwa, Kelaniya.

Petitioners

Case No. C. A. (Writ) Application 209/2017 Vs.

1. Chulananda Perera
Director General of Customs,
Department of Customs,
No. 40, Main Street, Colombo 11.
- 1(a). P.S.M. Charles,
Director General of Customs,
Department of Customs,
No. 40, Main Street, Colombo 11.
2. D. R. Luxman
Deputy Director of Customs,
Department of Customs,
No. 40, Main Street Colombo 11.
3. Sri Lanka Tea Board
No. 574, Galle Road, Colombo 03.
4. Rohan Pethiyagoda
Chairman,
Sri Lanka Tea Board,
No. 574, Galle Road, Colombo 03.
- 4(a). Lucille Wijewardene,
Director General of Customs,
Department of Customs,
No. 40, Main Street, Colombo 11.

5. Jayantha Edirisinghe
Tea Commissioner,
Sri Lanka Tea Board,
No. 574, Galle Road, Colombo 03.
 6. B. K. Jayamanna
Deputy Tea Commissioner (Exports),
Sri Lanka Tea Board,
No. 574, Galle Road, Colombo 03.
 - 6(a). Kithsiri Kumara,
Deputy Tea Commissioner (Exports),
Sri Lanka Tea Board,
No. 574, Galle Road, Colombo 03.
 7. Mangala Samaraweera,
Minister of Finance,
Ministry of Finance,
The Secretariat, Lotus Road, Colombo 01.
 8. Navin Dissanayake
Minister of Plantation Industries,
11th Floor, Sethsiripaya 2nd Stage, Battaramulla.
- Respondents**

Before: Janak De Silva J.

Counsel:

Vishwa Gunaratne with Darshika Perera for the Petitioners

Ganga Wakishta Arachchi SSC for the Respondents

Argued on: 06.03.2019

Written Submissions tendered on:

Petitioners on 09.11.2018

Respondents on 29.11.2018

Decided on: 04.10.2019

Janak De Silva J.

The 1st Petitioner is an exporter of black tea registered with the 3rd Respondent [P1 & P1(a)]. The 2nd Petitioner is a Director of the 1st Petitioner.

The Petitioners state that on or about 18.09.2016 the 1st Petitioner received a confirmed order for 32,000 kgs of tea to Iraq and to fulfil this order the 1st Petitioner in addition to the stocks it had, purchased consignments of tea from the public auction conducted by the Ceylon Chamber of Commerce between April 2015 to 25th February 2016. It is claimed that the purchase was made after the 3rd Respondent checked for its required quality standard.

After purchasing the said consignments of tea, the 3rd/6th Respondents approved the blend sheet (teas) for export. The relevant tea export cess was collected by the 3rd Respondent and the 1st Petitioner was granted an export license to export the said consignments.

The said consignments of tea were detained by the Customs and a customs inquiry held. After inquiry order was made declaring forfeited 32.5 Kg of tea below ISO 3720 *standard in terms of* sections 12, 44 and 57 of the Customs Ordinance (Ordinance) (P15). Furthermore, a mitigated forfeiture of Rs. 10,000,000/= was imposed on the 2nd Petitioner in terms of Sections 130 and 163 of the Ordinance.

The Petitioners pray for the following:

- (a) Writ of Certiorari quashing the said Order of the 2nd Respondent dated 27.03.2017 marked P15 in so far as it declared forfeited the tea contained in the said two containers and ordered a mitigated forfeiture of Rs. 10,000,000/= in terms of Section 130 and 163 of Customs Ordinance.
- (b) Writ of Certiorari quashing the decision of the 3rd to 6th Respondents and/or anyone or more of them not to permit the Petitioners to upgrade the whole quantity of tea contained in the said consignments.
- (c) Writ of Mandamus directing the 1st to 8th Respondents and/or anyone or more of them to permit the Petitioners to upgrade the whole quantity of tea contained in the said consignments.

Since the forfeiture was based on sections 12, 44 and 57 of the Ordinance, it is appropriate that these as well as the other relevant provisions of the Ordinance be examined to ascertain the structure and working of the Ordinance.

Liabie to Forfeiture vs Shall be Forfeited

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 ...**

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 held 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.

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.

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 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.

As held 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 ...”

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):

“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].

There is also another reason as to why the writ of certiorari quashing the Order of the 2nd Respondent dated 27.03.2017 marked P15 should be refused.

The general principle is that an individual should normally use alternative remedies where available rather than judicial review [*R. (Davies) v. Financial Services Authority* (2004) 1 W.L.R. 185; *R. (G) Immigration Appeal Tribunal* (2005) 1 W.L.R. 1445]. Our Courts have held that where a party fails to invoke alternative remedies judicial review can be refused. [*Rodrigo v. Municipal Council Galle* (49 N.L.R. 89); *Gunasekera v. Weerakoon* (73 N.L.R. 262); *Obeysekera v. Albert & others* (1978-79) 2 Sri.L.R. 220]; *Rev. Maussagolle Dharmarakkitha Thero and another v. Registrar of Lands and others* (2005) 3 Sri.L.R. 113].

The general principle is applicable even where the alternative remedy is an administrative procedure, such as in this case and Courts will require the party seeking judicial review first to exhaust such administrative procedure before invoking the discretionary power of judicial review [*R (Cowl) v. Plymouth City Council* (2002) 1 W.L.R. 803; *R. v. Barking and Dagenham LBC Ex. P. Lloyd* (2001) L.G.R. 421; *R. (Carnell) v. Regents Park College and Conference of Colleges Appeal Tribunal* (2008) E.L.R. 739].

However, as it is a general principle, Courts have recognized several qualifications to its application. There may be situations where the alternative remedy is not adequate and efficacious in which event judicial review is available [*E.S. Fernando v. United Workers Union and another* (1989) 2 Sri.L.R. 199]. It maybe that judicial review is capable of providing immediate means of resolving the dispute in which case it may be the more appropriate procedure. There may also be a need to obtain interim relief which may not be possible under the alternative procedure. This is not an exhaustive list and there are certainly other instances where judicial review may be granted even though an alternative administrative procedure exists.

However, I am of the view that none of those considerations are present in this case in so far as the writ of certiorari to quash the Order of the 2nd Respondent dated 27.03.2017 marked P15 in so far as it declared forfeited the tea contained in the said two containers.

That leaves the question of writ of certiorari to quash the mitigated forfeiture of Rs. 10,000,000/= in terms of Section 130 and 163 of Customs Ordinance imposed on the 2nd Petitioner.

The main issue is whether the tea that the 1st Petitioner was attempting to export was fit for human consumption. The Petitioners do not challenge the fact that the approved crude fibre content for human consumption is below 16.5% as per ISO 3720 standard. Three test reports prepared by the Sri Lanka Tea Board are marked P11a, P11b and P11c all three of which show that samples drawn from the consignments exceed the permitted levels. The Petitioners did not challenge these reports.

But they contend that these reports were not independent reports and as such there is a violation of the principles of natural justice in particular "*nemo iudex in causa sua*". I reject this position as the Sri Lanka Tea Board was not an interested party in the customs investigations.

The Petitioners contended that the consignments were approved by the Sri Lanka Tea Board for exportation. However, letter dated 09.03.2016 (P9) sent by the Deputy Commissioner (Exports) of the Sri Lanka Tea Board states that the samples drawn from the tea containers are different from the samples drawn from the shipments of tea prior to grant of authorisation for its export.

There is also evidence that the Petitioners have duplicated the lines of tea produced by them and used them in several consignments for tea exported by them. This appears to be the modus operandi used by the Petitioners to introduce substandard tea and export them out of Sri Lanka. This explains the reason why samples approved by the 3rd Respondent did not tally with the samples drawn from the containers.

Having regard to all the circumstances in this matter I see no reason to interfere with the order marked P15.

The Petitioners also seek a writ of certiorari quashing the decision of the 3rd to 6th Respondents and/or anyone or more of them not to permit the Petitioners to upgrade the whole quantity of tea contained in the said consignments. However, there is no such decision before Court. In *Weerasooriya v. The Chairman, National Housing Development Authority and Others* [C.A. Application No. 866/98, C.A.M. 08.03.2004] Sripavan J. (as he was then) held that the court will not set aside a document unless it is specifically pleaded and identified in express language in the prayer to the petition.

Finally, the Petitioners seek a writ of mandamus directing the 1st to 8th Respondents and/or anyone or more of them to permit the Petitioners to upgrade the whole quantity of tea contained in the said consignments. This must fail on at least two grounds. It is not possible to make such an order while the forfeiture by law is kept alive. Further in any event, the Petitioners have failed to establish a statutory or public duty to permit the Petitioners to upgrade the whole quantity of tea contained in the said consignments.

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

Judge of the Court of Appeal