

**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 Writ of Certiorari in terms of Article of the Constitution of the Republic of Sri Lanka.

D.S.K. Apparel Private Limited, No.
155/5, Pragathi Mawatha,
Katuwana Road, Homagama.

And Another.

Petitioners

Case No. : CA/WRT/0117/2020

Vs

Major General G.V. Ravipriya (Retd),
Director General of Customs,
Sri Lanka Customs,
Customs House,
Charmers Query, Main Street, No.
40, Colombo 11.

And 05 Others.

Respondents

Before: Hon. D.N. Samarakoon, J.
Hon. Sasi Mahendran, J.

Counsel : K. Deekiriwewa with Dr. K. Herath for the Petitioner.

Mr. Sumathi Dharmawardhena, ASG., PC., with Madhubashini Sri Meththa, SC., for the State.

Argued on: 22.02.2022

Written submissions tendered on: 21.02.2022 by 1st, 4th & 6th Respondents.
14.02.2022 & 28.03.2022 by Petitioner.

Decided on: 08.04.2022

D.N. Samarakoon, J.

Order

It is stated in paragraph 01 of the written submissions of 01st, 02nd, 03rd, 04th and 06th respondents dated 21.02.2022,

“The 01st petitioner in Writ 117/2020 is a limited liability company in whose name the subject matter of this application, i.e., Toyota Land Cruiser Jeep has been last registered at the Department of Motor Traffic. The 02nd petitioner in Writ 117/2020 is the Managing Director/Chairman of the said 01st petitioner company, in whose possession the subject vehicle was lying, at the time of seizure by the Central Investigation Bureau. The petitioner in Writ 118/2020 is the immediate preceding owner of the said vehicle, i.e., 02nd Registered owner”.

It is said in paragraph 18 of the said written submission,

“In the given circumstances, it is respectfully submitted that the decision impugned by the petitioner’s marked “X.07” had been made considering the requests made by one of either petitioners. The other party (petitioner in Writ 118/2020) has already consented to the order marked “X.07” and paid the amount in full. Therefore the said positions cannot be reprobated subsequently when the petitioners decided to file the present application before Your Lordships Court. For the above reasons the petition should be dismissed in limine.

It is said in paragraph 04 of the said submission that the “Petitioner in Writ 118/2020 has already paid the penalty of Rs. 100,000/- as evident on the document marked “X.03(b)”.

It is said in paragraph 05 of the said written submissions that the 02nd petitioner in Writ 117/2020 has requested the inquiring officer that,

“Therefore I humbly request considering my pathetic situation to release the vehicle on reasonable penalty”.

The aforesaid respondents have filed the same written submission dated 21.02.2022 in Writ 118/2020 too.

Hence the position of the said respondent is that there is acquiescence and estoppel on the part of the petitioners.

The said respondents, among other things, have cited the case of **COLLETES LIMITED v. BANK OF CEYLON, (1984) 2 SLR 252** at page 287,288,

“If a person having a right and seeing another about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. This is the proper sense of the term 'acquiescence', and in that sense

may be defined as quiescence under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct" Per Thesiger, L. J., in *De Bussche v. Alt* (21).

"If a man, either by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he has so sanctioned, to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct . . . I am of the opinion that, generally speaking, if a party having an interest to prevent an act being done has full notice of its having been done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice, than he would have had if it had been done by his previous license" Per Lord Campbell, L.C. in *Cairncross v. Lorimer* (22). This passage was quoted with approval by the Privy Council in *Sarat Chunder Dey v. Gopal Chunder Laha* (23).

An acquiescence is not a question of fact, but of legal inference from facts found.

In regard to estoppel, the said respondents cite **Spencer Bower and Turner** 03rd Edition (1977) Section 290 pages 283-284 which says,

“Where A has a right or title which B is in fact infringing under a mistaken belief that his acts are not acts of infringement at all and A is aware of his own title or right and also B’s invasion of that title or right and of his erroneous belief that he is not encroaching thereon, but is lawfully exercising rights of his own and yet, with that knowledge, A so

conducts himself or so abstains from objection, protest, warning or action, as to foster and maintain delusion under which he knows that B is labouring and induces B to act to his prejudice on faith of the acknowledgment to be implied from such conduct or inaction or, A is not permitted afterwards to assert his own rights against B, or contest B's rights against himself".

The petitioner has submitted at page 04 of the written submissions dated 14.02.2022,

"When there is total and patent want of jurisdiction acquiescence or waiver cannot cure the want of jurisdiction and hence it is ultra vires and a nullity."

"In **Collettes Limited vs. Bank of Ceylon 1984 2 SLR 283** Sharvananda J. (as he then was) held that, "An acquiescence is not a question of fact, but of legal inference from facts found". (at page 288) [It] "must be an intentional conduct with knowledge". (at page 283)

The petitioner has also cited at page 05 of the said written submission **Maersk (Lanka) PVT Limited vs. Minister of Ports and Aviation and others 2012 (2) SLR 20** in which the Court of Appeal said,

"It is often being laid down by many decisions of the Court that no amount of waiver or consent can extend a public authority's powers or validate actions which are ultra vires. The correct principle of law on this point is that an excess of statutory power cannot be validated by acquiescence or by the failure to raise a legal challenge regarding its validity or by the operation of an estoppel".

The petitioner has filed the same written submission in Writ 118/2020 too.

The petitioner also tendered an additional written submission by which, among other things, the petitioner has cited **Abeywickrema vs. Pathirana and others (1986) 1 SLR 121** in which it was held,

“A waiver must be an intentional act of surrender of rights with knowledge of what those rights are. An intention to waive a right or benefit to which a person is entitled is never presumed. (at page 152). The doctrine of estoppel and waiver cannot be employed to give a public authority powers it does not possess. (at page 153). By waiver one cannot convert nullity into validity”. (at page 155).

It appears that although the petitioners appear to have consented to certain things, the question whether that would amount to a denial of the writ for the petitioners, will depend on the validity of the action of the respondents. For example, if the action of the respondents is ultra vires or a nullity then the waiver and estoppel even on the part of the petitioners cannot give it validity. This question cannot be determined until the merits of the present applications are considered. Therefore it appears that it is premature to dismiss the applications in limine.

In the circumstances the preliminary objections are overruled.

Judge of the Court of Appeal.

Hon. Sasi Mahendran.

I agree.

Judge of the Court of Appeal.

