

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

**In the matter of an application in
the nature of Writs of Mandamus,
Certiorari and *Prohibition* under
article 140 of the Constitution of
the Democratic Socialist Republic
of Sri Lanka.**

1. Eco Tech Create 21 Company (Pvt) Ltd
2. Mr. Laknath Boteju
Director

The Petitioners of No. 249,
Kumbulapitiya Road,
Andiambalama.

Petitioners

CA WRIT 127/2017

Vs,

1. Mr. Chulananda Perera
Director General – Customs.
2. Mr. .R.D.A.M.G. Niyerepola
Deputy Director – Customs.
3. Assistant Suprintendent of Customs
Biodiversity, Cultural and National Heritage
Protection Branch.

1st to 3rd Respondents of;
Sri Lanka Customs
No. 40, Main Street,
Colombo 11.

4. Mr. Anura Sathurusinghe
Conservator General of Forests,
Forest Department.
5. Mr. Udaya R. Seneviratne
Secretary, Ministry of Mahaweli
Development and Enivironment.

4th and 5th Respondents of;
82, Sampathpaya, Rajamalwatte Road,
Battaramulla.

- 45 6. Mr. W.S.K. Pathirathne
Director General,
Department of Wildlife Conservation,
811/A, Jayanthipura Main Rd,
Battaramulla 10120.
- 50 7. Mr.R.M.D.B.Meegasmulla
Secretary,
Ministry of Sustainable Development and
Wildlife,
9th Floor,
Sethsiripaya, Stage 1,
Baththaramulla.
- 55 8. The Board of Investment of Sri Lanka.
Level 26,
West Tower, World Trade Centre,
Colombo 01.

Respondents

60 **Before : L.T.B. Dehideniya, J (P/CA) &
S. Thurai Raja PC. J**

**Counsel :Lakshman Perera PC with Pulasthi Hewamansa for the
Petitioners
Milinda Gunetilleke DSG for the 1st to 7th Respondents
Upul Jayasuriya, PC with Varuna Senadhira for the
65 8th Respondent**

Order on : 31st August 2017

Order

S. Thurai Raja, PC. J.

- 70 The Petitioners made submissions in support of issuance of notice and interim relief,
the 8th Respondent Board of Investment also supports the application and the interim
relief of the petitioners. Other respondents who were represented by the Attorney
General vehemently objecting for the issuance of the same. All parties made
submissions and filed written submissions.
- 75 The Petitioner claims, that it is a Board of Investment (BOI) registered company which
engages in manufacturing and exporting of Medicinal property with main contention of
Salacia reticulata, locally known as *kothalahimbutu*. The company had exported twice
with small quantities and on the third occasion Sri Lanka Customs department had
refused to grant necessary clearance and approval. On aggrieved of the refusal of the
80 Customs the petitioners had sought relief from this court.

Petitioners had filed the first petition dated on the 3rd April 2017 and on the 2nd May 2017 sought permission of the Court to amend the petition and the amended petition was filed on the 4th May 2017.

Summary of the relief sought by the petitioners were as follows:

- a. A writ of Certiorari quashing the decisions rescinding the purported approvals to export the consignment of value added powder form *Salacia reticulata* locally known as kothalahimbutu which was sought to be exported on or around February 2017.
- b. A writ of mandamus directing the 1st and/or 2nd and/or 3rd Respondents to permit the petitioners to export their consignments of Value added, Powder form *Salacia reticulata* (Kothalahimbutu) Subject to conditions made to the petitioners (by P6(a) to P6(d)),
- c. A writ of Prohibition preventing the 1st to 3rd respondents from interfering in the Petitioners lawful business, as regulated by Law,
- d. To issue a writ of Certiorari quashing the decision in P14(a) which in effect prevents the Petitioners from exporting the produces.

Interim relives prayed are as follows:

- i. Preventing the 1st to 3rd Respondents from restraining the Petitioners from exporting their value-added powder form *Salacia reticulata* until the final determination of the application,
- ii. Staying the 1st to 3rd Respondents from refusing to permit the petitioner to export their consignments of the said value added powder until the final determination of the application,
- iii. Staying the operation of letter marked P14(a),
- iv. Preventing the 6th Respondent from imposing any new terms and or conditions of export the powder contrary to P6 (d) till the determination of the application.

The 8th Respondent supports the claims of the Petitioners and submits that:

".. Once an agreement is entered into between and investor and the 8th respondent the 1st to 3rd Respondent or any one or more of them does not have the power nor jurisdiction to take any steps scuttling the processes of the investment agreement unless otherwise with the specific instructions as conveyed by the 8th Respondent after having notified the 8th respondent of any infringement either expressly manifest or purely speculative,"

The Learned President Counsel who appeared for the 8th Respondent supported his argument with the Supreme Court decision in **Ceylon Quartz Industries (private) Limited Vs. The Director General of Customs and others (SC Appeal No. 79 of 2002 decide on 04-10-2012)**, her Ladyship Shirani Bandaranayake C.J. held that,

"The position therefore is quite clear. Business Enterprises were invited to enter into agreements with the BOI offering different types of concessions for them. This included in terms of Clause 10 (ix) concession from export duty and any Custom or export control. To obtain such concessions, it would be necessary that the relevant goods and articles are manufactured

125 *or produced in accordance with the Agreement. It is also necessary to refer*
to the provisions of Clause 10(ix). It provides for any Governmental
authority to examine the correctness of any declaration made. However this
is subject to the condition that such authority should be exercised in the
manner as directed by none other than the BOI"

130 It was further held that,

"..In terms of the said Agreement, as stated earlier the goods manufactured
under the said Agreement could be exported free of export duty and any
custom or export control and if any Governmental authority is to examine
the correctness of any declaration made and for such purpose exercise
135 *such power in such manner", the said direction should be given by the BOI."*

The 8th Respondent conclude by submitting that it is the 8th Respondent and the 8th Respondent alone that has the responsibility to ensure that the petitioners have duly complied with the provisions of the agreement and by extension the laws of the land.

140 The 1st to 3rd respondents do not have the authority or power to make decision or determination in respect of exports of an exporter which is a Company registered with the 8th Respondent in respect of any issue arising out of such goods.

It will be appropriate to see the sequence of events before we proceed further.

- ❖ On the 25th May 2006 The Petitioner signed an agreement with the BOI. As per the agreement (P3a) the petitioner sought permission to export only the dried leave of *Salacia reticulata* (Kothalahimbutu) grown in its own plantation.
- ❖ On the 2nd October 2009 Petitioners signed an amended agreement with BOI, which permitted the Petitioners to manufacture value added products in addition to the original export of dried leaves.
- 150 ❖ On the 26th April 2013 the agreement between the Petitioners and the BOI was further amended and the Petitioners were permitted to manufacture medicinal preparation at least one other ingredient in addition to extracts of the *Salacia reticulata* stem, and permission to obtain raw material from lands owned by Petitioners or private lands.
- 155 ❖ On the 24th February 2017 the Department of Customs refuses to export the Petitioners value added *Salacia reticulata*.
- ❖ On the 30th March 2017 the 6th Respondent Director General of Wild Life, informed the Department of Customs that he has no objections to export "the medicinal preparations produced the stork of Kothalahimbutu, released by the Magistrate Court of Vavuniya. He further said that, there is no legal provisions to allow to extract *Salacia reticulata* from any State or private land for commercial purpose, under the Fauna and Flora protection ordinance as amended.
- 160

165 Before, I proceed further it will be appropriate to see some of the communications between the Petitioners and the State agencies as submitted by the Petitioners.

- On the 12th May 2008 the Secretary of Ministry of Indigenous medicine had replied and informed to the Petitioner that, Commissioner of

Ayurveda has no objections to manufacture Ayurvedic preparation using leaves and parts of kothalahimbutu with one another ingredient as per the provisions of the extra ordinary gazette notification No. 1449/16 issued on 15th June 2006. (P6 a)

- On the 11th June 2009 the Conservator General of Forest had replied to the Petitioner that, any products made out of kothalahimbutu (*Salacia reticulata*) could be allowed to be exported if the raw material is obtained from private lands only. Further it was mentioned that the petitioner, in addition to make arrangements to get the private lands registered in advance with the Forest department. (P6 b)
- On the 9th February 2012, the Secretary to the Ministry of Environment had replied to the Petitioner that approvals are to be obtained from the ministry of Agrarian Services and Wildlife. He further informed the Petitioner as follows: ' in order to ensure the protection of kothalahimbutu trees which are in the forest lands, harvesting of Kothalahimbutu from the private lands should be carried out under the close supervision of the officials of the Forest department. In case of the kothalahimbutu products are exported, necessary approvals should be obtained from the Forest Department as well.' Also he had said that the Petitioner to inform the officials of the Forest Department in the harvesting stage of the Kothalahimbutu trees. (P6 C)
- The Secretary of Ministry of Agrarian Services and Wildlife, replied and inform the Petitioner on the 23rd February 2012, that In order to protection of Kothalahimbutu trees, harvesting will be allowed only from the private lands and should be carried out under the close supervision and prior approval of the Conservator General of Forest. Further it is also mentioned that planting, harvesting, drying, transporting and storage should be under supervision and prior approval of the Conservator General of Forest. (P6 D)
- Customs authority had rejected the clearance and approval for export on the 24th February 2017. (P9)
- The Director General of department of wildlife conservation had written to the Director General of Customs with copies to the Petitioner on the 30th march 2017, that, he has no objection to export the medicinal preparations produced the stork of Kothalahimbutu, released from the Magistrate of Vavuniya. Further he had said that there is no legal provisions to allow to extract *Salacia reticulata* from any State land or private land for commercial purposes, under Fauna and Flora protection Ordinance. (P14 [a]).

The Petitioner submits that the Director General of wildlife taking up the above position (P14a) is completely contrary to the previous position taken by the State.

The Petitioners also submits that the Regulations passed in 2006, (marked P13) discloses the policy of the State regarding exporting of *Salacia reticulata*, it is the Petitioners position that considering, both the 2006 Gazette notification and the amendment to the substantive act in 2009, there is no change in the substantive law.

Learned Deputy Solicitor General (DSG) submits, that the agreement entered between the Petitioner and the BOI gives certain preferences to the Petitioner, but it is subject to prevailing laws. Schedule B of the Customs Ordinance lays down restrictions and prohibitions relating to exportation. Under the heading of "Table of prohibitions and restrictions outwards", it says "... Articles the exportation of which is prohibited by any enactment or any legal order now in force or hereafter to be enacted, any rules regulations, notifications, proclamations, or orders made or issued thereunder..."

When we consider the legal position of the subject matter (Salacia reticulata locally known as Kothalahimbutu), as at 25th May 2006 (The day the petitioner entered into an agreement with the BOI regarding exporting of the dried leaves of Salacia reticulata) there is no express prohibition of dealing with Salacia reticulata.

Section 42 of Fauna and Flora Protection Ordinance No. 44 of 1964 (as amended), reads as follows:

*PART IV
FLORA*

42. (1) No person shall in any area-

(a) remove, uproot or destroy, or cause in schedule". which is for the time being included in Schedule V and

(i) is the property of any other person; or

(ii) is growing in any public place;

(b) destroy any which is for the time being included in Schedule V and is his own property; or

(c) sell or expose or offer for sale any plant for the time being included in Schedule V,

except upon a permit in the prescribed form obtained from the prescribed officer on payment of the prescribed fee.

(2) If no fee is prescribed for the issue of a permit for the purposes of subsection (1), that permit shall be issued free of charge.

Schedule v (Section 42)

Family – Hippocrateaceae : Hippocratea arnottiana

Hippocratea macrantha

On the 15th June 2006, the Minister of Environment who is in charge of the subject of Protection of Fauna and Flora, promulgated a regulation under section 71 to be read with Section 45 of the said act, it reads as follows; (Gazette number 1449/16 marked as P13)

1. These Regulations may be cited as the Fauna and Flora (Prohibition of export) Regulations No 01 of 2006

2. No person shall export any material of all Salacia species hereto mentioned in the schedule below excluding dried leaves and, medicinal preparations containing at least one other ingredient in addition to the extracts or parts of Salacia species.

- i. Salacia reticulata
- ii. Salacia chinensis
- iii. Salacia diandra
- iv. Salacia oblonga.

260 When the Petitioner signed the agreement with the BOI, it was for exportation of dried leaves collected from their own private land. (There are many other conditions stipulated in the said agreement). Considering the law and the agreement there is no conflict.

265 The substantive ordinance was amended by Act No. 22 of 2009 (Certified on 20th April 2009). Among other amendments Section 42 also amended as follows;

Section 42 of the principal enactment is hereby amended as follows: -

270 (1) by the renumbering of that section as subsection (1) thereof; (2) by the insertion immediately after the renumbered subsection (1), of the following new subsection:— “(2) Any person who contravenes the provisions of subsection (1) of this section shall be guilty of an offence and on conviction be liable to a fine not less than ten thousand rupees and not more than twenty thousand rupees or to imprisonment of either description for a term not less than two years and not exceeding five years or to both such fine and imprisonment.”.

275

SCHEDULE VIII

(Section 42)

List of Plants that are protected

Family: Hippocrateaceae			
Scientific Name	English	Sinhala	Tamil
Loeseneriella arnottiana			
Loeseneriella macrantha		Diya kirindiwel (S)	
Salacia oblonga			
Salacia reticulata		Kotala-himbutu, Himbutu wel (S)	
Salacia diandra			
Salacia chinensis		Heen-himbutu (S)	

280 On a mere reading of the law and the regulations I understand that, growing of Salacia reticulata on private property can be removed, damage, uprooted or damaged. Which does not attract any penal provisions. But Destruction, sale or expose to sale of the said Salacia reticulata is not permitted and invites penal provisions.

I am of the view that the ordinary regulations promulgated in 2006 will also come within the restriction of the amendment passed in 2009.

285 The medicinal concoction derives from *Salacia reticulata*, which is a scheduled plant for the purpose of Section 42 of the Fauna and Flora Ordinance. The said section lays down prohibitions and restrictions relating to the plants mentioned in the schedule. Section 42(b) impose a specific prohibition of destruction of a schedule plant, wherever it is found. Whether it is State owned or private land destruction is strictly prohibited.

290 The Petitioners state that the production of this medicinal commodity is in the context of an enterprise with respect to which an agreement was entered into between the BOI and the Petitioner. The argument presented is that, in terms of agreement the customs department has no authority to question or investigate any consignment sought to be exported by the enterprise. In light if Schedule B of the Customs Ordinance lays down
295 the restrictions and prohibitions relating to exportation.

Considering the arguments put forward by Counsels for the 8th Respondent (BOI), Petitioner and other Respondents, I agree that the BOI has the power to confer certain special privileges to the investors. It is provided in Section 17 of the BOI act.

300 “ (1) *The Board shall have the power to enter into agreements with any enterprise in or outside the Area of Authority and to grant exemptions from any law referred to in Schedule B hereto, or to modify or vary the application of any such laws, to such enterprises in accordance with such regulations as may be made by the Minister.*

305 *(2) every such agreement shall be reduced to writing and shall upon registration with the Board, constitute a valid and binding contract between the Board and the enterprise.”*

Considering the Act and its schedules I find that the privileges are limited to revenue and exchange control matters. It does not extend to cover the provisions set out in Fauna and Flora Protection Ordinance.

310 I am mindful of the decision of the Supreme Court in Ceylon Quartz Industries (pvt) Ltd., case. Considering the Legal provisions stated in the Fauna and Flora protection Ordinance does not come with in the purview of the BOI, hence they cannot Grant any concessions to anyone. When a matter is prohibited by a statute no agency has the power to grant permission to export.

315 Section 42(b) of the ordinance expressly prohibit the destruction of any scheduled species (as listed), even if it is found in one's own / private property. *Salacia reticulata* is also a scheduled plant under the Schedule viii of Section 42.

320 The learned DSG claims that this is a bio piracy, and submits that, Kothalahimbutu is a botanical resource indigenous to Sri Lanka which the respondents, particularly the Department of wildlife Conservation are anxious to protect from exploitation by foreign agents. It is for this reason that several restrictions have been imposed on the destruction and removal of the plant and the manufacturing and export of any commodity utilizing any part of the plant.

325 Kothalahimbutu is believed to have staggering pharmacological properties that are still
being researched. It is believed that kothalahimbutu can be used to manufacture highly
efficacious therapeutic products that will likely generate astounding profits. Thus, it is
vital that local government agencies take special measures to ensure that the ultimate
beneficiary is the people of Sri Lanka and not some foreign based private enterprise.

330 Considering many previous incidents I tend to agree with the State. In the present
case, the Petitioner had signed an agreement to export dried leaves of kothalahimbutu
on the 25th May 2006, I presume, that they have done their feasibility study of their
profit returns. It was agreed at that time to allow export of dried leaves of
kothalahimbutu, and there is no change of stance by the State hence there is no
335 betrayal to investors by the State or State agencies. It appears the Petitioners had
change their plans the reason better known to them, for which, the State cannot be
held responsible.

Presently the petitioners are depending on the stock they received from the Magistrate
Court of Vavuniya, of which was obtained from the State land. Up to now the
Petitioners had not shown any evidence that they have obtained at least a leaf from
340 their own private plantation as they promised at the entry stage. I am of the view that
the Petitioners are not presented a prima facie case for the court to issue notice on
the Respondents (Excluding the 8th Respondent). Hence, I refuse to grant notice and
any interim relief.

Notice refused, no cost ordered.

JUDGE OF THE COURT OF APPEAL

L.T.B. Dehideniya, J (P C/A)

I agree,

PRESIDENT OF THE COURT OF APPEAL