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

In the matter of an application for a mandate in the nature of a Writ of Certiorari under and in terms of Article 140 of the Constitution.

SINGHA CEMENT (PVT) LTD
44/1 New Nuge Road,
Peliyagoda.

Petitioner

CA Writ Application No: 128/2017

-Vs-

1. P. SAMAN DE SILVA
   Director
   Central Investigation Bureau
   Sri Lanka Customs,
   40 Main Street,
   Colombo 11.

2. M. RAVINDRAKUMAR
   Deputy Director of Customs
   Sri Lanka Customs.
   40 Main Street,
   Colombo 11.

3. J. G. A. SANJEEWA
   Assistant Superintendent of Customs,
   Sri Lanka Customs,
   40 Main Street,
   Colombo 11.

4. DIRECTOR GENERAL CUSTOMS
   Sri Lanka Customs,
   40 Main Street,
   Colombo 11.

Respondents

Before: C.P. Kirtisinghe - J.
Mayadunna Corea - J.

Counsel: Romesh De Silva PC, with Riad Ameen, N. Arulpragasam and Sajith Navaratne instructed by G. G. Arulpragasam for the Petitioner.
M. Jayasinghe, DSG for the Respondents.

Argued on: 01.02.2023

Written submissions tendered on: 12.06.2023 and 19.06.2023

Decided On: 14.09.2023

C. P. Kirtisinghe - J.

The Petitioner is seeking for mandates in the nature of a writ of Certiorari quashing the decisions of the 1st Respondent marked P21 and P17 and also the decision of the 4th Respondent contained in the document marked P11.

By the decision contained in the document marked P17, the 1st Respondent had issued a notice to the Petitioner company to show cause why the 1st Respondent should not impose a forfeiture of Rupees Sixteen Billion, Ten Million, Nineteen Thousand, Six Hundred and Thirty-Seven and Seventy-One Cents (Rs.16,010,019,637.71) as being treble the value of the goods in terms of section 52 of the Customs Ordinance. By the decision contained in the document marked P21, the 1st Respondent had decided that the value declared by the Petitioner company in respect of the cement they had imported is false and thereby shall be liable in terms of section 52 of the Customs Ordinance. The goods shall be forfeited and as such goods are not recoverable, the person making that false declaration shall forfeit the treble the value of such goods or be liable to a penalty of Rupees Hundred Thousand at the election of the Director General of the Customs. Therefore, the 1st Respondent had forfeited a sum of Rs. 16,010,019,637.71 from the Petitioner and mitigated same to Rs. 262,521,414/=.

The case of the Petitioner can be summarized as follows;

The Petitioner company imports cement to this country from different parts of the world and the subject matter of this case relates to cement imported by the Petitioner in bulk form. The custom's value of the goods imported is determined in terms of Schedule E of the Customs Ordinance as amended by Act No. 2 of 2003. In terms of article 1 of the Schedule E of the Customs Ordinance, the custom's value is the transaction value, which is the price paid or payable for the goods when exported to Sri Lanka as adjusted in accordance with Article 8. Article 8 (1) (e) stipulates that the following sums should be added to the price actually paid or payable for the imported goods.

(i) The cost of transport of the imported goods to the Port of Sri Lanka.

(ii) Loading, unloading and handling charges associated with the transport of the imported goods to the Port of Sri Lanka.

(iii) The cost of insurance.

The Petitioner states that under Article 8(1)(e) of schedule E of the Customs Ordinance, the cost of transport, loading and unloading is required to be included in the customs value only up to the point of time the imported goods reached the port of Colombo. It is the case of the Petitioner that the cost of transport loading and unloading and handling charges incurred after the goods reached the port of Colombo cannot be included in the customs value. The Petitioner states that, the Petitioner did not include in the customs value the costs incurred at the port of Colombo. Thereafter the 3rd Respondent had commenced investigating about the costs incurred by the Petitioner at the port of Colombo and thereafter a customs inquiry commenced with the 2nd Respondent as the inquiring officer. In the said inquiry it was alleged that the Petitioner had not included the costs incurred at the port of Colombo in the customs value and therefore the Petitioner was liable under section 52 and 121 of the Customs Ordinance. After the inquiry the 1st Respondent made an order issuing a show cause notice calling upon the Petitioner to show cause as to why a forfeiter should not be enforced in terms of section 52 of the Customs Ordinance. That order is contained in the document marked P17. Thereafter the Petitioner had tendered written submissions in response to the show cause notice. Thereafter, the 1st Respondent on 10.03.2003 had made an order imposing forfeiter in the sum of Rs. 262,521,414/= in terms of section 52 and mitigated in terms of section 163 of the Customs Ordinance. That order is contained in the document marked P21. The Petitioner states that the said order is ultra vires the provisions of the Customs Ordinance and contrary to the

schedule E of the Customs Ordinance. It violates the rules of Natural Justice and it is unfair, irrational and unreasonable.

In the said order which is contained in P21 the 1st Respondent had stated that the inquiry was to ascertain whether the Petitioner company had committed a customs offence in terms of section 52 read with section 51 of the Customs Ordinance. In the aforesaid order the 1st Respondent had come to a finding that the value declared by the Petitioner in respect of the cement it had imported, in accordance with section 51 of the Customs Ordinance is a false declaration which shall be liable in terms of section 52 of the Ordinance. The 1st Respondent had also come to a finding that the basis on which the goods had been brought was CIF free out and such was not made known to the Customs either in the VDF or in their customs declarations. He had also come to a finding that the Petitioner had failed to declare that the parties (buyer and the seller) are related. If a true and correct declaration had been made, the Customs would have rejected the declared value and adjusted the value **including the cost of discharge as well**. By not declaring the fact that the parties are related and by not declaring that the terms of agreement not as CIF but as CIF free out, the importer had attempted to pay duties and other levies payable on the basis on false value than that of the dutiable value. The 1st Respondent had also observed the fact that the Petitioner in its VDF had declared that the seller and the importer are not related.

The principal issue to be decided in this Writ application relates to the unloading cost incurred at the Port of Colombo. These costs are incurred when unloading and discharging the goods from the ship. The Respondents argue that these unloading costs at the Port of Colombo form part of the customs' value under Article 8 (1) (e) (i) of schedule E of the Customs Ordinance as amended by Act No. 2 of 2003. The Petitioner argues that it does not form part of the customs' value. It is the case of the Petitioner that Article 8 (1) (e) (i) is only applicable for the cost of transport of goods **to the Port of Colombo**. Both parties agree that this is the principal issue that has to be decided in this case.

Article 1 of schedule E of section 51 of the Customs Ordinance as amended by Act No. 2 of 2003 states that the customs' value of any imported goods shall be the transaction value, that is, the price paid or payable for the goods when sold for export to Sri Lanka as adjusted in accordance with the provisions of Article 8.

Article 8 reads as follows;

"1. In determining the customs value under the provisions of Article 1 there shall be added to the price actually paid or payable for the imported goods: - …….

a……

b……

c…….

d…….

e. the following costs: -

(i) The cost of transport of the imported goods to the port of Sri Lanka:

(ii) Loading, Unloading and handling charges associated with the transport of the imported goods to the port of Sri Lanka: and

(iii)The cost of insurance."

The learned Additional Solicitor General has drawn our attention to the definition given in the Black's Law Dictionary regarding a **"Port"** which reads as follows;

"A place for the lading and unlading of the cargoes of vessels, and the collection of duties or customs upon imports and exports. A place, either on the sea – coast or on a river, where ships stop for the purpose of loading and unloading, from whence they depart, and where they finish their voyages."

Therefore, **"the Port"** in the said definition is a place for lading and unlading.

The learned Additional Solicitor General has drawn our attention to the fact that the word **"Freight"** includes the unloading of the goods. Thus, the learned Additional Solicitor General submitted that when freight is paid with respect to certain goods it is not the intention of the person paying freight that the goods would be brought up to the outer limit of the port and then tossed overboard. Freight by its very definition encompasses the delivery of the goods across the ship's rail.

The learned Additional Solicitor General has also submitted that The Carriage of Goods by Sea Act No. 21 of 1982 provides that freight includes the unloading of the ship. Although the Act does not expressly use the word **"Freight"**. Article 1 of the Schedule of the Act explains that "Carriage of goods covers the period from the time when the goods are loaded on to the time they are discharged from the ship".

At this stage it is appropriate to take into consideration the words contained in Schedule E of the Act No. 83 of 1988 which was subsequently repealed by Act No. 2 of 2003. Paragraphs 2 (2) 1 and 2 (2) 2 of the Schedule E of Act No. 83 of 1988 reads as follows;

"2. The normal price of any imported goods shall be determined on the following assumptions: -

2.1. that the **goods are delivered to the buyer at the port** of place of introduction in Sri Lanka, that is to say, the first seaport or airport **at which the goods are unloaded or in other cases where the goods are first dealt with by a custom officer**;

2.2. that the seller bears all costs, charges and expenses incidental to the sale and **to the delivery of the goods at the port** or place of introduction which are hence included in the normal price,"

Paragraph one of schedule E reads as follows;

1. The value of any imported goods shall be the normal price, that is to say, the price which they would fetch at the time of importation on a sale in the open market between a buyer and a seller independent of each other as indicated in paragraph 2.7.

According to paragraph one of the schedule E of the Act No. 83 of 1988 the value of any imported goods shall be the normal price, the price which they would fetch at the time of importation. According to section 2.2.2 of the schedule the costs, charges and expenses incidental to the delivery of the goods at the port are included in the normal price. Therefore, that section is clear and unambiguous and according to which the unloading charges at the port of Colombo has to be included in the value of any imported goods. But there is a difference in the new schedule E amended by the Amendment Act No. 02 of 2003 which reads as follows;

(e) the following costs: -

(i) The cost of transport of the imported goods **to the port of Sri Lanka**:

(ii) Loading, unloading and handling charges associated with the transport of the imported goods **to the port of Sri**

Lanka:

(iii) The cost of insurance.

In the schedule E of the Act No. 83 of 1988 it is specifically mentioned that the unloading charges at the port (of Sri Lanka) are included in the normal price of the imported goods which is deemed to be the value of the goods. But in the amended schedule E of the Act No. 02 of 2003 there is no such specific reference regarding the unloading charges at the port of Colombo. Instead, the amended schedule E refers to the cost of transport to the port of Sri Lanka and loading and unloading and handling charges associated with the transport **to the port of Sri Lanka.** It does not refer to the cost of transport at the port of Sri Lanka and does not refer to loading and unloading and handling charges associated with the transport at the port of Sri Lanka.

Therefore, the intention of the legislature is clear. In the schedule E of the Act No. 83 of 1988 it was specifically stated that the unloading charges at the port of Colombo are included in the value of the imported goods. Those words are not there in the amended schedule E and instead the amended schedule E refers to the transport charges and unloading charges associated with the transport to the port of Colombo. It does not refer to the transport charges and unloading charges associated with the transport at the port of Colombo. Therefore, it is clear that the legislature had thought it fit not to include the unloading charges at the port of Colombo in the transaction value which is also the customs value of the goods. If you give a literal interpretation to the words contained in the amended schedule E one can, come to the same conclusion. Lord Evershed MR had stated that the length and details of modern legislation has undoubtedly reinforced the claim of literal construction as the only safe rule (Maxwell on Interpretation of Statutes 12th Edition by P. St. J. Langon at page 28). As stated in the case of **R Vs Commissioner of Income Tax (1888) 22 QBD 296** the first and the most elementary rule of construction is that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one and otherwise in their ordinary meaning and according to Maxwell the second rule is that the phrases and sentences are to be constructed according to the rules of Grammer (Maxwell on Interpretation of Statutes 12th Edition by P. St. J. Langon at page 28). In the case of **R Vs Ramsgate (Inhabitants) (1827) 6 B. & C. 712** Bayley J. had observed as follows,

“It is very desirable in all cases to adhere to the words of an Act of Parliament, giving to them that sense which is their natural import in the order in which they are placed”

Therefore, when a literal construction is given to the words contained in the amended schedule E of the Act No. 02 of 2003, one can come to the conclusion that unloading charges in the port of Colombo are not included in the customs value within the meaning of that schedule. In the amended schedule E as it stands today Article 8(1)(e) (i) refers to the cost of transport to the port of Colombo and Article 8(1)(e) (ii) refers to the cost of unloading associated with the transport to the port of Colombo. It is the Article 8(1)(e) (ii) which is applicable to the unloading charges associated with the transport to the port of Colombo. Value Declaration Form (VDF) specifies the information required by schedule E of the Customs Ordinance. Cage 16g of the Value Declaration Form specifies the information which is required for loading, unloading and handling charges. In that cage it is stated as follows, “loading, unloading, handling charges (in the country of exportation)”. There is no cage requiring information regarding the unloading charges in the country of importation. It is a declaration form prepared by the Sri Lanka Customs. That form does not require information regarding the unloading charges in the port of Colombo. That shows that the Sri Lanka Customs was aware and was of the view that the unloading charges at the port of Colombo was not required to be included in the customs value. However, they are seeking to include the unloading charges at the port of Colombo under Article 8(1)(e) (i) of the schedule E. But the Sri Lanka Customs cannot do that when the words contained in that Article are given a literal interpretation. There is a definite distinction between the words “to the port of Colombo” and “at the port of Colombo”.

In the case of **Vallibel Lanka (Pvt.) Limited Vs Director-General of Customs and three others (2008) 1 SLR 219** Siripavan J. (as he then was) had observed as follows,

“It is the established rule in the interpretation of statutes levying taxes and duties, not to extend the provisions of the statute by implication, beyond the clear import of the language used or to enlarge their operation in order to embrace matters not specifically pointed out. In case of doubt, the provisions are construed most strongly against the state and in favour of the citizen. Thus, the intention to impose duties and/or taxes on imported goods must be shown

by clear and unambiguous language and cannot be inferred by ambiguous words."

Therefore, the court cannot give a wider interpretation to the words contained in Article 8(1)(e) (i) of schedule E of the Customs Ordinance to include the cost of unloading at the port of Colombo merely because some financial loss maybe caused to the state in certain circumstances. One must have regard to the strict letter of law and cannot import provisions in the Customs Ordinance so as to supply any assumed deficiency. Although according to the definition of a port as given in the Black's Law Dictionary it includes both loading and unloading the words "to the port of Sri Lanka" contained in the Articles 8(1)(e) (i) and (ii) excludes unloading at the port of Sri Lanka. Although the word "freight" includes unloading charges as well that is not a word contained in the Articles 8(1)(e) (i) and (ii) of the amended schedule E of the Customs Ordinance. That is a word contained in the schedule E of the Customs Amendment Act No. 83 of 1988 which was repealed by the Act No. 02 of 2003.

Article 2.2.3 of the schedule E of the Customs Amendment Act No. 83 of 1988 reads as follows,

2.3 the costs, charges and expenses referred to in paragraph 2.2

includes *inter alia* any of the following: -

2.3.1 carriage and **freight** to Sri Lanka

The word "freight" is not there in the amended schedule E which is applicable now. Instead, the words "the cost of transport to the port of Sri Lanka" and "the loading, unloading and handling charges associated with the transport to the port of Sri Lanka" are included in the amended schedule which shows that the legislature has intended not to include unloading charges at the port of Sri Lanka in the customs value.

The learned Additional Solicitor General for the Respondents has drawn our attention to the judgement of the Supreme Court of India in the case of **Garden Silk Mills Ltd and Anr Vs Union of India and Ors decided on 29 September 1999** (which appears in an Indian website in the internet and which is reported in A.I.R. (2000) Sc (1) page 33. In support of the contention that the unloading charges at the port should form part of the customs value. In that case the Supreme Court of India (Justices R.P. Sethi, B.N. Kripal, A.P. Misra) held that the landing charges were rightly taken into consideration in determining the

assessable value of the imported goods. But that judgment can be distinguished. The corresponding legislation in India contains in Rule 9 (2) of the customs' valuation (determination of price of imported goods) Rules of 1988 which reads as follows;

"9. Costs and Services.

(2) For the purpose of sub section (1) and sub section (1A) of section 14 of the Customs Act, 1962 (52 of 1962) and these rules, the value of the imported goods shall be the value of such goods, for delivery at the time and place of importation and shall include –

(a) the cost of transport of the imported goods **to the place of importation**.

(b) loading, **unloading** and handling charges associated with the delivery of the imported goods **at the place of importation**; and

(c) ……"

There is a fundamental difference between the aforementioned provisions contained in the Indian Legislation and the provisions contained in Article 8 (1) (e) of Schedule E of the Sri Lankan Customs Ordinance (as amended). The Rule 9 (2) of the Indian rules applicable to the situation refers to the word **"at"**. That rule refers to **unloading charges associated with the delivery of the imported goods at the place of importation**. But Article 8 (1) (e) of Schedule E of the Sri Lankan Customs Ordinance refers to the word **"to"**. The Indian Legislation is somewhat similar to the legislation contained in the sections 2.2.1, 2.2.2, 2.2.3 of Schedule E of the Customs (amendment) Act No. 83 of 1988 which was repealed by the Customs (amendment) Act No. 2 of 2003. Therefore, the *ratio decidendi* in **Garden Silk Mills Ltd and Anr Vs Union of India and Ors** is not applicable to this situation.

Section 51 of the Customs Ordinance (as amended) reads as follows;

"51. In all cases when the duties imposed upon the importation of articles are charged according to the value thereof, the respective value of each such article shall be stated in the entry together with the description and quantity of the same, and duly affirmed by a declaration made by the importer or his agent on a form of such size and colour as may be specified by the Director – General by notification published in the Gazette, and such value shall be determined in accordance with the provisions of Schedule E, and duties shall be paid on a value so determined."

Section 52 reads as follows;

"52. Where it shall appear to the officers of the Customs that the **value declared** in respect of any goods according to section 51 is **a false declaration**, the goods in respect of which such declaration has been made shall be forfeited together with the package in which they are contained. Where such goods are not recoverable, the person making such false declaration shall forfeit either treble the value of such goods or be liable to a penalty of one hundred thousand rupees, at the election of the Director – General of Customs."

The learned Additional Solicitor General in his written submissions has submitted that the Petitioner had fraudulently misrepresented three matters in the value declaration form. Firstly, the term of payment. Both CUSDEC and VDF discloses the terms of payment as CIF. However, the sales contract obtained through further investigation have revealed that the terms of payment has been on the basis of CIF (free out) and not CIF. Secondly, it has been submitted, that there is a non-disclosure of the sales contract which clearly sets out the terms of payment is based on CIF (free out) and not CIF. Thirdly, there had been a misrepresentation regarding the relationship of the parties. In answering the query in the VDF whether the buyer and the seller are related parties the distinct reply of the Petitioner has been in the negative. Subsequent investigations revealed that the Petitioner and the seller were indeed related parties and their relationship falls within categories enumerated in Article 9 of the Schedule E.

In terms of section 52 of the Customs Ordinance (as amended) an order of forfeiture can only be made in the situation where the value declared in respect of any goods is a false declaration. Section 51 provides that the value shall be determined in accordance with the provisions of schedule E and duties shall be paid on a value so determined. Section 52 applies only in a situation where there is a false declaration of the value declared. Therefore, if the value is declared in accordance with the schedule E of the Customs Ordinance as required by section 51 no forfeiture can be imposed. The Customs Ordinance does not define the words **"false declaration"** but it is a penal provision by which forfeiture can be imposed. Prior to the amendments introduced by Customs (amendment) Act No. 2 of 2003 the section 52 of the Customs (amendment) Act. No. 83 of 1988 did not contain the words **"false declaration"**. But under that provision, in a situation where it shall appear to the officers of the customs that the value declared in respect of any goods is not in accordance with the provisions of Schedule E, the goods in respect of which such declaration has been made could

be forfeited together with the package in which they are contained. Prior to the amendments introduced by the Customs (amendment) Act No. 2 of 2003, there was no provision similar to section 51 (A).

Customs (amendment) Act No. 2 of 2003 introduced significant changes. Section 52 of the Principal Enactment was amended by the substitution for the words "is not in accordance with Schedule E" of the words "according to Section 51 is a false declaration". Thus, the words **"a false declaration"** were introduced to Section 52. Further, the new section 51 (A) was brought in.

Section 51A reads as follows;

"5IA. (1)(a) Whenever an officer of customs has reason to doubt the truth or accuracy of any particulars contained in a bill of entry or a declaration made under section 51 or the documents presented to him in support of a bill of entry under section 47, the officer of customs may require the importer or his agent or any other party connected with the importation of goods, to furnish such other information, including documentary or other evidence in proof of the fact that the declared customs value represents the total amount actually paid or is payable for the imported goods as adjusted in accordance with Article 8 of Schedule E.

(b) After the receipt of further information or in the absence of any response, if the officer of customs still has reasonable doubt as to the truth or accuracy of the declared customs value, it shall be deemed that the customs value of the imported goods in question cannot be determined under the provisions of Article I of Schedule E and the importer, if so requests, shall be informed by the officer in writing of the grounds for such doubt and be afforded an opportunity to be heard.

(c) The officer of customs may thereafter proceed to determine the customs value in accordance with the other provisions of Schedule E and **amend the value as appropriate**.

Thus, in terms of the amendments introduced by the Act No. 02 of 2003, in a situation where the value declared is not in accordance with schedule E forfeiter under section 52 can be imposed if there is a false declaration and in other instances the procedure set out in section 51A should be followed and the customs value should be amended accordingly.

In the case of **Mireka Capital Land (Private) Limited Vs Director General of Customs [C.A. (Writ) 983/2007 (C.A. minutes 15.06.2010)]**, this court has held that section 52 specifically incorporates the requirement of culpability as a pre-condition for forfeiture. It was further held that the legislature by a subsequent amendment effected to section 52 by section 4 of the Act No. 02 of 2003 incorporated the mental element (*mens rea*) by providing that the forfeiture will be imposed only if there is a false declaration. In that case Justice S. Sriskandaraja had observed as follows,

"A false declaration is a declaration made with a fraudulent or dishonest intent therefore there is no merit in the submissions of the Respondents that there is no necessity for the Customs to prove that the importer when making such declaration had the intention to defraud revenue in so far as Section 52 is concerned.

The analyses of sections 47 and 52 show that in the absence of culpability i.e. in the absence of the intention to defraud revenue one cannot act under the said sections."

Allegations based on CIF and CIF (free out)

The 1st Respondent in his order contained in P21 has come to the following finding.

"Taking into consideration all these facts that the declarations were made I find that the value declared by the importer M/S Singhe Cement (Pvt) Ltd at the time were false declarations in that as price in the contract was for CIF (free out) basis, the importer declared that as the CIF price and thereby defrauded government revenue." Therefore, the 1st Respondent has come to the finding that the Petitioner Company had defrauded government revenue by declaring that the price in the contract was CIF. We agree with the submission of the learned Presidents' Counsel for the Petitioner that the Section 52 permits a forfeiture only if the value declared is a false declaration. No forfeiture can be imposed under section 52 of the Customs Ordinance, if the value declared is correct in accordance with Schedule E as required by Section 51. No forfeiture can be imposed under Section 52 on an allegation that the Petitioner as declared incorrect payment terms in the CUSDEC and VDF forms. Therefore, a forfeiture cannot be imposed under Section 52 on a mere allegation that the Petitioner had declared CIF instead of CIF (free out) in the CUSDEC and VDF as it is not a value but only a payment term. We have come to the conclusion that the

unloading charges at the Port of Colombo do not form a part of the Customs Value. Therefore, the declaration in the CUSDEC and the VDF regarding the terms of payment cannot make any difference in the customs value. It can be a relevant factor only in a situation where the unloading charges in the Port of Colombo should be included in the customs value. Therefore, no order for forfeiture can be imposed against the Petitioner under Section 52 of the Customs Ordinance on an allegation that the Petitioner had declared incorrect payment terms as the correct value had been declared in accordance with Schedule E. Therefore, the finding of the 1st Defendant to the effect that the Petitioner Company had defrauded government revenue by declaring the contract was CIF is *ultra vires* the provisions of the Customs Ordinance, contrary to Schedule E of the Customs Ordinance and unlawful.

The relationship between the parties

Article 1 (2) of Schedule E of the Customs Ordinance reads as follows;

"2 (a) In determining whether the transaction value is acceptable for the purpose of paragraph 1, the fact that the buyer and the seller are related within the meaning of Article 9 shall not in itself be ground for regarding the transaction value as unacceptable. In such case the circumstances surrounding the sale shall be examined and the transaction value shall be accepted provided that the relationship did not influence the price. If in the light of information provided by the importer or otherwise, the Customs Administration has grounds for considering that the relationship influenced the price. It shall communicate its grounds to the importer and the importer shall be given a reasonable opportunity to respond. If the importer so requests, the communication of the grounds shall be writing.

(b) In a sale between related persons, the transaction value shall be accepted and the goods valued in accordance with the provisions of paragraph 1 whenever the importer demonstrates that such value closely approximates to one of the following occurring at or about the same time: -

(i) the transaction value in sales to unrelated buyers of identical or similar goods for export to Sri Lanka:

(ii) the customs value of identical or similar goods as determined under the provisions of Article 5:

(iii)the customs value of identical or similar goods as determined under the provisions of Article 6.

In applying the foregoing tests, due account shall be taken of demonstrated differences in commercial levels, quantity levels, the elements enumerated in Article 8 and costs incurred by the seller in sales in which the seller and the buyer are not related that are not incurred by the seller in sales in which the seller and the buyer are related.

(c) The tests set forth in paragraph 2 (b) are to be used at the initiative of the importer and only for comparison purposes. Substitute values may not be established under the provisions of paragraph 2 (b)."

That section stipulates that the fact that the buyer and the seller are related within the meaning of Article 9 shall not in itself be ground for regarding the transaction value as unacceptable. In such a case the circumstances surrounding the sale shall be examined and the transaction value shall be accepted if the relationship did not influence the price. The transaction value becomes unacceptable only in a situation where the relationship between the seller and the buyer had influenced the price. Therefore, unless it is proved that the relationship had influenced the price a mere incorrect statement of relationship can never amount to a false declaration. Therefore, a forfeiture under section 52 of the Customs Ordinance cannot be imposed solely on the basis of an alleged false declaration of relationship in the absence of any finding by the Customs that such relationship influenced the price. In the document marked P21 the 1st Respondent has not come to a positive finding that the relationship between the parties had influenced the sale price. In that order the 1st Respondent has only stated that by not declaring the fact that the parties are related the importer has attempted to pay duties and other levies payable on the basis on false value than that of the dutiable value. Although the 1st Respondent has stated in his order that it has been admitted and accepted by M S Singhe Cement (Pvt) Ltd that they are related to the seller in that that the seller is a shareholder of Singhe Cement (Pvt) Ltd and out of any accruals of sales seller is entitle for dividends there is no such admission recorded at any stage of the inquiry. In their statement of objections, the Respondents had marked the documents R1, R2 and R3 to prove this relationship. But these documents were never produced at the inquiry. No such evidence was produced at the inquiry. The question of relationship between the seller and buyer was never an issue at the inquiry. In the order marked P17 the 1st Respondent does not say that the relationship

between the parties had influenced the sale price. The 1st Respondent only says that the value declarations are false in terms of section 52 of the Customs Ordinance. Therefore, the Petitioner never had the opportunity of meeting with this allegation and the Petitioner was never given a hearing on this allegation. Thus, the 1st Respondent had violated the rules of natural justice.

On the question of the denial of natural justice M D H Fernando J. in the case of **Jayawardena Vs Darani Wijethilaka, Secretary Ministry of Justice and Constitutional Affairs and others (2001) 1 SRL 132** had observed as follows,

"The legal principles are clear. In *Cooper v. Wandsworth Board of Works*" it was, laid down that "although there are no positive words in a statute, requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature." In a passage which has repeatedly been cited with approval, Lord Loreburn, LC, referred to the duty of public bodies and officers when called upon to decide questions, even involving discretion:

"In the present instance, as in many others, what comes for determination is a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, **or even depend on matter of law alone**. In such cases [they] will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and listen fairly to both sides, for **that is a duty lying upon everyone who decides anything**. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, **always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting anything prejudicial to their view."** *Board of Education v. Rice, [1911] AC 179*."

In this case we need not go that far to the Principles of English Common Law. The legislature has incorporated the rules of natural justice in Article 1(2) of schedule E of the Customs Ordinance. It stipulates that if in the light of information provided by the importer or otherwise a Customs administration has grounds for considering that the relationship influenced the price it shall communicate its grounds to the importer and the importer shall be given a reasonable opportunity to respond. No such grounds have been communicated to the Petitioner in this case and the Petitioner was not given a reasonable opportunity to respond to this allegation.

For the aforementioned reasons we are of the view that the order of forfeiture of goods made by the 1st Respondent in terms of the section 52 of the Customs Ordinance is *ultra vires* the provisions of the Customs Ordinance, contrary to Schedule E of the Customs Ordinance, unlawful and in violation of the principles of natural justice.

Availability of an alternative remedy

The learned Additional Solicitor General has drawn our attention to section 154 of the Customs Ordinance which reads as follows;

"154(1) All ships, boats, goods, and other things which shall have been or shall hereafter 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 in respect to ships, boats, goods, and other things seized and condemned for breach of such Ordinance, unless the person from whom such ships, boats, goods and other things shall have been seized, or the owner of them, or some person authorized by him, shall, within one month from the date of seizure of the same, give notice in writing to the Collector or other chief officer of customs at the nearest port that he intends to enter a claim to the ship, boat, goods, or other things seized as aforesaid, and shall further give cash security to prosecute such claim before the court having jurisdiction to entertain the same and otherwise to satisfy the judgment of the court and to pay costs in such sum as the Collector or proper officer of customs at the port where or nearest to which the seizure was made shall consider sufficient.

If proceedings for the recovery of the ship, boat, goods or other things so claimed 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, and shall be dealt with accordingly by the Collector or other proper officer of customs.

(2) If after the institution of proceedings in the proper court, the claimant shall give cash security to restore the things seized or their value in such sum as the Collector or proper officer of customs at the port where or nearest to which the seizure made shall consider sufficient, the ship, boat, goods or other things seized may, if required, be delivered up to the claimant at the discretion of the Principal Collector of Customs or a Deputy Collector of Customs.

(3) After institution of proceedings in the proper court in respect of any ships, boats, goods or other things the court, may, on the application of the Director-

General of Customs and if the claimants do not object thereto, authorise such Director-General to dispose of such ships, boats, goods or other things and deposit the proceeds of sale in court. Where the claimants object to the disposal of such ships, boats, goods or other things the court may require the claimants to deposit cash security, equal to the market value (as assessed by such Director-General) of such ships, boats, goods or other things, in court."

It has been submitted by the State that the Petitioner has failed to follow the aforementioned statutory remedy contained in the Customs Ordinance which provides a mechanism to be followed when claiming forfeited goods. Citing the judgement of **Ishak Vs Lakshman Perera, Director General of Customs (2003) 3 SLR 18** the learned Additional Solicitor General has submitted that when the Customs Ordinance itself specifically provides for a remedy to address the grievance of the Petitioner, the Petitioner cannot come before this court by way of a Writ application seeking the same relief. The facts of that case can be distinguished from the facts of this case. Section 154 of the Customs Ordinance provides for a situation where the goods are forfeited and seized. It does not provide adequate remedy in a situation where no goods have been seized and forfeited. In this case no goods have been seized and forfeited as the goods were unavailable to be forfeited. Thus, section 154 does not provide an adequate remedy for the Petitioner. In the case of **Ishak Vs Lakshman Perera** cited above there were some currency notes seized and forfeited and Shirani Thilakawardena J. (P/CA) held that section 154 was an adequate remedy and the Petitioner in that case had already instituted action in a competent civil court. In any event the availability of an alternative remedy does not prevent this court from issuing a Writ in a case of excess or absence of jurisdiction. In the case of **Kanagarathna Vs Rajasundaram (1981) 1 SLR 492** Samarakoon CJ. Held that the availability of an alternative remedy does not prevent the court from issuing a Writ of Prohibition in cases of excess or absence of jurisdiction. In the case of **Sirisena Vs Kotawara Udagama Corporative Society Ltd. 51 NLR 262** Grasion J. held that there is "no doubt a well-recognized principle of law that the Supreme Court will not as a rule make an order of Mandamus or Certiorari where there is an alternative an equally convenient remedy available to the aggrieved party. But the rule is not a rigid one." In that case it was held that event though an alternative remedy was also available a Writ of Certiorari would lie to quash the proceedings of a tribunal which flagrantly exceeded the limited statutory powers conferred on it. In this case the 1st Respondent has acted unlawfully and *ultra vires* the provisions of the Customs Ordinance and acted in the absence of

jurisdiction. Therefore, this court can issue a Writ of Certiorari quashing that decision irrespective of the fact whether an alternative remedy is available or not. For the aforementioned reasons we issue a mandate in the nature of a Writ of certiorari quashing the decision of the 1st Respondent dated 10.03.2017 contained in the document marked P21. We also issue mandates in the nature of a Writ of Certiorari quashing the show cause notice issued by the 1st respondent dated 21.07.2016 contained in the document marked P17 and the decision of the 4th Respondent dated 02.11.2015.

Applications are allowed.

Judge of Court of Appeal

Mayadunna Corea - J.

I Agree

Judge of Court of Appeal