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

In the matter of an application for mandates in the nature of Writs of Certiorari and of Prohibition and Mandamus under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. (Writ) Application No: 0387/2012

Wee Tiong (S) Pvt Limited,
No. 64-D, Kallang Pudding Road,
02-00 Wee Tiong Building,
Singapore, 349323

Petitioner

- **Vs–**

1. Director General of Customs
   Sri Lanka Customs,
   Customs House,
   No. 40 Main Street, Colombo 01

2. Mailwaganam Paskaran,
   Deputy Director of Customs,
   Sri Lanka Customs,
   Customs House,
   No. 40 Main Street, Colombo 01

3. Saman De Silva,
   Deputy Director of Customs,
   Sri Lanka Customs,
   Customs House,
   No. 40 Main Street, Colombo 01

4. Rodamas Holdings (Pvt) Limited
   No. 688 Aluthmawatha Road,
   Colombo 15

5. Daisang International (Pvt) Ltd.,
   No. 81, Averiwatte Road,
   Hendala, Wattala.

6. Seylan Bank PLC
Seylan Towers,
P O Box 400
No. 90, Galle Road,
Colombo 03

7. Hon. Attorney General
Attorney General's Department,
Hulftsdorp, Colombo 12.

Respondents

Before : P. Kirtisinghe J

&

R. Gurusinghe J

Counsel : Faisz Musthafa P.C., with A.A.M. Illyaz P.C., with Faiza Markar

For the Petitioner

Dilrukshi Dias Wickremasinghe, P.C.,

For the 3rdRespondent

Sanjeeva Jayawardena P.C., Lakmini Warusawithane

For the 6thRespondent

Suranga Wimalasena DSG,

For the State

Argued on : 26.09.2023

Decided on : 25.10.2023

R. Gurusinghe J

The petitioner in the Writ Application No. 380/12 is the 6th respondent in this application. Both applications 380/12 and 387/12 arising out of the same customs inquiry and the relief sought by both petitioners are the same, and as such, the parties have agreed on the matter to be decided in CA Writ Application 387/2012. The judgment in this application is, therefore, applicable to the Writ Application No. 380/12 as well.

The petitioner is a company registered in Singapore. The petitioner seeks, among other reliefs, to issue a mandate in the nature of Writ of Certiorari quashing the order of the 2nd respondent marked P19 so far as it relates to the forfeiture of 2,476.45 metric tons of sugar referred to in the order marked P19. A Writ of Mandamus directing 1st, 2nd and 3rd respondents to pay to the petitioner the sales proceeds of the consignment of sugar declared forfeited by P19, or in the alternative, a Writ of Mandamus directing 1st, 2nd and 3rd respondents to pay to the 6th respondent the sale proceeds of the consignment of said sugar declared forfeited by P19.

The petitioner has entered into a contract with Rodamas Holdings (Pvt) Ltd., the 4th respondent in application No. 0387/12 (hereinafter referred to as Rodamas), bearing no. 2308/12 for supply of 2000 metric tons of refined sugar–45 icumsa of Thailand origin at US$ 700 per metric ton. The payment method agreed upon between parties was DP Terms (documents against payments). A copy of the said contract is produced marked P2. Managing Director and the Chief Executive Officer of Rodamas was K. Gnanasekaran. The petitioner states that out of the above 2000 metric tons of refined white sugar (sugar), which it contracted to supply, a quantity of 1000 metric tons of sugar was supplied and delivered to Rodamas and the petitioner received payment of purchase price. Copies of invoices and bills of lading (BL) dated 14.09.2012 marked P3.

As per the petitioner on or about 24.08.2012, at the request of Rodamas, the petitioner entered into another contract with Rodamas for the sale and supply of further 3000 metric tons of sugar at the rate of US$ 640.0 per metric ton under contract no. 4208/2012. The payment method was DP terms. A copy of the said contract dated 24.08.2012 is produced marked P4. As per agreement P4,*"title of the goods shall not pass until the seller has received payment full invoice value according to the seller's instructions".* On or about 5.09.2012, Managing Director of Rodamas K. Ganasekaran gave instructions to the petitioner to ship 4000 metric tons of sugar consisting of 1000 metric tons being the balance in respect of the 1st contract and further 3000 metric tons being the subject matter of later contract to Daisang

International (Pvt) Ltd., (Daisang) the 5th respondent. The correspondence between the parties was produced marked P5 (a) and P5 (b) on 9.09.2012 under BL No. BKKCB 12013937. The petitioner shipped through a company in Bangkok to the 5th respondent 45,000 bags of sugar, equivalent to 2,250 metric tons in terms of the said contracts. A copy of the BL is produced marked P6. At the time of shipping the said goods of the petitioner, the remitting bank, namely United Overseas Bank of Singapore, forwarded the original documents, namely the original Bill of Lading, Commercial Invoice for US$ 1,440,000/- and Notice of Bill Exchange for US$ 1,440,000/- to Seylan Bank the 6th respondent, the collecting Bank in Sri Lanka. Copies of the said documents marked P7(a), P7(b) and P7(c) were produced. The petitioner has shipped another consignment of sugar consisting of 15000 bags, equivalent to 750 metric tons in terms of the above contract. A copy of BL No. BKKCB 12013942 is produced marked P9. The United Overseas Bank, acting as the remitting bank in Singapore, forwarded the original documents, namely, On Board Bill of Lading, Commercial Invoice for US$ 480,000/- and Bill of Exchange for US$ 480,000/-, to the Seylan Bank. Copies of those documents were produced by the petitioner marked P10(a), P10(b) and P10(c).

K. Gnanasekaran, in collusion with an employee of the Seylan Bank (Eranga Ratnayake), removed one set of original BLs and other relevant documents which were sent by the petitioner and replaced them with coloured photocopies of the same. Without making any payments to the Seylan Bank, K. Gnanasekaran and Daisang obtained the goods from the shipping company. They paid customs duties to the customs and released the sugar. At that time, Seylan Bank was under the impression that the original BL and all other documents were with the Bank. As the remitting bank in Singapore was not paid, it made inquiries from Seylan Bank as to why the payments were delayed. The Seylan Bank replied that the customer had not yet made payment and obtained the documents.

The petitioner made inquiries from Delmege Forsyth & Company (Shipping) Limited and the shipping company, by documents marked P13 dated 03/10/2012, informed the petitioner that the original Delivery Order had been collected from the shipping agent upon submitting the original BL and other documents. Thereafter, on 03/10/2012, one of the Directors of the petitioner came to Sri Lanka and made a complaint at the Criminal Investigation Dept. (CID) regarding the above matter.

The CID thereupon took steps to raid the warehouse where the said sugar had been stored. As the said goods, which were stored in the warehouse, had by then been detained by Sri Lanka Customs, the CID refrained from

taking any further action. The CID filed a report in proceedings bearing no. 1489/2012 in the Magistrate's Court of Fort against K. Gnanasekaran, Managing Director of Rodamas, the sole Director of Daisang and R.N.E.R.B. Ratnayake, an Officer of the Seylan Bank. A copy of the said Magistrate's Court case is produced marked P14.

The Sri Lanka Customs commenced an inquiry bearing No. CIB/INV/45/2012/CCR/4383 on 18/10/2012 and the Attorneys-at-Law who represented the petitioner at the said customs inquiry became aware that the petitioner had been wrongfully and unlawfully named as a suspect in the said proceedings. Thereafter, further inquiry was held on 22/10/2012, 26/10/2012, 01/11/2012, 02/11/2012, 05/11/2012 and 06/11/2012."

The Seylan Bank was allowed to participate in the above inquiry only as an observer. The bank was not allowed to cross-examine the witnesses.

M. Paskaran, the 2nd respondent, Deputy Director of Customs who held the above-mentioned inquiries, decided as follows:

I carefully examined the documents marked and the evidence lead before me at the inquiry which made it evident that:

a. *Shipping documents read that the importer is Daisang International (Pvt) Ltd.*

b. *Bills of lading reads the shippers as the Thai Sugar Trading Corporation Ltd, and T.I.S.S. Company Ltd, in Thailand.*

c. *The importer has not entered into any agreement with any part for the importation of the sugar consignments in question.*

d. *As per the Report of Examination of Company produced by the defense, Memorandum and Articles of Association of Daisang International Pvt Ltd., has been executed on 5/09/2012 and the company has only one shareholder while the share capital of the company is Rs. 10/-.*

e. *The commercial invoices dated 09/09/2012 read that goods of values 480,000/- USD and 1,440,000/- USD issued in the name of the importer refer to contract no. 4208-2012.*

f. *Sales contract No. 4208-2012 is not between the importer and the seller, but between Rodamas Holdings (Pvt) Ltd. And Wee Tiong (S) Pte.*

Ltd. Only 1000 mt of sugar has been imported by Rodamas Holdings (Pvt) Ltd previously against the contract No. 2308-2012.

g. *Mr. Ganasekaran of Rodamas Holdings (Pvt) Ltd stated that he had cleared a consignment of sugar by submitting falsified documents in the like manner previously and it was a success. Customs declaration I 115279 of 07-09-2012.*

h. *Mr K. Ganasekaran claims that he is the Managing Director or Rodamas Holdings (Pvt) Ltd.*

i. *Mr K. Ganasekaram claims that he acted as the documentation manager of the importer – Daisang International (Pvt) Ltd.*

j. *Mr. S. Krishnan of Daisang International (Pvt) Ltd., got the shipping documents from Mr. K. Ganasekaran relating to the two consignments of sugar. The shipping documents included Commercial Invoice, Packing List, Certificate of Origin, Certificate of Marine Insurance, SGS Certificate of weight, quality and packing.*

k. *Mr. K. Ganasekaran confirms that he was willfully instrumental in forgery and manipulation of the shipping documents for making the declarations to the Director General of Customs.*

l. *Mr R.M.E.R.B. Ratnayake confirms that he was willfully instrumental in forgery and manipulation of the shipping documents for Mr K. Gnanasekaran.*

m. *Both Mr K. Gnanasekaran and Mr R.M.E.R.B. Ratnayaka admitted that they obtained computer-printed scanned copies of original documents, except for the original bill of lading, and placed the bank stamp and false signatures on the documents.*

n. *Mr. M.U.A. Cader of the Shipping Company confirmed that the original bill of lading had been used to obtain the delivery order.*

o. *Mr R.M.E.R.B. Ratnayake and Mr K. Ganasekaran confirmed that the original shipping documents, except for the original bill of lading, are still in the bank and since they were not used for the clearance of goods.*

p. *Import has not been duly transacted through a commercial bank, entailing actions in terms of Sections 12 and 43 of the Customs Ordinance.*

q. *Falsified shipping documents have been made use of for the two declarations made to the Director General of Customs entailing actions in terms of Section 119 of the Customs Ordinance.*

r. *Mr. K. Ganasekaran, Mr. S Krishnan and Mr R.M.E.R.B. Ratnayake have willfully perpetrated the fraudulent act entailing actions in terms of Section 129 of the Customs Ordinance.*

The reasons stated above, now I order the following;

1. *Declare the forfeiture of 2,476.45 MT of Sugar valued at Rs. 261,438,827/= imported by M/s Daisang International (Pvt) Ltd and seized against this case by Customs, in terms of Section 119 of the Customs Ordinance.*

2. *I impose a mitigated further forfeiture amounting to Rs. 30,000,000/- on Mr K. Gnanasekaran in terms of Section 129, read with Sections 163 and 166B of the Customs Ordinance.*

3. *I impose a mitigated further forfeiture amounting to Rs. 5,000,000/- on Mr R.M. Eranga Rajeendra Bandara Rathnayake in terms of Section 29 read with Sections 163 and 166B of the Customs Ordinance.*

4. *I impose a forfeiture of Rs. 100,000/- on Mr S. Krishnan in terms of Section 119 of the Customs Ordinance*

5. *Further investigations have to be done with regard to the 40 containers of Thailand Refined White Sugar that were imported under Bill of Lading Nos: LCHCMB120000036 and LCHCMB120000037 and the involvement of M/s Wee Tiong (S) Pte Ltd.*

The petitioner states that;

(a) The finding that the 5th Respondent was entitled to the said goods is unsupported by the evidence and vitiated by an error of law.

(b) The said order is vitiated by the failure to take into account the relevant circumstances including the fact that title in terms of

the contract had not passed to the 5th Respondent but remained with the Petitioner and that the petitioner had not been guilty of or privy to any fraud or stealth;

(c) The said order is *ultra vires* the power of the 2nd Respondent in as much as the pre-conditions contemplated in Section 119 of the Customs Ordinance warranting the imposition of forfeiture had not been established;

(d) The said order is unreasonable, void and vitiated by error of law in as much as the 2nd Respondent had failed to take into account that there was no loss to revenue and failed to correctly apply Section 119 of the Customs Ordinance in the light of indicia set out in Section 166B of the Customs Ordinance;

(e) The said order has been made in violation of the principles of natural justice in as much as Counsel for the Petitioner was not permitted to fully cross-examine the material witnesses namely Gnanasekaran and Ratnayake;

(f) The said order is vitiated by the fact that the 2nd Respondent has posed wrong issues and answered them erroneously;

(g) The said order has been made on erroneous factual and legal assumptions unsupported by material or evidence;

(h) The said order has been made *mala fide* and for a collateral purpose, namely to enrich Customs Officers by way of rewards, particularly in light of the fact that there has been no loss of revenue;

(i) The 2nd Respondent totally ignored the fact that the Petitioner has not received the purchase price for the above consignments of sugar to date, but the goods have been cleared from the Port of Colombo without making payment to the Petitioner;

(j) The said order is based upon the erroneous assumption by the 2nd Respondent that the said consignment of sugar belonged to the 5th Respondent (the Notify Party) which said assumption is unsupported by any evidence and contrary to the law relating to the sale of goods and the terms of contract between the parties.

(k) The 2nd Respondent misdirected himself in coming to the conclusion that the importer had not entered into any agreement in ignoring the fact that the 4th Respondent made the 5th Respondent as a Notify Party and thereby erred in holding that the 5th Respondent acquired rights to the said consignments;

(l) The said order offends principles of proportionality in as much as there has been no loss of revenue;

(m) The said order is arbitrary, oppressive, unreasonable and not rationally related to any objective and as such violative of Article 12(1) of the Constitution.

Objections of the1st to 3rd respondents

The 1st to 3rd respondents filed objections and averred the following facts.

a. The customs conducted an investigation and subsequently held an inquiry, CID/INV/45/2012, regarding the consignment of sugar referred to in the petition;

b. At the said inquiry, the 10th respondent in 0380/12 K Gnanasekaran admitted that he with the assistance of Mr Eranga Ratnayakethe banking assistant of the Grandpass branch of the Seylan Bank removed one original BL from each set of 3 original documents from the custody of the Seylan Bank and submitted them to the shipping agent – Delmege Forsyth and Company Ltd., to obtain the Delivery Order from the shipping agent. The respondent states that if not for this stealthily, surreptitious and fraudulent act, the shipping agent would not have issued the Delivery Order, where, in turn, the CUSDEC would not have been approved;

c. Additionally, the seal of the Seylan Bank was affixed by Mr Eranga Ratnayake in the supporting documents that were attached to the CUSDEC;

d. Mr Eranga Ratnayake readily admitted to committing the aforesaid fraudulent act at the behest of K. Gnanasekaran;

e. The provisions of the Customs Ordinance obligate importers to disclose facts and documents truthfully. A breach of such duty,

especially submitting false documents, empowers the Customs to forfeit the goods in terms of section 119 of the Customs Ordinance;

f. The Sri Lanka Customs forfeited the consignment of sugar in view of unequivocal admissions of Diasang, Selliah Krishnan, and K. Gnanasekaran i.e. submission of false documents to the Sri Lanka Customs to clear the goods;

g. The Seylan Bank alleges that it has incurred monumental losses due to the forfeiture of the consignment of sugar. The respondents state that if the Bank has incurred such monumental losses alleged, then the remedies for recovery of such losses lie against the aforesaid perpetrators of the offence. (Daisang, Selliah Krishnan, Eranga Ratnayake and K. Gnanasekeran).

1st to 3rd respondents state that the Seylan Bank was remiss in its duties in securing the shipping documents that were in its custody and sufficiently safeguarding its shipping documents, and failed to take adequate measures to give instructions to its employees relating to the safekeeping of the documents. The respondent alleged that the Seylan Bank had breached its duty of care.

The respondents have taken up the position that an offence has been committed under section 119 of the Customs Ordinance, and forfeiture of the goods was correct in terms of the provisions of section 119.

Decision

The following facts can be considered as undisputed facts.

Managing Director of Rodamas K. Gnanasekaran was a customer of Seylan Bank, Grandpass branch, and had maintained accounts with the Seylan Bank on behalf of himself and several companies, where he is a Director for their business purposes. Selliah Krishnan was the sole Director of Daisang. Krishnan had opened an account in the Seylan Bank, Grandpass branch in the name of Daisang International (Pvt) Ltd, with the direction and help of K. Gananseka ran. Daisang International was merely a proxy company of Gananasekaran. Gnanasekaran imported the sugar consignment from Wee Tiong, the petitioner, in the name of Daisang. Gnanasekaran, as Managing Director of Rodamas, has entered into commercial contracts with Wee Tiong for the purpose of consignment of sugar. Gnanasekaran instructed Wee

Tiong that the notifying party for the shipment of the said consignment of sugar to be Daisang International (Pvt) Ltd. The payment method agreed upon for the sugar consignments was Documents against Payment(DP terms). The original Bills of Lading and other relevant documents with regard to the consignments of sugar were sent to the collecting bank(the Seylan Bank) by the remitting bank(The United Overseas Bank in Singapore).

The buyer is required to make payment to the collecting bank to have the BL and other related documents for the purpose of clearing the goods. In the present matter, Daisang International was to make payment to the Seylan Bank in order to receive the BLs and other documents to clear the goods. However, Gnanasekaran, with the assistance of the bank assistant at the Seylan Bank branch in Grandpass named Eranga Ratnayake, stealthily removed the original BLs and replaced them with a similar coloured copy of BLs. Gnanasekaran got the consignments of sugar cleared by using these illegally removed documents.

The respondents have submitted in their written submission that both counsel for the petitioners in the two Writ Applications unequivocally admitted that Gnanasekaran, Krishnan and Eranga had perpetrated fraud to obtain documents and get the consignment of sugar released. The respondent submitted that "hence, the fraud having been committed, be admitted by all parties and thus undisputed. Thus, the question that remains to be answered by Court is whether the confiscation was lawful and justifiable when a fraud is committed and when the parties have unequivocally admitted that they have committed such fraud."

<u>Ownership of the goods forfeited by the Customs</u>

In Clause 8 of the P4 contract, the petitioner (the Seller) and the buyer agreed to the following terms:

"5% to be paid upon sale confirmation and balance to be paid after receipt of the faxed document and before the release of cargo documents to the notify party.

1. *Commercial Invoice;*
2. *Full set of Clean on Board Charter Party Bill of Lading notify buyer and issued to order;*
3. *Certificate of Origin;*
4. *Certificate of weight and quality issued by SOS.*

Title of goods shall not pass until the Seller has received payment full, the full invoice value in accordance with Seller's instructions."

Section 18 of the Sales of Goods Ordinance No. 11 of 1896 is as follows:

1. *Where there is a contract of sale of specific or ascertained goods, the property in them transferred to the buyer at such time as the parties to the contract intend it to be transferred.*

2. *For the purpose of ascertaining the intention of the party, regard shall be had to the terms of contract, the conduct of parties and the circumstances of the case.*

As per contract P4 and in terms of the provisions of the Sales of Goods Ordinance, the title in sugar consignment is with the petitioner until he receives the sale price. In CIF contracts, the property passes with the transfer of the Bill of Lading. In this matter, Gnanasekaran, with the assistance of Eranga Ratnayake, dishonestly acquired the delivery order and illegally affixed the bank seal. A Stolen Bill of Lading cannot pass the title to the holder.

Professor Michael Furmston's Principle of Commercial Law 2nd Edition, page 50 explains the retention of title clause as follows:

"It is very likely that a seller who employs standard conditions of sale and normally gives a customer credit will wish to provide that property does not pass simply on delivery but only at some later stage such as when payment is made."

The petitioner has taken steps to send the original Bills of Lading and other documents through a remitting bank in Singapore to the Seylan Bank in Sri Lanka. The payment method agreed upon was DP terms. Since the price of the goods was not paid to the petitioner, the title of the sugar consignment in question is still with the petitioner.

Section 119 of Customs Ordinance is as follows;

119. If any person shall make and subscribe any declaration, certificate, or other instrument required by this Ordinance to be verified by signature only, the name being false in any particular; or if any person shall make or sign any declaration made for the consideration of the Director-General or the proper officer of Customs on any application presented to him the same being untrue in any particular; or if any person required by this Ordinance or any other enactment relating to the Customs to answer questions put to him by the officers of Customs shall not truly answer such questions; or if any person

shall counterfeit, falsify, or wilfully use when counterfeited or falsified, any document required by this Ordinance or any enactment relating to the Customs, or by or under the directions of the Director-General or any instrument used in the transaction of any business or matter relating to the Customs, or shall fraudulently alter any document or instrument, or counterfeit the stamp, seal, signature, initials, or other mark of, or used by the officers of the Customs for the verification of any such document or instrument, or for the security of goods, or any other purpose, in the conduct of business relating to the Customs, every person so contravening shall be liable to forfeit a sum not exceeding one hundred thousand rupees, and any goods; including currency in any form, in relation to which the document or statement was made shall be liable to forfeiture:

Provided always that this penalty shall not attach to any particular contravention for which any other penalty shall be expressly imposed by any law in force for the time being.

Forfeiture

In the case of *Sinnetamby v. Ramalingam 26 NLR 371*, Schneider J, held as follows;
"If I may say so with all respect, I approve the principle to be deduced from that case, which is that before an order of confiscation is made, the owner should be given an opportunity of being heard and that an order of confiscation should not be made unless the owner is in some way implicated in the offence which renders the thing liable to confiscation."

The words used in Section 119 "shall be liable to forfeiture" and not shall be forfeited. This section does not require the automatic forfeiture of the goods on the finding of an office, irrespective of the fact that the owner of the goods is innocent and the owner is no party to the commission of the offence.

In the case of *Manawadu vs The Attorney General* [1987] 2 Sri LR 30, Chief Justice Sharvananda stated this;

> *I am inclined to hold, as the House of Lords did in A. G. v. Parsons (supra), that "forfeited" meant "liable to be forfeited, " and thus avoid the injustice that would flow on the construction that forfeiture of the vehicle is automatic on the conviction of the accused.*

In the case *of Toyota Lanka (Pvt) Ltd and another vs Jayathilake and others* [2009] 1 Sri LR 276 considering the scope of section 47 of the Customs Ordinance stated as follows:

"Hence, I am fortified in the view and hold that the provision in Section 47 (but if such goods shall not agree with particulars in the Bill of Entry, the same shall be forfeited ....) apply to a situation in which by means of wrongful entry goods are conveyed by stealth, to evade payment of customs duties or dues or contrary to the prohibition or restriction. In such a situation, wrongful entry and evasion, since consequence of forfeiture is by operation of law, even if the officer had delivered the goods upon the submission of a CUSDEC, such goods may be seized at in subsequent stage in terms of section 125. I am further of the view and hold that the forfeiture provided for in Section 47 would not apply to a situation of a disputed classification of goods or an underpayment or short levy of duties or dues. In such an event proper cause would be a requirement for payment of the amount due prior to delivery of goods or recovery of the amounts due in terms of section 118."

In the case of *Manawadu vs The Attorney General [1987] 2 Sri LR 30*,the Supreme Court considered section 40 of the Forest Ordinance as amended by Act No. 13 of [1982].
"The amended section 40 reads as follows:
Upon conviction of any person forest offence –

a) all timber or forest produce which is not the property of the State in respect of which such offence has been committed and

(b) all tools, boats, carts, cattle and motor vehicles used in committing such offence (whether such tools, boats, carts, cattle and motor vehicles are owned by such person or not).

shall by reason of such conviction be forfeited to the State."

In that case, the Learned Magistrate has forfeited the lorry involved in the offence without giving an opportunity to the owner of the lorry, who was not a party to the case, to show cause as to why the lorry should not be forfeited. The section does not specifically provide for giving a hearing to the owner of the vehicle before forfeiture.

Chief Justice Sharvananda quoted the following passage.

"In Inspector Fernando v. Marther (1932) 1 CLW 249 Akbar, J., in construing section 51 of the Excise Ordinance, which corresponded to section 40 of the Forest Ordinance Cap. 451, quoted with approval the following statement of Schneider J., in Sinnetamby v. Ramalingam,Sinnetamby v. Ramalingam - (1924) 26 NLR 371

"Where an offence has been committed "under the Excise Ordinance no order of confiscation should be made under section 51 of the Ordinance as regards

the conveyance used to commit the offence, e.g. a boat or motor car unless two things occur.

(1) That the owner should be given an opportunity of being heard against it; and

(*2) Where the owner himself is not convicted of the offence, no order should be made against the owner, unless he is implicated in the offence which renders the thing liable to confiscation."*

Chief Justice Sharvananda held as follows;

"*Having regard to the above rules of construction, I am unable to hold that the amended subsection 40 excludes by necessary implication the rule of 'audi alteram partem'. On this construction, the petitioner, as owner of lorry bearing No. 26 Sri 2518, is entitled to be heard on the question of forfeiture and if he satisfies the court that the accused committed the offence without his knowledge or participation, his lorry will not be liable to forfeiture.*

His Lordship further stated,

In the light of the above principles, I am unable to accept the submission of State Counsel that the legislature by Section 7 of Act No. 13 of 1982 intended to deprive an owner of his vehicle that had been used by the offender in committing a forest offence without the owner's knowledge and without his participation. Having regard to the inequitable consequences that flow from treating the words 'shall by reason of such conviction be forfeited to the State' as mandatory. I am inclined to hold, as the House of Lords did in A. G. v. Parsons (supra) that "forfeited" meant "liable to be forfeited. " and thus avoid the injustice that would flow on the construction that forfeiture of the vehicle is automatic on the conviction of the accused. Having regard to the above rules of construction, I am unable to hold that the amended subsection 40 excludes by necessary implication the rule of 'audi alteram partem'. On this construction the petitioner, as owner of lorry bearing No. 26 Sri 2518 is entitled to be heard on the question of forfeiture and if he satisfies the court that the accused committed the offence without his knowledge or participation, his lorry will not be liable to forfeiture.

The above-mentioned cases emphasize that before imposing forfeiture, the owner must be afforded an opportunity to show cause as to why such property should not be forfeited. This is one of the rules of natural justice. Even in an action of *rem,* once the property is seized, the owner must be notified by personal notice or by publication.

On behalf of the respondents, it was argued that nowhere in section 119 does it speak or refer to ownership. Further, it was argued that "there shall be a forfeiture of a sum of money and the goods if *inter alia* false documentation is submitted irrespective of ownership." "Ownership or title is irrelevant because when a party contravenes section 119, the party

commits an offence against the state, not against another private party; it is an action *in rem* and not an action in *personam.*"

I am unable to accept the above argument as it is. This argument is true to some extent when it comes to civil forfeiture. The action *in rem* proceeds against property without regard to its ownership. The property itself is "guilty" the moment it is used in connection with an illicit act. This is a legal fiction. This may be true for properties like illegally acquired property, unexplained property or proceeds of a crime, etc. Even in actions in *rem,* the owner's innocence is a relevant fact.

Section 166 B of Customs Ordinance is as follows;

In imposing a penalty or ordering a forfeiture under sections 27, 28, 29, 30, 31, 32, 38, 47, 52, 56, 57, 59, 62, 63, 64, 67, 68, 74, 76, 77, 110, 119, 129, 130, 131, 132, 133, 135, 136, and 137, the Director-General shall have

(a) the gravity of the contravention giving rise to the penalty or forfeiture;

(b) the amount of revenue lost as a result of such contravention;

(c) the availability or shortage, as the case may be, of the goods with respect to which such contravention has been committed.

Section 166 B requires that in imposing a penalty or ordering a forfeiture under section119,the gravity of the contravention giving rise to the penalty or forfeiture and the amount of revenue loss as a result of such contravention are relevant factors that should have to be taken into account by the 2nd respondent. In this case, no revenue to the state has been lost and the petitioner has committed no offence.

It is my view that Section119 requires considering the culpability of the owner of goods, which the 2nd respondent failed to consider before making an order to forfeit goods. If the owner of the goods has nothing to do with the commission of the offence under section 119, such goods are not liable to be forfeited.

The respondents have further submitted that where fraud has been committed, officials cannot expect to turn a blind eye under section 119 and refrain from forfeiture. I concede that the seizure of the sugar consignment is correct in view of the fraud committed by Gnanasekaran, and Eranga Ratnayake. However, when the respondents found that the petitioner was not paid and the ownership of the goods was still with the petitioner and that the petitioner was not privy to the fraud, they should not have forfeited the goods.

The petitioner has not committed any offence under section 119 of the Customs Ordinance. The petitioner has been dealing with reputed

commercial banks. No one expects that the BLs would be stolen from the Bank and cleared the goods. When the remitting Bank did not receive money on time, the petitioner made inquiries from both banks and the shipping company. When the petitioner came to know that the Delivery Order was issued, one of the petitioner's directors came to Sri Lanka on the same day and made a complaint to the CID. The petitioner has acted in the manner that any law-abiding person would do. The 2nd respondent failed to give due consideration that the petitioner exercised due diligence and completely relied on banking transactions.

The forfeiture of the sugar consignment is also bad for the following reasons.

The 2nd respondent did not allow the Counsel for the petitioner to cross-examine the witnesses Gnanasekaran and Eranga Ratnayake fully during the inquiry proceedings on 06.11.2012. The petitioner alleged that the petitioner was stopped at a crucial juncture during the cross-examination of the suspect, Gnanasekaran and not allowed to cross-examine Eranga Ratnayake at all. This amounts to a breach of natural justice.

The 2nd respondent has failed to consider that the petitioner was not negligent in handling documents or the consignment of sugar and it was not privy to any of the illegal acts done by K. Gnanasekaran. The confession of Gnanasekaran, who defrauded the petitioner and the 6th respondent bank, was irrelevant against the petitioner.

The 2nd respondent failed to consider the contract entered into between the petitioner and the 4threspondent and failed to consider the applicable law relating to the sales of goods.

The respondents have failed to take into consideration the provisions of section 166 B of the Ordinance that the petitioner had not contravened any provisions of law, and there was no loss of revenue when forfeiting the sugar consignment.

Seylan Bank

On behalf of the 3rd respondent, it was argued that the Seylan Bank has no *locus standi* to file an action against the customs because the collecting bank's duty to make payment to the remitting bank arises only if the buyer has collected documents from the collecting bank paying the sale price to the collecting bank. On behalf of the third respondent, it was submitted that if the collecting bank is not paid by the buyer, the bank's duty is to inform the remitting bank and send back the document. However, in this matter, the buyer has stolen the documents from the bank and cleared the goods.

The third respondent further argued that the seller (the petitioner) should have sued against the buyer and the collecting bank to recover the selling price. Since the bank was negligent in handling the documents, the bank

cannot avoid the liability. In this case, the matter to be decided is whether the forfeiture of the goods by the customs is correct in law. Whether the bank is liable to pay the seller is not an issue in this application, and therefore, court forms no opinion in that regard.

On behalf of the3rd respondent, it was quoted certain parts of the evidence given by K. Gnanasekaran and tried to impute that the manager of the Seylan Bank branch at Grandpass, and Wee Tiong knew about the fraud committed by K. Gnanasekaran. Gnanasekaran himself is the fraudster. There was no charge against the 6th respondent or the petitioner. The Seylan Bank was not even allowed to cross-examine any of the witnesses. Counsel for the petitioner was also not allowed to complete his cross-examination of the witness, K. Gnanasekaran.

The 2nd respondent decided as follows; "At this stage, I come to the conclusion that sufficient questions have been asked from the suspect K. Gnanasekeran and now I call upon the prosecution to read out the three statements of the other suspect, R.M.E.R.B. Rathnayake recorded on 6/10/2012, 11/10/2012 and 16/10/2012."The counsel for the 3rd respondent in this application submitted that the 2nd respondent had to make the above decision because, the counsel for the petitioner had repeatedly asked the same question at the custom inquiry. However, the 2nd respondent did not mention that he stopped the cross-examination because the question was repeatedly asked by the counsel. But he only observed that sufficient questions had been asked. Counsel for the respondents did not provide any examples of the repeated questions to this court. There is no legitimate reason for the 2ndrespondent to curtail the cross-examination of the defence counsel. This amounts to a breach of rules of natural justice.

When considering the facts of the case, the evidence of Gnanasekaran cannot be used to impute any allegation against the petitioner or the 6th respondent bank. The 3rdrespondent's above argument cannot be sustained.

The 3rd respondent submitted in the written submission that the original BLs had been endorsed in the name of the 5th respondent when the BL was handed over to the shipper, and the title of the goods was already passed to the 5th respondent. This argument was not pleaded in the objections and not taken up at the argument. If the BL was endorsed in the name of the buyer, the question arises as to why the buyer stole the documents from the Seylan Bank. Even if the BL was endorsed, the petitioner's intention was to hand it over to the buyer through the 6th respondent Bank when the buyer had paid the selling price to the Bank.

Availability of an alternative remedy

It has been submitted by the State that the Petitioner should be sued against the buyer and the collecting Bank, and it has failed to do so.

In the case of *Sinha Cement (Pvt) Ltd Vs Director Central Investigation Bureau Sri Lanka* CA Writ Application No: 128/2017, Justice C. P. Kirtisinghe held as follows;

"*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 Gratien 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 and equally convenient remedy available to the aggrieved party. But the rule is not a rigid one." In that case, it was held that even 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."*

When considering the facts of this case, I decide that the availability of alternative remedies does not prevent the petitioners from seeking redress in these Writ applications.

For the reasons enumerated in this judgment, we decide the forfeiture of the subject consignment of sugar under section 119 of the Customs Ordinance is without jurisdiction and null and void. Therefore, the petitioner is entitled to the relief as prayed for in paragraph (b) and (d) of the prayer to the petition.

Judge of the Court of Appeal

Pradeep Kirtisinghe J.

I agree.

Judge of the Court of Appeal.