

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, Prohibition and Mandamus in terms of Article 140 of the Constitution of the Republic of Sri Lanka.

CA (Writ) Application No: 524/2021

1. Christina Packaging and Accessory
(Private) Limited
No: 285/12, 10 Mile Post Road,
Werahera, Borelasgamuwa.
2. R. M. Samarasinghe
Director,
Christina Packaging and Accessory
(Private) Limited,
No:285/12, 10 Mile Post Road,
Werahera, Borelasgamuwa.

PETITIONERS

Vs.

1. Major General G. V. Ravipriya (Retd.)
- 1A. P. B. S. C. Nonis
Director General of Customs,
Sri Lanka Customs,
Sri Lanka Customs House,
Main Street, No: 40,
Colombo 11.
(1A Substituted Respondent)
2. A. M. S. P. Jayawardena
Deputy Director of Customs,
Inquiring Officer,
3. H. R. G. Karunathilake

Officer who was assisting the Inquirer,
(Prosecution)

4. M. T. M. Kumarasinghe
Assistant Superintendent of Customs,
(Producing Officer)
2nd to 4th Respondents are from:
Industries and Services Directorate,
Sri Lanka Customs,
Sri Lanka Customs House,
Main Street, No: 40,
Colombo 11.

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

RESPONDENTS

Before : Sobhitha Rajakaruna, J.
Dhammika Ganepola, J.

Counsel : K. Deekiriwewa with Dr. (Mrs.) M. K. Herath, Dr. Kanchana
de Silva and Jagath Gajaweera Arachchige for the
Petitioners.
S. Wimalasena, D. S. G. with R. Aluwihare, S. C. for the
Respondents.

Argued On : 21.03.2023

Written Submission : Petitioners : 20.06.2023

tendered On Respondents : 27.07.2023

Decided On : 04.08.2023

Dhammika Ganepola, J.

The first Petitioner is a Company which imports accessories for the garment industry and exports value-added goods under the Temporary Imports for Export Processing (TIEP) and Bonding Facility scheme. The 2nd Petitioner is a director of the 1st Petitioner Company. The Petitioners state that they ordered certain goods from a Chinese exporter. However, the exporter had loaded certain packages of undeclared cosmetics, two Ceramic Commodes and three Ceramic Wash Basins into the container. It is said that the said cosmetic packages which were supposed to have been shipped to Dubai had been mistakenly loaded into the container by the exporter and the said ceramic bathroom fittings had been sent free of charge for the personal use of the directors of the 1st Respondent Company without their knowledge. The Petitioners conceded that those items had not been declared in the Manifest, Bill of Lading, Delivery Order, Packing List or Commercial Invoice. Consequently, Sri Lanka Customs invoking Sections 12,43 and 107 of the Customs Ordinance has forfeited the entire consignment by its Order dated 02.06.2021 including the items which had been duly declared under the said consignment (inventoried items no.1 to 12,16,17,18 and 21) as those items had been used to cover or conceal the goods which had not been duly declared. However, the declared items were subsequently released on a mitigated forfeiture of Rs.5,000,000/= in terms of Sections 163 and 166B of the Customs Ordinance.

Despite the said ceramic items not being duly declared, the Petitioners claim that such items could have been returned to the Petitioners with a penalty or mitigated without forfeiting by resorting to terms of the Import Control Regulation No.3 of 2021 bearing Gazette Notification No. 2214/56 dated 11.02.2021 marked X5. The Petitioners further contend that the cosmetic items which were forfeited could have been mitigated at the discretion of the Director General of Customs without destroying them. Accordingly being aggrieved by the above order dated 02.06.2021 of the 2nd Respondent, the Petitioner seeks intervention of this court *inter alia* by way of Writs of Certiorari to quash the impugned order dated 02.06.2021, Writs of Mandamus compelling the 1st Respondent to mitigate the forfeiture in respect of the said ceramic bathroom fittings (inventoried items no.19 and 20) and the cosmetic items (inventoried items no.13,14 and 15) and to release the one million cash deposit and four million bank guarantee tendered in order to clear the impugned consignment and Writ of Prohibition prohibiting 1st to 4th Respondents from claiming destroying charges from the Petitioners.

It is on common ground that the impugned ceramic bathroom fittings and cosmetic items which had not been declared in the Manifest, Bill of Lading, Delivery Order, Packing List or commercial Invoice, were shipped along with the subject consignment exported by the Petitioners.

Legality of the Forfeiture of Ceramic Items

The Petitioners argue that the Customs authorities had resorted to forfeiting the ceramic items instead of mitigating the forfeiture based on the wrongful assumption that a license from the Import Control Department must be produced in respect of the imported goods and that the Petitioners had failed to produce any such license. However, it is apparent that the said items were forfeited primarily on the basis that such items were not declared under the provisions of the Customs Ordinance. Whether an item is licensable or not is immaterial when forfeiting any imported goods if the items imported have not been declared to the Customs authorities in the first place. Hence, the applicability of Regulation 4 of the Gazette Extraordinary marked X5 is immaterial in the given instance since there already were sufficient grounds for the forfeiture of the ceramic items as they were undeclared. Thus, I am of the view that the Petitioners have been misdirected in law in submitting that the said Gazette Extraordinary marked X5 shall be applicable in the given circumstances.

The Respondents claim that the said ceramic items had been illegally imported by the Petitioners without declaring the same. In this instance, it is pertinent to note the applicability of paragraph 07 of the Import and Export (Control) Regulations No. 04 of 2020 promulgated in terms of the Import and Export Control Act No. 01 of 1969. Said paragraph 07 stipulates that at the time of importation of the impugned ceramic goods, there was a temporary suspension of the importation of ceramic goods. As such, it appears that the Petitioners in violation of the said provisions had attempted to illegally import the impugned ceramic items into the country. Therefore, I am of the view that the Respondents have acted in terms of the law in forfeiting the impugned ceramic goods illegally imported into the country.

Legality of the Forfeiture of Cosmetic Items

The Petitioners claim that the 2nd Respondent has come to a presumption or assumption that the questioned undeclared cosmetic items had been concealed among the above mentioned declared items (inventoried items nos.1 to 12,16,17,18 and 21) without having any iota of evidence to prove the same. Thus, the Petitioners claim that the impugned order is illegal. The quantity of the cosmetic items found undeclared was fairly considerable. An extent of 2888 kg of undeclared cosmetic items had been found at the far end of the container among other goods at the examination of the consignment. As evidenced by the photographs marked R13(a) to R13(e), it appears that the said cosmetic items had been concealed using other goods (such as paper rolls). The way the said cosmetic items had been packed and placed in the container itself was sufficient to come to a finding that cosmetic items had been concealed.

On the other hand, placing those undeclared cosmetic items among other declared items in the container itself suggests concealment of the same. In these circumstances, I am not inclined to accept the proposition of the Petitioner that the 2nd Respondent has arrived at the impugned order when there was no evidence of a concealment.

Legality of the Forfeiture of Declared Goods under the Impugned Consignment

The Petitioners contend that there is no basis for the Respondents to invoke said Section 47 and to forfeit the declared inventoried items no.1 to 12, 16 to 18 and 21 on the basis that those goods had been utilized to cover or conceal the questioned undeclared ceramic and cosmetic items since those goods are separable from each other. The said Section 47 is as follows,

*47. The person entering any goods inwards, whether for payment of duty or to be warehoused, or for payment of duty upon the taking out of the warehouse, or whether such goods be free of duty, shall deliver to the Director-General a bill of entry of such goods, on a form of such size and colour as may be specified in that behalf by the Director-General by Notification published in the Gazette, and be fairly written in words at length, expressing the name of the ship, and of the master of the ship in which the goods were imported, and of the place from which they were brought, and the description and situation of the warehouse, if they are to be warehoused, and the name of the person in whose name the goods are to be entered, and the quantity, value and description of the goods, and the number, dimensions, and denomination or description of the respective packages containing the goods, and such other particulars as the Director-General by that or a subsequent Notification may require him to furnish, and in the margin of such bill shall delineate the respective marks and numbers of such packages. The particulars furnished in the bill of entry shall be supported by such documents containing such particulars as the Director-General may, by Notification published in the Gazette, require if such person fails to deliver a bill of entry prepared, and supported by such documents, as aforesaid, he shall be liable to a penalty not exceeding one thousand rupees. Such person shall pay any duties and dues which may be payable upon the goods mentioned in such entry; and such person shall also deliver at the same time two or more duplicates of such bill, in which bill all sums and numbers shall be expressed in figures, and the particulars to be contained in such bill shall be legibly written and arranged in such form and manner, and the number of such duplicates shall be such, as the Director-General shall require, and such bill of entry when signed by the Director-General, or person authorised by him, and transmitted to the proper officer, shall be the warrant to him for the examination and delivery of such goods; **but if such goods shall not agree with the items that have not been agreed with the particulars in the bill of entry the same shall be forfeited, and such forfeiture shall include all other goods which shall be entered or packed with them as well as the packages in which they are contained.**" (Emphasis added)*

Above, Section 47 as well as the Sections 43 and 107 specifies that, in relation to the goods imported or brought in contravention to the relevant provisions "shall be forfeited." In **Palasamy Nadar v. Lanktree, 51 NLR 520 at 522 Gratian J.** stated as follows, "*the Customs Ordinance is an antiquated enactment....Some of its provisions declare that in some circumstances goods "shall be forfeited" while in other circumstances they are merely "liable to forfeiture".....I am prepared to concede that the draftsmen must be given credit for having intended the terms "forfeited" and "liable to forfeited" 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...”. Thus, since Section 43, 47 and 107 specifies that in the given instance, the goods “shall be forfeited”, on the happening of the given event i.e. when such goods shall not agree with the particulars in the bill of entry, their owner is automatically and by operation of law divested of his property in the goods. Hence, no adjudication is required to implement the mandatory effect of forfeiture.

The words “shall be forfeited” signifies a mandatory forfeiture by the operation of law without leaving any space for the inquiring officer to use his discretion. In **Attorney General v. R. Kadirgamar 68 NLR 352** it was decided, *where an article is landed without being entered in a Bill of Entry or some other document, or else without being declared as part of a passenger’s baggage, Section 107 of the Customs Ordinance automatically imposes a forfeiture of such article.* This position was upheld in the case of **Bhambra v. The Director General of Customs and Others [2002] 3SLR 401**. It was held in that 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.”*

Under such circumstances, it appears that in the instant case there is no decision which could be quashed by a writ of certiorari since the goods are Invariably forfeited by operation of law. This position was upheld in the cases of **Ishak v. Laxman Perera Director General of Customs and another [2003]3 SLR 18** and **A.H.M.C.M. Nazeer and Another v. Jagath Wijeweera Director General of Customs and another CA Writ 83/2014** decided on 09.08.2019 also.

Possibility of Returning the Impugned Goods and Failure to Mitigate Forfeiture

The Petitioners also claim that despite the said ceramic items not being duly declared, such items could have been returned to the Petitioners with a penalty. However, since the impugned ceramic goods had been illegally imported into the country at a point where there was a temporary suspension on its importation, the Respondents claim that a practical problem arises as to quantifying the value of such goods for the purpose of imposing a penalty and recovering such sum via any commercial bank in Sri Lanka. Thus, it is apparent that the impugned ceramic goods could not have been returned to the Petitioners with a penalty or mitigated without forfeiting by resorting to terms of the Import Control Regulation No.3 of 2021 bearing Gazette Notification No. 2214/56 dated 11.02.2021 marked X5.

However, Subsequently, the same goods (inventoried items no.1 to 12,16 to 18 and 21) were released to the Petitioners by the 2nd Respondent on a mitigated forfeiture of Rs.5,000,000/- in terms of Sections 163 and 166B using his discretionary powers. It is

observed that the 2nd Respondent has exercised his discretion correctly and reasonably since the said goods were duly declared and only utilized to conceal the questioned items.

The Petitioners contend that the 1st Respondent has failed to exercise the discretion vested with him under Section 163 of the Customs Ordinance in order to mitigate the forfeiture and penalty made in respect of the questioned ceramic items and cosmetic items in that context. The Petitioners submit that the Director General of Customs can mitigate any type of forfeiture irrespective of the gravity of the forfeiture at his discretion if he deems such forfeiture or penalty as unduly severe in terms of Section 163 of the Ordinance.

*163. In all cases in which under this Ordinance any ships, boats, conveyances, goods, or other things have become liable to forfeiture or shall have been forfeited, and in all cases in which any person shall have incurred or become liable to any penalty, it shall be lawful for the Director-General, should he deem such forfeiture or penalty **unduly severe**, to mitigate the same; but all cases so determined by the Director-General shall nevertheless be liable to revision by the Minister. (Emphasis added)*

In *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* (1948) 1KB 223 at 229 it was observed that *“...a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting ‘unreasonably.’”*

It is on common ground that the impugned consignment was imported under the TIEP and Bonding Facility Scheme. Under the said scheme, the Petitioners are allowed to import only certain permitted items without customs duties or other payable levies. The said Scheme has been introduced to assist exporters by exempting them from paying fiscal levies on the importation of goods needed to manufacture goods for export. It is undue and unlawful for the Petitioners to enjoy such a duty exemption to import other (non-permitted) items for personal use or any other purpose.

The impugned ceramic items and cosmetic items were undeclared goods. further, it is observed that as per the Regulation No. 7 of the Import and Export (Control) Regulations No. 04 of 2020 promulgated under the Import and Export (Control) Act No. 1 of 1969 at the time of the importation of the impugned consignment, the importation of ceramic items had been suspended.

In terms of Regulation no. 9 of the Gazette No.378/3 dated 02.12.1985 on or after the expiry of a period of three months from the date of operation (01.01 1986) no person shall import a registered cosmetics without a license. The exportation of articles which are prohibited by any enactment or any legal order in force are restricted items under the Customs Ordinance. Accordingly, cosmetic items are restricted, and the National Medicines Regulatory Authority (NMRA) approval is also required to import the same. It is on common ground that the Petitioners have failed to obtain prior approval from the NMRA for the importation of the impugned cosmetic items. Therefore, these undeclared

and restricted cosmetic items were unlawfully imported in a concealed manner. Further, it is worth observing that the cosmetics that are imported without prior approval of the NMRA may contain chemicals and other substances which may cause harm to the consumers who use them. Discharge of such substandard cosmetic items on a mitigated confiscation may lead to grave repercussions.

The Petitioner's stance was that the shipper mistakenly loaded the cosmetic items into the container without the Petitioners' knowledge. The evidence given by the 2nd Petitioner at the Customs inquiry supports said stance. However, the fact that the Petitioners had no approval from the NMRA to import said cosmetic items to the country itself, is sufficient for the Director General of Customs to forfeit the impugned cosmetic products. Thus, I conclude that the said forfeiture by the Director General of Customs cannot be deemed as undue and severe. Accordingly, such circumstances justify the impugned decision to confiscate without mitigating and destroying such cosmetics.

Furthermore, the Petitioners' claim for the mitigation of undeclared and unknown forfeited cosmetic items is incomprehensible when these items have been loaded into their container mistakenly and without their knowledge as alleged by the Petitioners. The Respondents state that even the shipper has not reclaimed the said cargo which had been allegedly loaded by mistake. In such circumstances, the Petitioners' claim for the mitigation of undeclared and unknown forfeited cosmetic items is baffling to this court. Therefore, I am of the view that there are no reasons for this court to interfere with the discretion exercised by the 1st Respondent under Section 163 of the Customs Ordinance.

Failure of the Petitioners to Come before this Court with Clean Hands

The Petitioners further submit that the said ceramic items had been sent by the exporter free of charge for personal use but without the knowledge of the Petitioners. However, contradicting the said position of the Petitioners, it had been revealed from the evidence given by the 2nd Petitioner at the Customs inquiry (marked X6) that the 2nd Petitioner had ordered the bathroom items for personal use and that the shipper had requested him to send some photographs of the items which he expected to buy. It is pertinent to take into consideration the following questions put to the 2nd Respondent by the inquiring officer and the answers given by the 2nd Petitioner in respect of the same at the Customs inquiry on 01.06.2021, in deciding upon the matters at hand.

Q: *have you ordered the bathroom items for your personal use?*

A: *yes.*

.....

Q: *Did your shipper issue you any invoice for your personally ordered items which consist bathroom accessories etc.?*

A: No

Q: Then how did you order these bathroom accessories from the shipper?

A: Since I inform the shipper that I am building a new house the shipper requested me to send some photographs of the items which I am expected to buy.

Thus, the Petitioners are now estopped from claiming that the above ceramic items have been sent by the shipper to the Petitioner without their knowledge. It had been further disclosed from the proceedings of the customs inquiry that the shipper had informed the 2nd Petitioner of the shipment of certain undeclared items along with the consignment, via the email dated 08.03.2021. However, the Petitioners failed to disclose the said email until the Customs inquiry held on 01.06.2021. Even at the time when the consignment was examined on 12.03.2021 by Customs, the Petitioners failed to disclose the said email which was material to the matter in issue to the Customs officials. The explanation given by the 2nd Petitioner for the said failure was that the 2nd Petitioner did not notice the same as he was busy. In view of the contents of the said email and the baseless excuse provided by the 2nd Petitioner to justify his failure to produce the said email dated 08.03.2021, the only inference this Court could draw upon is that the 2nd Petitioner intentionally attempted to conceal the fact that he intended to import the said undeclared goods along with the impugned consignment. Non-declaration of the impugned ceramic and cosmetic items to Customs at the required juncture, the contradictory positions taken up by the 2nd Petitioner at and the concealment of said communication by the 2nd Petitioner further show their *mala fide* intentions.

Failure to Provide Reasons for the Impugned Order dated 02.06.2021.

One of the main arguments of the Petitioners is that the impugned decision of the 2nd Respondent was made without assigning reasons. In the instant inquiry, the 2nd Respondent inquiring officer performed a quasi-judicial function and is duty bound to act fairly. Fairness requires a reasoned decision. However, the Respondent's stance is that the 2nd Respondent has given reasons through the observations made by him and as such the orders are consistent with the DOPL 1488 and the general duty to give reasons. The 2nd Respondent has stated in the document marked X6A, under the heading of "Observations" (X6A) that '*having gone through the evidence, led before me which includes documents marked at the inquiry, answers to the questions by the officer assisting the inquiry and response to show cause, I observed following.*' and '*considering all the evidence led before me, I make following order.*' It must be noted that the 2nd Respondent Inquiring Officer has provided the reasons for his determination under the guise of "observations" and has in fact paid due attention to the evidence led before him. Upon considering the contents placed under the heading "Observations", it appears that the observations include an evaluation of evidence under the heading "Observations" which justify his conclusion.

Therefore, I am unable to agree with the position taken up by the Petitioners that the impugned decision of the 2nd Respondent was made without assigning reasons.

Based on the circumstances and reasons provided above, I am not inclined to grant any of the reliefs prayed for in the prayer to the Petition.

I order no cost.

Application is dismissed.

Judge of the Court of Appeal

Sobhitha Rajakaruna J.

I agree.

Judge of the Court of Appeal