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 Prohibition and Mandamus in terms of Article 140 of the constitution.

CA Writ Application

No. 58 / 2012

N. Ekanayake,

Carrying on a sole proprietorship business under the name, style and firm of

Midland Enterprises,

No.41,

Yatinuwara Veediya,

Kandy.

Petitioner

-Vs-

1. **Hon. Attorney General,**

   Attorney General's Department,

   Colombo 12.

2. **K.V.P. Ranjith de Silva,**

Secretary,

Ministry of Ports and Highways,

Office of Ministry of Ports,

No.45,

Leyden Bastian Road,

Colombo 01.

3. **Sri Lanka Ports Authority,**

No.19,

Chaithya Road,

Colombo 01.

Respondents

BEFORE : **Vijith K. Malalgoda, PC J. (P/CA)** and

A.H.M.D. Nawaz, J.

COUNSEL : K. Deekiriwewa with L.H. Deekiriwewa for the Petitioner.

Milinda Gunathilake, DSG, for 1st to 3rd Respondents.

Argued on : 21. 11.2014

Written Submissions on : 07.05.2015

Decided on : 25.04.2016

A.H.M.D. NAWAZ, J,

The Petitioner by way of this application seeks mandates in the nature of prohibition and mandamus against the 3rd Respondent-the Ports Authority. Whilst the prohibition sought is against a revised tariff that was introduced to be effective from 1st February 2012, being applied to charge the Petitioner for space occupied by his imported vehicles before 1st February 2012, the mandamus is to the effect that the Ports Authority must apply port charges that were applicable prior to 1st February 2012 in respect of his imported vehicles.

The issue before this Court is traceable to imports of vehicles made by the Petitioner in the year 2011. Admittedly the Petitioner in this application is engaged in the business of importation of motor vehicles. The Petitioner imported 58 vehicles in 2011 and as averred by him in his petition, he was not able to clear the vehicles within the timeframe given by the ports authority *due to unavoidable delays and due to some financial constraints* (sic). It is not disputed that the first three vehicles were imported by the Petitioner on 13th October 2011, thereafter 29 vehicles were imported by November 2011, and the rest were imported by December 2011. Even the statement of objections sets out a complete list of dates of importation in paragraph 5 thereof.

As is apparent the Petitioner had not cleared any of the said vehicles by the time he preferred this application to Court. As does happen, the imported vehicles occupy space in the premises of the Ports Authority and Sri Lanka Ports Authority-the

statutory functionary is empowered by its enabling statute-Sri Lanka Ports Authority Act No.51 of 1979 (SLPA Act) to levy charges for provision of services such as occupation of space. In fact these tariff charges are imposed by virtue of Section 37 (1) of the SLPA Act. The applicable provision is to the following effect;

> *"The charges that may be levied by the Ports Authority for the services provided by the Authority* ***shall be fixed,*** *and* ***may be revised from time to time,*** *by the Authority with the approval of the Minister who shall, before giving his approval, consult the minister in charge of the subject of Finance."*

The word **"charges"** is defined in Section 89 of the SLPA Act to include charges, rates, fees and dues of every description which the Ports authority is, ***for the time being authorized to demand***, take and recover and charge shall be construed accordingly.

Both the empowering provision to fix charges and revise them from time to time and the definitional section of "charges" make crystal clear a salient aspect namely once the charges are fixed, they become chargeable for the time being and these charges become payable on demand. This Court has to construe the charges which the Ports Authority is authorized to demand in accordance with the definition so ascribed to charges in Section 89 of the SLPA Act.

CHARGES FOR THE YEAR 2011

As the vehicles imported by the Petitioner landed in the port in the year 2011, there was a tariff that was applicable for the services of housing these vehicles in the port premises and the applicable charges have been appended to the petition as X3. It is indisputable that the Petitioner was liable to pay the applicable tariff for space given to him in accordance with these charges as days of non-clearance by

him of his vehicles lengthened since the several dates of entry of the vehicles into the country in the year 2011.

If there are other statutory rights available to the Ports Authority for non-clearance such as auctioning of non cleared vehicles, it is well within the statutory rights of the Ports Authority to pursue it. I have to state at the outset that this application does not call in question any such statutory rights of the 3rd Respondent Authority. The question before this Court in the instant application is what happens to the liability to pay unpaid port charges when the prevalent 2011 charges were revised and made known by a letter dated 13th January 2012 **(R4).** The question before this Court resolves into two mutually consistent issues which may be set down.

> *"Is the petitioner liable to pay for space occupied before 1st February 2012, according to the increased tariff that came into effect on 1st February 2012? Or as the petitioner contends, should he be permitted to pay for this space, in accordance with the tariff that prevailed before 1st February 2012?*
>
> *In a nutshell the question is whether the Ports Authority can make use of a revision that came into effect on 1st February 2012, to charge for space occupied before 1st February 2012? Viewed from another angle, is the increased revision that came into effect on 1st February 2012 retrospective? Should space occupied before 1st February 2012 be charged at the increased rate that came into effect on 1st February 2012 (the new charges or tariff)?"*

Whilst the effect of the contention of the learned Deputy Solicitor General was that the revision which came into force on 1st February 2012 entails a retrospective effect, the Counsel for the Petitioner has joined issue and contended to the contrary. Undoubtedly the Ports Authority is empowered under Section 37(1) of

the SLPA Act to fix charges and revise them from time to time. But the question before us is whether the Ports Authority is statutorily authorized to revise them with retrospective effect.

Revised Tariff for Occupation of Space with effect from 1st February 2012

By the letter dated 13th January 2012 (R4), the 3rd Respondent in this instant application Ports Authority revised the rates applicable for imported goods that were kept in its premises for longer than three days.

By R4 tariff item 46 was amended to include the following additional Tariff items for the recovery of occupational charges on imported vehicles:-

"Tariff Item

46.01.05 Imported vehicles if cleared within 3 clear days	Rent Free
46.01 Basic Charge if not cleared within the specified	US$ 0.75
Time period of 3 days (from the 1st day up to the date of cleared)	
46.01.07 Surcharge from 8th day to 14th day	US$ 1.00
46.01.08 Surcharge thereafter	US$ 1.50

Further, in the said letter, it was indicated that the rates will be **effective from 1st February, 2012 onwards.**

The said letter dated 13th January 2012 was addressed to the Ceylon Association of Ship's Agents and the Sri Lanka Association of Vessel Operators. As the Ports Authority could not possibly know of all importers, notices of the revised rates had been sent to these two Associations in the particular industry concerning imports. The letter clearly states that the rates will be effective from 1st February 2012 onwards. So the old tariff ceased to be operative from 1st February 2012. But the

old tariff would remain applicable to charge an importer for space occupied before 1st February 2012, because that is the tariff that was in force before 1st February 2012. We set down below our reasoning as to why the old charges which existed up to 31st January 2012 should apply to levy charges for space occupied up to 31st January 2012.

Why does the old tariff apply to charges leviable up to 31st January 2012?

The foremost reason is that R4 declares that the new charges will only be operative from 1st February 2012. It simply means that for space occupied from 1st February 2012 onwards, the new increased charges will apply. If SLPA space had been used prior to 1st February 2012, it would be the old tariff that should be used. There are other reasons as to why this should be so.

Section 89 of the SLPA Act defines charges to include charges, rates etc which the Ports Authority is, *for the time being authorized* to demand. Till 31st January 2012, there was in existence one tariff and the following date namely on the 1st February 2012, a new tariff came into existence. The old tariff should naturally, in accordance with the definition, be the benchmark for charging for space occupied before 1st February 2012, because that was the only tariff which was in existence "for the time being" before 1st February 2012. Clearance of an imported vehicle may take place after 1st February 2012, but for liability to pay for space occupied up to 31st January 2012, it would only arise under the old tariff which existed up to 31st January 2012 and not under the new tariff that was brought into force on 1st February 2012.

Presumption of Non Retrospectivity

This rationale also accords with common sense and logic. Because liability to pay for space had crystallized in terms of the old tariff up to 31st January 2012 and what was leviable up to 31st January 2012 has become a quantifiable and crystallized amount as at 31st January 2012.

A superimposition of the new tariff effective from 1st February 2012 for space occupied before 1st February 2012 will also militate against the legislative intent of non-retrospectivity one finds both in the charging Section 31(1) of the SLPA Act and the definition of charges in Section 89 of the Act

Presumption of Non Retrospectivity in Section 6(3) of the Interpretation Ordinance

In relation to non-retrospectivity one finds this presumption enshrined in Section 6(3) of the Interpretation Ordinance which goes as follows:-

> *"Section 6(3) Whenever any written law repeals either in whole or part a former written law, such repeal shall not, in the absence of any express provision to that effect, affect or be deemed to have affected-*
>
> *(a) the past operation of or anything duly done or suffered under the repealed written law;*
>
> *(b) any offence committed, any right, liberty or penalty acquired or incurred under the repealed written law;.."*

I have to observe that if liability or penalty incurred under a repealed law remains intact despite the passage of the repealing Act, so must a liability or penalty incurred under a repealed regulation or tariff enacted under a parent Act. Thus the liability under the old tariff could be properly described as something suffered

under the repealed tariff and its past operation will continue notwithstanding the introduction of the new tariff with effect from 1st February 2012 and the new tariff will affect the past operation only if there are express provisions to that effect in the new tariff. That could take place only if the parent Act-the SLPA Act embodies contrary provisions manifesting an intention to permit retrospectivity.

We find no such express provisions in the Sri Lanka Ports Authority Act conferring a revisionary power to impose new charges with retrospective effect.

In the circumstances any act on the part of the 3rd Respondent Authority to render applicable the new charges to space occupied before 1st February 2012 would be *ultra vires* the powers conferred in the enabling legislation and Sri Lanka Ports Authority would be acting *ultra vires* if it proceeds to apply the new tariff with retrospective effect.

In this regard the learned Counsel for the Petitioner has drawn our attention to the judgment of Sharvananda J (as he then was) in ***The Attorney General of Ceylon v W.M. Fernando***[1]. The learned Judge had this to say in regard to both *ultra vires* content of a subordinate legislation and retrospectivity.

> *"A Court has no jurisdiction to declare invalid an Act of Parliament, but has jurisdiction to declare subordinate legislation to be invalid if it is satisfied that in making the subordinate legislation, the rule-making authority has acted outside the legislative powers conferred on it by the Act of Parliament under which such legislation is purported to be made.*
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> *Subordinate legislation is always liable to be attacked by Courts on the ground that it is ultra vires, that it goes beyond the powers conferred by the*

[1] 79 (1) N.L.R 39 at pp 42-43.

enabling statute on the rule-making agency. Such subordinate resolution may be ultra vires by reason of its contents or by reason of procedural defects....

.....The doctrine that subordinate legislation is invalid if it is ultra vires, is based on the principle that a subordinate agency has no power to legislate other than such as may have expressly been conferred by the supreme Legislature. Subordinate legislation is fundamentally of a derivatory nature and must be exercised within the periphery of the power conferred by the enabling Act....

.....When the validity of delegated legislation having retrospective operation is raised, the Court will inquire further, whether the power to make regulations having retrospective operation falls within the scope of the enactment from which it purports to derive its authority....

*.....**Thus, power to legislate by regulation in a manner which may impair the liberty of the subject, or impose some form of taxation, or which would have retrospective effect, or which would exclude the subject from access to the Courts, will not readily be implied."***

It has to be remembered that the Petitioner is not calling in question the validity of the revised tariff. He does not even contend that the 3rd Respondent has made a retrospective revision. His complaint is that whilst R4 itself declares the revised tariff to be prospective with effect from 1st February 2012, the Ports Authority is seeking to render this prospective revision applicable to a past liability which remains quantifiable and intact under the old tariff.

We conclude that there cannot be a retrospective application of a revision of tariff which has the consequence of a prospective effect.

Sripavan J, (P/CA) (as he then was) made some pertinent observations in ***Fonterra Brands Lanka (Private) Ltd., v Director General of Customs and Another***[2]

> *"It is a well known and well recognized rule that in a statute imposing pecuniary burden, if there is a reasonable doubt with regard to the construction of any burdensome provision, the construction most beneficial to the subject is to be adopted."*

The revised rule in the case before us is prospective in effect. But the attempt to apply it retrospectively would attract the taint of *"ultra vires"* and illegality in the end-As Lord Diplock famously classified the grounds of judicial review in the seminal decision of ***Council of Civil Service Unions v Minister for the Civil Service***[3] he alluded to illegality thus-

> *"By 'illegality' as a ground for judicial review I mean the decision maker must understand correctly the law that regulates his decision making power and must give effect to it....."*

The fact that If a body clothed with statutory power attempts to step outside the four corners of the Act, it could be checked and halted in its attempts was clearly spelt out in the well known case of ***R v Electricity Commissioners ex p London Electricity Joint Committee Co (1920) Ltd***[4]

> *"Any statutory authority acting ultra vires could be called to order by the prerogative writs-by prohibition, to prevent them proceeding further with an*

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[2] 2008 (B.L.R) 346 at 348
[3] (1985) A.C. 374; (1984) 3 W.L.R 1174 HL
[4] (1924) 1 KB 171.

unauthorized scheme, and by certiorari to declare that any decision already taken was ineffective"[5]

Before I set down my conclusions, let me dispose of a jurisdictional issue that the learned Deputy Solicitor General raised in the course of his submissions namely a writ of mandamus cannot lie against the Sri Lanka Ports Authority-a statutory functionary.

Will Mandamus lie against a jurisdic person?

The learned Deputy Solicitor General has cited the case of ***Haniffa v The Chairman, Urban Council, Nawalapitiya***[6] for his proposition that mandamus cannot lie against a juristic person such as the Sri Lanka Ports Authority. In fact Tambiah J (with Sri Skanda Rajah J agreeing) stated;

"I fail to see how we can issue a mandamus on a juristic person. A mandamus can only issue against a natural person. If such a person fails to perform a duty after he has been ordered by Court, he can be punished for contempt of court."

But the law seems to have moved away. Today, a juristic person, no less than a natural person, can be commanded by mandamus to carry out its public duty-see ***Abeydeera v Dr.Stanley Wijesundera***[7].

This modern trend has been echoed by the learned authors of the well known tome on administrative law-H.W.R. Wade & C.E. Forsyth in several editions of their

[5] Also see this passage cited at p 514 of *Administrative Law* by Wade & Forsyth (Eleventh Edition)
[6] 66 N.L.R 48
[7] (1983) 2 Sri.LR 267, 279-280.

treatise *Administrative Law* and the Eleventh Edition of the work captures the perceptive observations of the celebrated jurists at p522.[8]

> *"Although the older authorities have not been invalidated, mandamus has in practice acquired a more precise scope than that which Lord Mansfield advocated. Modern government is based almost exclusively on statutory powers and duties vested in public bodies, and a mandatory order is the regular method of enforcing the duties. The plethora of ancient and customary jurisdictions no longer exists. The introduction in the nineteenth century of the modern system of local government, and the provision by the state in the twentieth century of social services and benefits which were previously a matter for private charity, have sharpened the distinction between bodies and activities which are governmental and those which are not..."*

It is in this context that Wade & Forsyth state in the same breath.[9]

> *"Within the field of public law the scope of a mandatory order is still wide the court may use it freely to prevent breach of duty and injustice"*

Darling J's dictum in ***R v Hanley Revising Barrister***[10] is pertinently cited to drive home the point that no shackles should be placed on the issue of this constitutional remedy.[11]

> *"Instead of being astute to discover reasons for not applying this great constitutional remedy for error and misgovernment, we think it our duty to be*

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[8] See Administrative Law , Eleventh Edition (2014)
[9] Ibid at p522
[10] (1912) 3 KB 518 at 529
[11] See Administrative Law, Eleventh Edition, Wade & Forsyth p522

vigilant to apply it in every case which, by any reasonable construction, it can be made applicable."

So we reject the argument that mandamus cannot lie against a public body such as the Sri Lanka Ports Authority.

We have already commented on the availability of prohibition. The writ is available to prevent an officer or authority from proceeding, in a given matter, to exercise a power which it does not have under the law, or to act in violation of the rules of natural justice where the law requires such officer or authority to obey them.

Conclusion

We have already concluded that the new tariff which was introduced with effect from 1st February 2012 could only have prospective effect. It can be used only to levy occupational charges from importers whose vehicles begin to occupy space of the Sri Lanka Ports Authority from the date of commencement of the new tariff namely 1st February 2012. It has no retrospective effect to extend to cases where occupational charges accrued under the old tariff which expired on 31st January 2012. Any attempt to use the new tariff to cover any period of occupation prior to 1st February 2012 would be *ultra vires* the Sri Lanka Ports Authority Act.

In the circumstances, this Court would proceed to issue a writ of prohibition against the Ports Authority applying the revised rules to enhance the liability of the Petitioner to pay leviable charges due before 1st February 2012. As for space occupied prior to 1st February 2012 it is the old tariff that would apply.

The Petitioner does not disclose in his application that he has demanded the public duty of conforming to the applicable tariff as far as he was concerned and there was a refusal of that duty. Since we have set down the duty owed and the writ

issues to prohibit any *ultra vires* act outside the statutory powers it is futile to grant a writ of a mandamus. In the circumstances, this Court is disinclined to issue a writ of mandamus in view of the clear legal position we have taken of the revised tariff.

JUDGE OF THE COURT OF APPEAL

Vijith K. Malalgoda, P.C. J. (P/CA)

I agree

PRESIDENT OF THE COURT OF APPEAL