

**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 *prohibition* under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

**CASE NO: CA/WRIT/0281/07**

1. Udesh Kumara Senevirathne,  
No. 125/B/1, Vaboda South,  
Vaboda.
2. H. M. Nalin Premalal,  
C/8, National Housing Scheme,  
Thimbirigasya Road,  
Colombo 05.
3. Mohideen Durwis Rizvi,  
150/24 d, Mahawela Lane,  
Baseline Road,  
Dematagoda,  
Colombo 09.
4. Mohammed N. Nawshad,  
No. 125/B/1, Vaboda South,  
Vaboda.

**PETITIONERS**

**VS.**

1. K.L.T.G. Perera (Retired),  
Director of Customs,  
Sri Lanka Customs,  
The Times Building,  
Colombo 01.
2. G.W.A. Silva,  
Superintendent of Customs,

Sri Lanka Customs,  
Colombo Port  
Colombo 01.

3. C. Wijethunga,  
Deputy Director of customs,  
Revenue Task Force,  
Sri Lanka Customs,  
Colombo 01.
4. C.P.B. Pitawela, (Retired),  
Asst. Superintendent of Customs,  
Sri Lanka Customs  
Colombo 01.
5. Mrs. P.S.M. Charles,  
Director General of Customs,  
Sri Lanka Customs,  
Colombo 01.

**RESPONDENTS**

Before: **M. T. MOHAMMED LAFFAR, J. &  
K. K. A. V. SWARNADHIPATHI, J.**

Counsel: Faisz Musthapha, P.C. with M.R.M. Dhailamy for the  
Petitioners.

Kanishka de Silva, S.S.C. for the Respondents.

Written Submissions on: 13.01.2020 (by the Petitioners).

29.11.2019 (by the Respondents).

Decided on: 30.04.2021.

**MOHAMMED LAFFAR, J.**

The Petitioners in this application have invoked the supervisory jurisdiction of this Court under Article 140 of the Constitution seeking the following main relief:

- a) a writ of certiorari quashing the order of the 1<sup>st</sup> Respondent above named dated 19.03.2007, marked as “X4”.
- b) a writ of prohibition restraining the Respondents from enforcing and/or proceeding on the said order X4.

When this matter was taken up for argument, both parties had consented to dispose the matter by way of written submissions.

The 1<sup>st</sup> and 2<sup>nd</sup> Petitioners filed the instant application dated 20.03.2007 on the basis that they are Directors of two companies, namely One Time Worldwide Express (Pvt) Limited and Korman Logistics Lanka (Pvt) Limited, and that the said companies are engaged in provision of International Freight Forwarding Services. The 3<sup>rd</sup> Petitioner claims that he is the owner of the M/s S.N.S. Logistics, a clearing agency in Sri Lanka. The 4<sup>th</sup> Petitioner is an employee of the said One Time Worldwide Express (Pvt) Limited and Korman Logistics Lanka (Pvt) Limited.

The Petitioners state that in their normal course of business, the said One Time Worldwide Express (Pvt) Limited and Korman Logistics Lanka (Pvt) Limited act as cargo agents to several overseas freight forwarders in Dubai, United Arab Emirates (U.A.E.) including Green Cargo Dubai of U.A.E.

The Petitioners further state that in the year 2003, the said One Time Worldwide Express (Pvt) Limited and Korman Logistics Lanka (Pvt) Limited received instructions from the said Green Cargo Dubai of U.A.E. to issue delivery orders to an ultimate consignee by the name of *Lakdiva Trading Company* to clear certain consignments which had arrived at the Port of Colombo.

They further submit that the 3<sup>rd</sup> Petitioner thereafter provided his services as per instructions from Green Cargo Dubai of U.A.E to the said consignee namely Lakdiva Trading Company and issued delivery orders. The said consignee had cleared 10 consignments with the assistance of clearing agency, namely Victory Lanka Freight Services. The 4<sup>th</sup> Petitioner, acting as an employee of the clearing agent, namely S.N.S. Logistics, presented documents to Sri Lanka Customs on behalf of the said

Lakdiva Trading Company and cleared six consignments. They further submit that no allegation had been made or any inquiry held as against Victory Lanka Freight Services which had acted in clearing 10 consignments.

Thereafter, surprisingly, on or about 04.11.2003, during the night, several custom officers raided the office premises of the said One Time Worldwide Express (Pvt) Limited and Korman Logistics Lanka (Pvt) Limited then seized all files and documents at the office and recorded statement of the 2<sup>nd</sup> Petitioner and took him into custody and on the next date the 1<sup>st</sup> Petitioner went and made his statement, and both were released from custody.

The Petitioners further submit that at the time the said raid was conducted, they learnt that the raid conducted upon an investigation by Sri Lanka Customs, into imports consigned to their client namely, M/s. Lakdiva Trading Company. However, the Petitioners state that the said One Time Worldwide Express (Pvt) Limited and Korman Logistics (Pvt) Limited have had no whatsoever involvement in the said 16 containers property to be investigated by Customs and imported by the said M/s. Lakdiva Trading Company other than issuing of delivery orders in their usual course of business.

It was further submitted by the Petitioners that upon the charges levelled against them, they were ordered to be present for a Customs Inquiry on 10.08.2004 and after inquiry on 30.05.2006, the 1<sup>st</sup> Respondent issued notice requiring the 1<sup>st</sup> and 3<sup>rd</sup> Petitioners, to show cause. This order has been marked as 'X2'.

The Petitioners filed a written explanation to the notice to show cause on 15.09.2006 (marked as 'X3') as ordered by the Inquiry Officers. However, on 19.03.2007, the 1<sup>st</sup> Respondent delivered his final order imposing forfeitures of money (penalties from the Petitioners) as set out in paragraph 35 of the Petition. This forfeitures order marked as 'X4'.

It was the contention of the Petitioners that the said whole consignment belongs to them were duly inspected and cleared on payment of

applicable customs duties and other levies as determined by the consignee's representatives. Thereafter, the said consignments were handed over to the consignee's representative immediately upon clearance thereof and the One Time Worldwide Express (Pvt) limited and Korman Logistics (Pvt) Limited had nothing to do with the consignments other than issuing of delivery orders in their usual course of business.

In the circumstances, the Petitioners submit that the said *forfeiture order - X4* is illegal, and null and void<sup>1</sup>.

However, when I peruse the Statements of Objection filed by the 5<sup>th</sup> Respondent dated 17.10.2007, the causes for initiating the alleged inquiry against the Petitioners are so expounded. They need to be reproduced verbatim in the manner stated in the Affidavit filed by the 5<sup>th</sup> Respondent as follows:

- a) The instant case was initiated on 04.11.2003, on the detection of two loads of cigarettes in two premises at Wellawatte. The two premises were: No. 4B, Collingwood Place, Wellawatte, Colombo 06 and No. 23/1, Anula Road, Colombo 06. These premises belonged to Mr. Abdul Cader Mohammed Baseer and Mr. Abdul Cader Mohammed Haseem respectively.
- b) The investigators found cartons of Tang Powder and Cigarettes at the aforementioned premises.
- c) Subsequent to this find, the Investigators on the suspicion that the Cigarettes had been smuggled into the country under the cover load of Tang Powder proceeded to cheque the names of the Importers of the same. *The Import Clearance System showed that the said cartons of Tang Powder had been imported by a company named Lakdiva General Trading of No. 113, Vinayalankara Mawata, Colombo 2.* The consignment of Tang Powder had been imported from Dubai in a 1X40' Container and cleared by the same on 03.11.2003. It was also revealed during the course of these investigations that prior to this, 14 other consignments had been cleared by the aforesaid Importer.
- d) However, investigations revealed that there is no Vinayalankara Mawata in Colombo 2, the investigators proceeded to visit No: 113,

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<sup>1</sup> *vide* paragraph 36 of the Petition.

Vinayalankara Mawata, Colombo 10 and found the premises to be an abandoned one. Consequently, the Owner of the aforesaid premises when contacted by the telephone stated that *no business entity is or was registered by him or any other person under his authority, at the said premises.*

- e) Upon investigations it was found that the sole Proprietor of the entity Lakdiva General Trading was a Mr. Sheik Mohammed Jaffer Hussain of No: 212/1A, Quarry Road, Dehiwela. (The owner and occupier of these premises is a Retired Principle who was unaware of such a person and stated that there is no such person in his premises.)
- f) The Investigators then proceeded to visit the Offices of the Customs House Agents who had cleared these shipments on behalf of the Importer.
- g) The Customs House Agents in question were found to be M/s. S.N.S. Logistics of No: 1119/D, Dalupitiya Road, Hunupitiya, Wattala and Victory Lanka Freight Services of No: C-1, 1<sup>st</sup> Floor, YMBA Building, Colombo 01. The Proprietor of M/s. S.N.S. Logistics informed the Investigators that whilst he did not have any business under this name, his former Manager one Mr. Mohideen Durvis Rizvy was conducting business of clearing and forwarding under the same. The owner of Victory Lanka Freight Services was found to be Mr. Vitharanalage Garmini Jayalath.

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- ff) *The declared value of the good also appeared as largely under invoiced. The banks stamps placed on the invoices were proved as having been forged.* The suspect name Mohamed Niyas Nawshad appeared before the inquiry and admitted he was the recipient of import documents from Babu, which were handed over to the wharf clerks for clearing the goods from the port. He further admitted that he received the goods from the wharf clerks once they cleared from the port. However, he failed to answer as to whom these goods were then sold or delivered.
- gg) The evidence that was revealed at the inquiry showed that none of the consignments were channelled through, approved exchange instruments and modes of payment (i.e., D/P. D/A L/C) or other related instruments is specified in Extraordinary Gazette Notification Number 1022/6 of 08.04.1998 which was published under the Import and Export Control Ac No: 1 of 1969 [vide 5R4]... The violation of these Gazette Regulations constitutes an action that violates the provisions in Customs Ordinance under sections 12, 43 and Schedule B read with the Import and Export Control Act. Therefore, all the consignments were liable to forfeiture and the parties knowingly engaged in these illegal importations are liable in terms of section 129 of the Customs Ordinance.

Accordingly, the Respondents took up the position that, there is no perverse or illegality in the alleged Customs inquiry. They further submitted that Petitioners have no basis in law to pursue this application on the basis that they misrepresented the material facts and therefore, they sought to dismiss the application.

This Court observes that when the Petitioners filed this application, they were well aware that the investigation conducted by the Customs had revealed that no company in the name and style of M/s Lakdiva General Trading Company actually exists. In other words, the Petitioners in any event have not contested the fact that the M/s Lakdiva General Trading Company is a fiction.

Further, it is interesting to note that although the Petitioners accept the fact that they had submitted papers on behalf of the said M/s Lakdiva General Trading Company to clear the consignments in question<sup>2</sup>, no plausible explanation offered as to how they dealt with and acted on behalf of company that does not exist.

In my view, the conduct of the Petitioners does not warrant the issuance of the writs as prayed in the Petition. A party cannot ask for a writ as of right. It is a discretionary relief as well as an equitable relief. When granting such a relief, the conduct of the party applying for it is intensely relevant.

It is settled law that a person who approaches the Court for the grant of discretionary relief, to which category an application for *certiorari* would certainly belong, *has to come with clean hands, and should candidly disclose all the material facts which have any bearing on the adjudication of the issues raised in the case.* In other words, he owes a duty of utmost good faith (*uberrima fides*) to the court to make a full and complete disclosure of all material facts and refrain from concealing or suppressing any material fact within his knowledge or which he could have known by exercising diligence expected of a person of ordinary prudence.

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<sup>2</sup> *vide* paragraph 9 of the Petition.

Learned State Counsel for the Respondents has drawn our attention to the decision of *W.S. Alphonso Appuhamy vs. L. Hettiarachchi (Special Commissioner, Chilaw)*<sup>3</sup>, in which it was found that an applicant for a mandate in the nature of a writ of *mandamus* had suppressed and misrepresented material facts. The Court decided the case on its merits, but observed that the case was one in which the principles set out in the celebrated English decision of *King vs. The General Commissioners for the Purpose of the Income Tax Acts for the District of Kensington-Ex-parte Princess Edmond de Poignac*<sup>4</sup> would have applied, and the Court, in its discretion, could have dismissed the application *in limine*<sup>5</sup>.

In *Fonseka vs. Lt. General Jagath Jayasuriya and Five Others*<sup>6</sup>, a divisional bench of this Court held that,

- 1) *A petitioner who seeks relief by writ which is an extra-ordinary remedy must in fairness to Court, bare every material fact so that the discretion of Court is not wrongly invoked or exercised.*
- 2) *It is perfectly settled that a person who makes an ex parte application to Court is under an obligation to make that fullest possible disclosure of all material facts within his knowledge.*
- 3) *If there is anything like deception the Court ought not to go into the merits, but simply say" we will not listen to your application because of what you have done.*

As correctly observed by Saleem Marsoof, J. in *Namunukula Plantations Ltd. vs. Minister of Lands and Others*<sup>7</sup>, if any party invoking the discretionary jurisdiction of a court of law is found wanting in the discharge of its duty to disclose all material facts or is shown to have attempted to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person.

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<sup>3</sup> [1973] 77 NLR 131

<sup>4</sup> [1917] 1 KB 486.

<sup>5</sup> It was held in Apuhamy's case 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.*

<sup>6</sup> [2011] 2 Sri LR 372.

<sup>7</sup> [2012] 1 Sri LR 365.



Therefore, I proceed to dismiss this application without costs.

*Application dismissed.*

Judge of the Court of Appeal.

**K. K. A. V. SWARNADHIPATHI, J.**

I agree.

Judge of the Court of Appeal.