

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, Mandamus Prohibition and Quo Warranto under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Abdul Wahid Shaul Hameed,
11, 4th Street,
Balakrishna Nagar,
Nerkundram, Chennai, 600107, India.

CA/WRT/ 19/2020

Presently at 113,
New Motor Street, Colombo 12.

2. Arumugam Paneer Selvam,
3/75, Brass Founder Road,
Colombo 13.
3. Mohamed Ariff Mohamed Rizvi,
No.327/8, Porathotta,
Kochchikade.

Petitioners

Vs.

1. P.M.S. Charles,
Director General of Customs,
Sri Lanka Customs,
Custom House, 40, Main Street,
Colombo11.

1(A) The Director General of Customs,

(As the above-mentioned Director General of Customs has been appointed as the new Governor to the Northern Province and no appointment has been made for the position of Director General)

- 1(B) Vijitha Ravipriya,
Director General of Customs,
Sri Lanka Customs,
Custom House, 40, Main Street,
Colombo 11.

2. Tharanga Abeysuriya Gunasekera,
Deputy Superintendent of Customs, DS537,
Sri Lanka Customs
Bandaranaike International Airport,
Katunayake.

3. S.Ravikumaran,
Superintendent of Customs,
Chief Assistant Charges Officer,
Sri Lanka Customs,
Bandaranaike International Airport,
Katunayake.

4. A.N. James,
Superintendent of Customs,
Chief Assistant Charges Officer,
Sri Lanka Customs,
Bandaranaike International Airport,
Katunayake.

5. S. Ranasinghe,
Superintendent of Customs,

Chief Assistant Charges Officer,
Sri Lanka Customs,
Bandaranaike International Airport,
Katunayake.

6. A.A.S. Abeysinghe,
Superintendent of Customs,
Chief Assistant Charges Officer,
Sri Lanka Customs,
Bandaranaike International Airport,
Katunayake.

7. D. Peter M. Goonewardena,
Deputy Director of Customs (Legal),
Inquiring Officer,
Bandaranaike International Airport,
Katunayake.

8. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondents

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

Counsel: Neil Unamboowe, PC with Tersha Nanayakkara and Lakdev Unamboowe
for the Petitioners
Sumathi Dharmawardene, PC, ASG with Nayomi Kahavita, SC for the
Respondents

Written 20.05.2022 (by the Petitioner)
Submissions: 23.09.2022 (by the Respondents)
On 08.12.2022 (by the Petitioner)

Decided On : 27.02.2023

B. Sasi Mahendran, J.

The Petitioners, an Indian and two Sri Lankans, were arrested by Sri Lanka Customs at the Bandaranaike International Airport under the Customs Ordinance No. 17 of 1869, as amended, for allegedly attempting to **fraudulently remove foreign exchange from Sri Lanka**, while they were in the transit area/lounge. They were produced before the Magistrate's Court of Negombo and remanded for the duration of the investigation under Section 127A of the Customs Ordinance. Subsequently, the Petitioners were released on bail by the Provincial High Court holden in Negombo, under Section 127C of the Customs Ordinance. While matters remained as such, the Petitioners were summoned for an inquiry in terms of Section 8(1) of the Customs Ordinance. The Petitioners raised a jurisdictional objection to the conducting of the inquiry on the basis that the newly enacted Foreign Exchange Act No. 12 of 2017 had stripped the Customs of its authority to conduct such an inquiry; an authority which it enjoyed under the previous legal regime, i.e., the Exchange Control Act No. 24 of 1953, as amended (This Act was repealed by the Foreign Exchange Act; vide Section 30 of the Foreign Exchange Act). The 7th Respondent, the Deputy Director of Customs, (the Inquiring Officer) overruling this contention observed that the Customs did possess jurisdiction to conduct an inquiry. The said order dated 14th November 2019 ("**P15**") is now challenged by way of this writ application. The Petitioners are seeking a writ of Certiorari to quash the said order ("**P15**") and a writ of Prohibition preventing the Respondents from holding an inquiry into the alleged smuggling of foreign currency by the Petitioners. When this application was supported on the 16th of July 2020, this Court granted the interim order prayed for staying any further proceedings before the Customs until the final determination of this application.

In determining the lawfulness of the impugned order, the questions that arise for our determination, as agreed to by learned Counsel for the parties (when this matter was called in open court on 16th March 2022), are whether the Sri Lanka Customs has jurisdiction to conduct this inquiry in relation to matters involving foreign currency and whether the Customs has jurisdiction to search 'onward transit passengers' such as the 1st Petitioner, in the transit

area/lounge of the airport. The scope of our determination is thus limited to answering those two questions.

Prior to embarking on answering these questions, it is pertinent to set out the factual background of this application.

The 1st Petitioner is an Indian national who was travelling from India to Singapore via Sri Lanka. He departed from India on the 12th of July 2018 and arrived in Sri Lanka on the same day at around 10:40 am. The connecting flight to Singapore was at 1:55 am on the 13th of July. The 2nd and 3rd Petitioners, Sri Lankans, entered the airport on the 12th of July, intending to travel to, respectively, India and Thailand. The 2nd and 3rd Petitioners claim that they each had in their possession a sum of foreign currency which they had declared at the behest of the Customs officials; the 2nd Petitioner claims to have had 4300 Euros and the 3rd Petitioner claims to have had 4300 Euros and 800 USD. These sums of money did not exceed the threshold at which a declaration ought to have been made.

The Petitioners were observed by the Customs Officers on CCTV cameras (as set out in the report of the Superintendent of Customs “**X4**” and further reports presented to the Magistrate’s Court “**P2(b)**”). This was on the basis that the Customs obtained information that some person was collecting foreign currency notes from other passengers leaving Sri Lanka in the transit area/lounge. The Respondents contend that the 1st Petitioner had in his possession foreign currency to the tune of LKR 48,761,538.39/-. It is also contended by the Customs Officers that, some foreign currency notes in his possession bore the same serial numbers of foreign currency notes that were previously in the possession of the 2nd and 3rd Petitioners. The 2nd and 3rd Petitioners admit that they handed over the total sum of 8700 Euros to the 1st Petitioner so that the latter could purchase electronic items from Singapore for the former. The Petitioners were questioned and then arrested by the Customs Officers, acting under Section 127 of the Customs Ordinance. All three Petitioners were alleged to have acted in contravention of Sections 12,44, and 107A of the Customs Ordinance read with Section 8 of the Foreign Exchange Act together with the Regulations promulgated thereunder. As mentioned above, the Petitioners who were arrested were subsequently produced before the Magistrate’s Court of Negombo and remanded on the 14th of July, under Section 127A of the Customs Ordinance (vide journal entry dated 14th July 2018 – “**P2(A)(i)**” on page 96 of the Brief). They were granted bail by an order of the Provincial High Court holden in Negombo dated 30th August 2018 (vide page 59 of the Brief).

By letters dated 6th February 2019 (“P11”, “P11a”, and “P11b”) the Petitioners were required to be present on the 22nd of February 2019 for an inquiry to be conducted in terms of Section 8(1) of the Customs Ordinance. At the inquiry which was held on the 11th of October 2019 (“P13”), the Petitioners, as aforesaid, raised a jurisdictional objection. The inquiring officer (the 7th Respondent) directed written submissions to be filed on the said preliminary objection. The inquiring officer’s order was made on the 14th of November 2019 (“P15”). The said order notes that foreign currency is presently regulated under Section 8(1) of the Foreign Exchange Act; that Regulations have been promulgated under Section 8(1) of the Foreign Exchange Act regulating the amount of foreign currency that can be imported or exported. It is further noted that this would be considered an enactment or legal order restricting the importation or exportation of an article falling within the last paragraph of Schedule B of the Customs Ordinance (referred to in Sections 12 and 44, the relevant Sections the Petitioners are accused of contravening). Meaning it is “a restriction which has to be enforced at the border by the officers of the Customs as agent of the State which has promulgated the Foreign Exchange Act” (page 2 of the order). Therefore, the inquiring officer held that the Customs had jurisdiction to conduct a Section 8(1) inquiry in this scenario. It is against this order that this application was filed.

Jurisdiction to conduct an inquiry

The learned President’s Counsel for the Petitioners strongly contends that in terms of the operative legal regime the Customs officials usurped the authority of the Central Bank, as administrators, to enforce the restriction placed on the importation or exportation of foreign currency. As a result of which, the Customs patently lack jurisdiction to hold an inquiry under Section 8(1) of the Ordinance. On a careful study of this objection, we observed that the learned President’s Counsel’s contention is twofold with regard to jurisdiction to hold an inquiry over foreign currency: firstly, unlike the previous legal regime in force (the Exchange Control Act No. 24 of 1953), the present Foreign Exchange Act has not facilitated the application of the provisions of the Customs Ordinance. Secondly, the relevant provisions of the Customs Ordinance (that is Sections 12, 44, and 107A, including Schedule B referred to in the said Sections) do not explicitly regulate or restrict the importation or exportation of foreign currency.

On an examination of the relevant provisions, we find ourselves unable to agree with this contention.

It is true that the administration of the Exchange Control Act and the Foreign Exchange Act is vested with the Central Bank of Sri Lanka. Section 2(1) of the former Act states that the Central Bank “as the agent of the Government” is “responsible” for carrying out the provisions of the Act, whilst Section 2(1) of the new Act states that the Central Bank “as the agent of the Government” is responsible for “implementing” the provisions of the Act. The dispute surrounds the role the Customs play under both Acts. In terms of the Exchange Control Act, by virtue of Section 23, the Customs Ordinance was applicable to anything the importation or exportation of which into or from Sri Lanka is restricted by Part IV of the Act. Part IV included foreign currency. In contrast, the Foreign Exchange Act does not explicitly contain such a provision. If one stops at that point, then it appears that the Customs Ordinance will not apply in relation to an item prohibited or restricted under the Foreign Exchange Act, and therefore no inquiry can be conducted under Section 8(1). Yet, the Foreign Exchange Act confers power on the relevant Minister to regulate by orders published in the Gazette the flow of foreign currency, enabling for it to be regulated according to the need or circumstance of the day. Section 8(1) of the Foreign Exchange Act reads:

A person in, or resident in, Sri Lanka shall-

- (a) export from Sri Lanka or import into Sri Lanka, any foreign currency or Sri Lanka currency;
- (b) hold foreign exchange in his possession or in a bank account in Sri Lanka,

only for such purpose, **up to such limits and subject to such terms and conditions as may be prescribed by the Ministry by an Order published in the Gazette.** [emphasis added]

The Minister (that is the Minister assigned the subject of Central Bank (Section 33)) has promulgated Regulations under the said Section. Clause 1(1) of Part 1 of Schedule 1 of an order titled “Purposes, Limits, Terms and Conditions for Import and Export of Foreign Currency or Sri Lanka Currency” (published in Gazette Extraordinary No. 2045/56 dated 17th November 2017 – vide page 33A) states:

“Any person departing from or arriving in Sri Lanka may carry any amount of foreign exchange in the form of currency notes, bank drafts, cheques, travel cards, etc. legitimately acquired by such person **subject to a declaration made to the Customs Department at the port of departure or arrival,** respectively, if the total value of such foreign exchange exceeds United States Dollars 15,000 or its equivalent in other foreign currencies”. [emphasis added]

This provision clearly sets out the authority to whom the declaration must be made if the sum of foreign currency in one’s possession exceeds the permissible threshold. This is a

term and condition that is prescribed by the Minister, which must be adhered to if a passenger intends to import or export a sum in excess of the limit.

We are mindful of the legislative intent in repealing the previous legal regime, and replacing it with the existing one as elucidated in the Supreme Court's Special Determination on the Foreign Exchange Bill (SC (SD) No. 1/2017 to SC (SD) No. 4/2017- reported in Decisions of the Supreme Court on Parliamentary Bills 2017 at page 88). Their Lordships of the Supreme Court (at p. 95) observed:

“The Bill has sought to give effect to the fiscal policy of the Government as set out in the 2016 and 2017 Budget Proposals which were presented by the Government and approved by the Parliament.

The Cabinet has deliberated on the subject matter of foreign exchange which affects the economy of this country and found that a proper legal framework is needed for the management and regulation of foreign exchange and to encourage Sri Lankan citizens to remit to Sri Lanka foreign exchange they have in their possession outside Sri Lanka. The existing Exchange Control Act was enacted long ago in 1953, at a time when exchange control was the norm and it contains criminal offences which are rather harsh. Most countries in the world have liberalized exchange control laws and also moved away from criminal offences to civil penalties. The existing law has not been successful in preventing the outflow of foreign exchange out of the country through legal and non legal channels. Therefore a new law was required to provide incentives for Sri Lankans having money outside the country to remit that money to Sri Lanka without having to face with criminal penalties. The Bill in hand contains provisions to cater to the said need as well as intervention by the Government if any outflows of foreign exchange becomes a threat to the national economy. The decision to bring up this Bill is nothing but a matter of policy.”

The provision read in context, makes it clear that the Foreign Exchange Act was not merely to incentivize Sri Lankans abroad to remit money to Sri Lanka, it also envisaged state intervention to curtail the outflow of foreign exchange, especially through the “non-legal channels”. Hence, it can safely be presumed from the scheme of the Act, read with the Regulations promulgated thereunder, that the Customs would have the necessary jurisdiction for such purpose, as the agents of the State at the borders of the country. This becomes more relevant in the present economic context.

If therefore, a passenger fails to declare, that passenger by virtue of his or her omission to declare can be liable before the law. In this regard, Sections 127 and 146 of the Customs Ordinance become relevant; provisions which enable the Customs to arrest some person if the Customs has “reasonable suspicion” that such person is guilty of an offence. In the case of foreign exchange, that is the non-declaration of the excess sum, which is an ‘omission’.

The other contention of the learned President's Counsel is that the relevant provisions of the Customs Ordinance (that is Sections 12, 44, and 107A, including Schedule B referred to in the said Sections) do not explicitly regulate or restrict the importation or exportation of foreign currency. Section 12 provides that goods enumerated in the table of prohibitions and restrictions in Schedule B shall not be imported or brought into or exported or taken out of Sri Lanka save in accordance with the conditions expressed in Schedule B. Section 44 notes that if any person exports or attempts to export or take out of the country any goods enumerated in the table of prohibitions and restrictions in Schedule B, in contravention of the prohibitions and restrictions contained in such table such goods shall be forfeited by the Customs. Section 107A(1) and (2) provides that any passenger arriving in or leaving Sri Lanka may be searched and their baggage examined and if any prohibited, restricted, or uncustomed goods are found, whether such goods are concealed in the passenger's baggage or upon his person, such goods are forfeited.

It is undisputed that Schedule B has not listed foreign exchange explicitly in the list of prohibited or restricted items. Instead, it falls within the umbrella clause, that is the last paragraph of the said Schedule which reads:

“Articles the exportation of which is **restricted by any enactment or any legal order now in force** or hereafter to be enacted, **or any** rules, regulations, notifications, proclamations, or **orders made or issued thereunder**, except in accordance with such enactment, rules, regulations, notifications, proclamations, or orders.”

As alluded to above, the relevant Minister has promulgated an order under the present Foreign Exchange Act which restricts the importation or exportation of foreign currency, and by that said order there is a requirement for a declaration to be made to the Customs.

Further, this must be read with Section 146 which provides additional penalties listed in Schedule F. Schedule F lists foreign currency under “goods”, making it apparent that (a) foreign currency has been referred to as “goods”, although it might seem peculiar, and (b) the authority of Customs to act in cases of undeclared foreign currency above the limit have not been taken away. This Section reads:

If any person by reason of any act or commission becomes liable, under the provisions of any section of this Ordinance to forfeit any goods or any sum of money, or to any penalty other than a fine, such person shall, in addition, be guilty of an offence and shall, on conviction after summary trial before a Magistrate

- a) If the act or omission by reason of which he becomes liable to the forfeiture or penalty, relates to the importation or exportation of any goods set out in Column I of schedule F to this Ordinance and in excess of the amount set out in the corresponding entry in Column II of that schedule, be liable to the penalty set out in the corresponding entry in Column III of that schedule;
- b) If the act or omission by means of which he becomes liable to forfeiture or penalty relates to the importation or exportation of any goods which are not set out in Schedule F and the value of such goods exceeds two hundred and fifty thousand rupees, be liable to imprisonment of either description for a term not less than three months and not more than two years or to a fine not exceeding twenty five thousand rupees or to both such imprisonment and fine; and
- c) If the act or omission does not relate to such importation or exportation, be liable to imprisonment of either description for a term not exceeding two years or to a fine not exceeding ten thousand rupees or to both such imprisonment and fine:

Provided, however, that no prosecution shall be instituted against any person under this section, unless the Principal Collector is of opinion that the forfeiture or penalty, as the case may be, whether imposed or not cannot or is not likely to be recovered from such person.

In contrast to the softening of penalties imposed for those transgressing the provisions of the Foreign Exchange Act, as set out in the Supreme Court's Special Determination, the requirement of a declaration to the Customs appears to signify that there is no softening of the powers and penalties that the Customs possesses, in terms of the Customs Ordinance, and can inflict upon a transgressor, specifically by Schedule F. The relevant part of this Schedule reads:

Goods	Quantity	Penalty
Foreign Currency or gems	Equivalent to 15,000 and above, but less than 30,000 in Sri Lanka Rupees	Imprisonment of either description for a period not less than one year and not exceeding two years
	Equivalent to 30,000 and above, but less than 150,000 in Sri Lanka Rupees	Imprisonment of either description for a period not less than two years and not exceeding five years

	Equivalent to 150,000 and above, but less than 300,000 in Sri Lanka Rupees	Imprisonment of either description for a period not less than five years and not exceeding ten years
	Equivalent to 3000,000 and above, but less than One Million in Sri Lanka Rupees	Imprisonment of either description for a period not less than ten years and not exceeding fifteen years
	Equivalent to One Million and above in Sri Lanka rupees.	Imprisonment of either description for a period not less than fifteen years and confiscation of property.

The requirement of a declaration to Customs, aside from the fact that it is an acknowledgment of pragmatic realities i.e., the presence of the Customs authorities at the airport, recognises the historical purpose for which the institution was established. The origins of this institution as recorded in ‘Customs Law of Sri Lanka: A Manual’ by P. Weerasekera and T. Kananathalingam (Volume II at page 737) are traced back to times of the Artha Shastra authored by Kautilya. The authors note that in 1806 a Comptroller General of Customs was appointed by British administrators with eleven collectors working under him at different coastal maritime locations. Further, the development of export-oriented plantation crops and the gradual increase of imports after the British conquered the Kandyan Kingdom in 1815 led to the enactment of Ordinance No. 5 of 1837 for the regulation of customs. The Customs Ordinance No. 17 of 1869, “which remains alive today”, is a consolidation of Ordinance No. 5 of 1837, which had been amended many times, and several other customs-related enactments.

In this regard, the Customs can and has the authority or jurisdiction to hold an inquiry under Section 8(1) of the Ordinance in a case such as the present in which the allegation is smuggling or fraudulently removing foreign exchange from Sri Lanka and thereafter to take the necessary consequent steps.

Be that as it may, the main issue which goes to the root of this application is whether Customs can search a person in a transit area/lounge.

Transit Passenger

As narrated above, the 1st Petitioner is an Indian national who was apprehended by Customs while he was in transit. He had not cleared immigration but was in the transit area/lounge awaiting his onward connection to Singapore. An issue then arises as to whether the Customs has authority to apprehend such a passenger.

In the inquiring officer's order (“P15”), overruling an objection raised by the Petitioner, it is noted that transit passengers,

“are not permitted to engage in any business activity or employment as they are not authorized to engage in such activity whilst being a transit passenger. They enjoy no immunity if they have breached the above terms under which they are allowed to remain in the transit area of the airport..”

The words cannot be read to mean that a transit passenger cannot engage in a business activity or employment. In a digital age, where trade and commerce take place online, it is plainly obvious that transit passengers might be engaging in their own business activities or employment. This cannot be read to say that they cannot do so. But, as explained below, there is a truth to what is said in the order, when it is read in context.

Although we agree with the learned President's Counsel that a transit passenger is not under an obligation of declaration to Customs since a transit passenger does not fall within the definition of a “person resident in Sri Lanka” (in terms of Section 8(1) of the Foreign Exchange Act as interpreted or defined in the order published in Gazette bearing No. 2045/56 of 17th November 2017 – vide page 35A), this does not mean that Customs does not have the authority to check if required. This is provided for in Section 127 of the Customs Ordinance. This Section reads:

Every offence under this Ordinance shall be deemed to be cognisable within the meaning of the Code of Criminal Procedure Act, and any person against whom a reasonable suspicion exists that he has been guilty of any such offence may be arrested in **any place** either upon land or water by any officer of Customs or other person duly employed for the prevention of smuggling. Every person so arrested shall with all convenient dispatch, be taken before the nearest Director General of Customs to be dealt with according to law. [emphasis added]

Thus, a transit passenger is at liberty to enjoy the transit promenade or engage in his or her lawful business activity or employment as a transit passenger pleases. However, the moment such a passenger is engaging in any unlawful business or the business of smuggling, as rightly held in the impugned order, such passenger loses that privilege and opens himself up to face the law enforcement authorities. The Customs has jurisdiction provided there is “reasonable suspicion” that a person is “guilty of any such offence”. That is a condition

precedent that must be established prior to exercising jurisdiction. It is equally important that the officers must act *bona fide* (vide Dias v. Director General of Customs 2001 3 SLR 281).

In Part II of Schedule 1 of an order promulgated under Section 8 of the Foreign Exchange Act (published in Gazette Extraordinary No. 2045/56 dated 17th November 2017 – vide page 36A), Clause 1(3) states:

“Any person resident outside Sri Lanka may in Sri Lanka retain in his possession without limit foreign currency if such foreign currency was **acquired by him whilst he was outside Sri Lanka** or from foreign exchange accounts maintained with authorized dealers or restricted dealers.”

This then is the reason an inquiry under Section 8(1) is envisaged. It is for the purpose of ascertaining, to use the words of her Ladyship Shiranee Tilakawardena J. in Kuruwita Manchester Textile Mills Ltd v. Director General of Customs [2003] 3 SLR 158, the “veracity”, “truth” or “credibility” of the statements made relative to the Customs. It is to inquire into whether the sums of money were acquired from outside Sri Lanka or not. This inquiry is necessary to protect the natural justice rights a person is entitled to. In Dias v. Director General of Customs (supra) his Lordship J.A.N. De Silva J. (as he then was) opined:

“These inquiries under Section 8(1) are generally a sequel to the investigation in which relevant evidence may be gathered to provide the foundation for an inquiry, charges are framed..”

In the instant case, the Customs were in receipt of information that a person was collecting money in the transit area/lounge. On receiving such information, it observed suspicious activity via CCTV cameras. They questioned the Petitioners, and it was subsequently revealed that the serial numbers on the foreign currency notes given by the 2nd and 3rd Petitioners matched with the notes in the possession of the 1st Petitioner, meaning that it was money acquired in Sri Lanka. In addition, the 2nd and 3rd Petitioners themselves admitted handing over the foreign currency. Therefore, he is not entitled to claim that immunity. He has not disputed the serial numbers.

For the foregoing reasons, we hold that Sri Lanka Customs has jurisdiction to hold an inquiry under Section 8(1) of the Customs Ordinance in relation to matters involving foreign currency and the Customs has jurisdiction to search ‘onward transit passengers’ such as the 1st

Petitioner, in the transit area/lounge, if such passenger is reasonably suspected of being guilty of an offence.

This application is dismissed. We make no order for costs.

JUDGE OF THE COURT OF APPEAL

D. N. SAMARAKOON, J.

I AGREE

JUDGE OF THE COURT OF APPEAL