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

In the matter of an appeal under Section 754 of the Civil Procedure Code as amended.

C.A. Case No.810/1999 (F)

D.C. Colombo Case No.3371/SPL

Angelo Sebastian Pereira
P.O. Box 4306, Dubai,
United Arab Emirates.
PLAINTIFF

-Vs-

Hon. The Attorney General,
Attorney General's Department,
Hulftsdorp Street,
Colombo 12.
DEFENDANT

NOW

Angelo Sebastian Pereira
P.O. Box 4306, Dubai,
United Arab Emirates.
PLAINTIFF-APPELLANT

-Vs-

Hon. The Attorney General,

Attorney General's Department,

Hulftsdorp Street,

Colombo 12.

DEFENDANT-RESPONDENT

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

COUNSEL : Basheer Ahamed with A.A.M.Illiyas, Sanjaya Wilson Jayasekera, Tharindu Sampath Rathnayaka and Suhadini S. Punchihewa for the Plaintiff-Appellant

Vikum de Abrew SDSG with Yuresha Fernando SSC for the Defendant-Respondent

Decided on : 20.12.2019

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

This appeal preferred by the Plaintiff-Appellant (hereinafter sometimes referred to as the Plaintiff) against the Honourable Attorney General as representing the state raises the following questions:

1) Was the plaintiff the owner of 50 slabs of gold forfeited by the customs on 15 July 1991?
2) Does he have *locus standi* to file action?
3) Has he imported the 50 slabs of gold into the country?

Thus the question of ownership of the 50 slabs of gold and whether the Plaintiff-Appellant imported gold into this country figure prominently in this appeal. The facts, as evidently manifested in the pleadings and evidence, disclose the initial story of the Plaintiff- an

Indian national- having disembarked at the Katunayake Airport from an Air Lanka flight from Dubai to Madras and being stopped by customs officers for questioning on his way to the transit terminal of the airport. The Plaintiff who had been *en route* to Madras arrived in the wee hours of the morning on 15,07.1991 and was proceeding to the transit lounge when he was accosted by the customs officers. His connecting flight to Madras had been scheduled several hours after his arrival.

The evidence is that two officers of the customs department on duty inside the terminal building at the airport stopped the Plaintiff and another person by the name of Mohamed Marsoof on suspicion. Upon being questioned whether he had any valuables in his possession, the Plaintiff stated that he was carrying gold to Madras. Thereupon one of the customs officers took him, with his briefcase and passport, to the customs office at the airport and began interrogation to ascertain where the gold was. The Plaintiff said that the gold was in his brief case, which was subsequently opened and lo and behold, there were 50 slabs of gold at the bottom of the briefcase. An inquiry followed on the same day namely 15.07.1991 and the 50 slabs of gold valued at Rs 3, 217, 500 were forfeited and a penalty of Rs 9, 652, 500/=, being three times its value, was imposed on the Plaintiff by an order dated 15.07.1991-see admissions to this effect at p 61-62 of the appeal brief. The forfeiture is averred in the answer of the Defendant-Respondent to be justified under Section 125 of the Customs Ordinance-see the Seizure Notice dated 15.07.1991 **(P1)** at page 267 of the Appeal brief. In addition to the above provision, further justification for the forfeiture is attributed to Sections 12, 43, 107 (a) (1) of the Customs Ordinance and Sections 21 (1) and 21 (2) of the Exchange Control Act-see paragraph 20 (ii) of the answer dated 30th March 1992.

The Plaintiff was thereafter taken to the Katunayake Police and produced before the Magistrate's Court of Negombo on 16.07.1991 and remanded. The penalty of Rs 965, 2500 was later mitigated to Rs 100, 000, which sum the Plaintiff paid. The payment of Rs 100, 000 is evidenced by **P2** dated 07.08.1991. The witness for the Customs-one Anura Gunatilleke giving evidence stated to Court that the fact of payment of the mitigated

penalty was brought to the notice of Court and no action was filed against the Plaintiff. It would thus appear that there was no institution of MC proceedings against the Plaintiff as he had paid the penalty of Rs 100, 000.

On 10.08.1991 the Attorney at Law for the Plaintiff gave notice of an intended action under Section 154 of the Customs Ordinance to the Director General of Customs by **P3** in which there is a claim that the 50 slabs of gold belonged to the Plaintiff. In a section 461 notice of even date given under the Civil Procedure Code to the Attorney-General (**P4**), it was asserted that the 50 slabs of gold belonged to the Plaintiff. By **P5** dated 20.08.1991, the Deputy Director of Customs (Baggage) nominated a sum of Rs 25, 000 as security for the cost of the action, which sum had been paid too, as evidenced by **P6**-see page 274 of the Appeal Brief.

It was subsequent to these steps that the Plaintiff instituted this action by his plaint dated 13.09.1991. The plaintiff prayed, *inter alia*, for the following remedies:

a) a declaration that the Plaintiff is the owner of the 50 slabs of gold:
b) the order of forfeiture of the 50 slabs of gold 's wrongful, unlawful and contrary to law:
c) An order for the delivery of the said 50 slabs of gold to the Plaintiff:
d) an order that the sum of Rs 100, 000 paid as mitigated penalty be refunded:
e) an order for damages in a sum of Rs 2 million.

On the same day as the plaint was filed on 13.09.1991, the Plaintiff filed an affidavit declaring his oath of ownership to the gold, as required under section 155 of the Customs Ordinance-see ***Govindasamy v Attorney-General*** (1980) 2 Sri.LR 278; on the directory nature of the oath of declaration see ***S.M.Seyadu Ibrahim v The Attorney-General*** 78 N.L.R 301.

The argument in this Court focussed principally, as I have set out earlier, on the question whether

(1) the Plaintiff was the owner of the 50 slabs of gold and

(2) He had imported into Sri Lanka the sovereign articles.

It would appear that Sections 154 and 155 of the Customs Ordinance allude to an owner of goods of forfeited goods giving notice and affirming an oath of ownership, prior to the institution of proceedings and it is crystal clear that the question of ownership of the forfeited gold must be gone into before its importation or otherwise is considered. The declaratory relief sought is that the Plaintiff is the owner of the goods and that the forfeited sovereign must be restituted. I shall then appraise and evaluate the arguments on ownership.

Ownership of the gold

On the question of ownership the learned Senior Deputy Solicitor General (SDSG) Mr.Vikum de Abrew contended that the assertion of ownership to gold put up by the Plaintiff must be rejected because the Plaintiff has taken up two contradictory stances on ownership. In a prior statement made to the Customs on 15.0.07.1991 (the date of his detention in Sri Lanka), the Plaintiff claimed that he was carrying the gold on behalf of one Mohamed who was the owner of the gold. It was on the instruction of that person that he was conveying the gold to Madras to be given to a person who would show up at the airport in Madras and identify himself. The Plaintiff was to derive a benefit of Indian Rupees 50,000 for the carriage of the gold.

This was the pith and substance of the statement made by the Plaintiff to the Customs, which was marked at the trial as **D1**-see p308 of the Appeal Brief. The learned SDSG contrasted this position vis a vis the subsequent assertions of the Plaintiff at the trial. At the trial the Plaintiff claimed that he was the owner of the 50 slabs of gold. In a nutshell the contention of Mr. Vikum de Abrew is that the stance taken by the Plaintiff at the trial contradicts his prior statement and therefore his version of ownership must be rejected. In other words there was a material contradiction on the issue of ownership that tilts the probabilities against the Plaintiff on the declaratory relief and the learned District Judge of Colombo has himself dismissed the action by answering the issue on ownership (Issue No 16) against the Plaintiff in the following tenor:

Not sufficient evidence on ownership-see the Issue at page 72 and the answer thereto in the judgment at page 257 of the Appeal Brief.

Before I come to the rival arguments put forward by Mr.Basheer Ahamed for the Plaintiff-Appellant, let me make my observations on the contention of the learned SDSG having regard to the provisions of the Evidence Ordinance in relation to contradictions.

CROSS-EXAMINATION AS TO PREVIOUS STATEMENT IN WRITING

Section 145 of the Evidence Ordinance enacts:

(1) *A witness may be cross-examined as to previous statements made by him in writing or reduced into writing and relevant to matters in question without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.*

(2) *If a witness, upon cross examination as to a previous oral statement made by him relevant to matters in question in the suit or proceeding in which he is cross-examined and inconsistent with his present testimony, does not distinctly admit that he made such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he made such a statement.*

Section 155 (c) of the Evidence Ordinance enables the credibility of a witness to be impeached vis a vis his previous statement. Section 145 and section 155(c) should be read together, though they deal with different aspects of the same matter. The points of distinction between them are as follows:

(a) Section 155(c) permits the credit of a witness to be impeached by proof of former statements that are inconsistent with any part of his evidence, but it lays down no procedure for the purpose. But section 145 lays down that procedure.

(b) Section 155(c), therefore, presupposes the existence and binding effect of section 145, and in a sense controlled by the provisions of section 145.

The scope of section 145 and the reasons for questioning a witness as to his previous statements are twofold:-

(a) to test his memory, and

(b) to contradict him.

Section 145 enacts that if it is intended to contradict a witness with his prior statement, his attention should be called to the writing-see ***Kanu vs. State*** A.I.R. (1971) S.C. 2256. It is not sufficient to ask a witness whether he did or did not make a certain statement *unless the witness in answer to the question admits that he made such a statement.* In that case, if the statement is contradictory of something else which the witness has said, it is the duty of the cross-examiner *to give the witness an opportunity of reconciling his statement.* If the cross-examiner does not do so, counsel for the plaintiff may, on re-examination, give that opportunity or the Court itself should do so.

In ***Tennekoon vs. Tennekoon*** (1975) 78 N.L.R. 13 at p.15, Malcolm Perera J. observed that, "Section 145 of the Evidence Ordinance requires that if it is intended to rely on a previous statement to contradict a witness, his attention must be called to those parts of the statement which are to be used for contradicting him. The witness must be afforded every opportunity to address his mind to the relevant portions of the statement and **every occasion given to him to explain or reconcile his statements**. If such an opportunity is not given to the witness, the contradictory writing cannot properly be admitted in evidence. The witness must be treated with fairness and should be afforded every opportunity of explaining the contradictions after his attention has been drawn with

clarity and in a reasonable manner. It is a question of fact in each case whether there has been a substantial compliance with the requirements of section 145."

A similar view was expressed by Weerasuriya J. in the case of ***Tikiri Banda vs. Pathuma Beebee and Another***, 1998 (3) Sri L.R. 46, where he said that "Further, attention of the witness was not drawn to this portion of the statement to enable her to explain the discrepancy. It is to be noted that section 145(1) of the Evidence Ordinance requires that the attention of a witness must be drawn to any portion of a statement which is inconsistent, to enable the witness to explain the inconsistency before such portion could be produced as a contradiction."

So the golden rule is that a witness can be contradicted with his prior inconsistent statements. But before this takes place, his attention must be drawn to those parts of the statement with which he is sought to be contradicted. He should also be given an opportunity to explain the discrepancy. It would not necessarily mean that the statement must be shown to the witness but it would suffice for the purpose if his attention could be driven home to those parts.

Sections 145 and 155 (c) are uniformly applicable to both civil and criminal trials and the profundity of criminal jurisprudence on contradictions will hold true in civil proceedings as well. It repays attention to pay heed to the above procedure emphasized by Asoka De Z Gunawardhana J in ***Gamini Sugathsena v the State*** (1988) 1 Sri.LR 408, which was indeed an appeal in a criminal case.

The rule in subsection (1) of Section 145 of the Evidence Ordinance is in the nature of an exception to the general principle that all uses of the contents of a written instrument must be forbidden until the instrument itself is produced. But there is a caveat to the application of the application of Section 145 (1). *Every opportunity must be given to the witness to explain the inconsistency between his prior statement and testimony.* The question is whether all this has happened in this case.

The attention of the Plaintiff was indeed drawn to the material parts of his statement in the course of his cross-examination. The witness admitted to making the statement. The witness admitted that the bag containing gold was given by one Mohamed in Dubai. Save for saying that the bag was given to him by Mohamed in Dubai, there is no other assertion in the statement that he was the owner of the goods. One can even go to the extent of saying that there was an omission to assert ownership in the prior statement made on 15.07.1991. But less than a month later on 10th August 1991, in both his section 154 notice to the Director General of Customs and 461 notice to the Attorney-General, the Plaintiff categorically asserted ownership to the forfeited goods in addition to averring the same in his plaint. He again articulated his claim to ownership in his evidence in chief. As could be expected, in the course of the cross examination the Counsel for the state confronted him with his inconsistent statement made to the Customs. The inconsistent statement was marked as **D1**.

At this stage I must pause to observe that a contradiction, albeit proved against a witness, is not substantive evidence. Substantive evidence which is either relevant evidence or facts in issue is found in Sections 6 to 55 of the Evidence Ordinance. Sections 145 and 155 (c) of the Evidence Ordinance are far away from Sections 6 to 55 and would not constitute substantive evidence. This legal position notwithstanding, evidence emanating through Sections 145 and 155 (c) will go to credibility of the witness and if the witness has explained away the inconsistency satisfactorily, the so called contradiction marked or omission pointed out would not have been proved. So the question arises whether the Plaintiff reconciled the differing versions.

Has the Plaintiff explained the inconsistency?

In the course of the cross-examination itself the Plaintiff proceeded to explain as to why he did not claim ownership of the gold in his statement marked as **D1**. The evidence pertaining to this is found at pages 119 and 121 of the Appeal Brief. The Plaintiff laid the blame for inconsistency fairly and squarely on the customs officers. Though a suggestion

was made that he fabricated the statement, he attributed it to the interrogating officer. The question and answer at page 121 throw some light on this aspect of the matter.

Q: *Are you telling us that the only reason for you to make a false statement was because somebody told you to do so?*

A: *Yes. I have to pay Rs.9.5 million. If I say it is my gold and I had no way to get out.*

Q: *So you did something incorrect under pressure?*

A: *Yes*

Quite poignantly the following question and answer at page 119 of the Appeal brief bring out the same allegation.

Q: *Did you consider that it was incorrect for you to make a false statement?*

A: *The Customs Officer told me. That is the reason I said so.*

Thus there was evidence of inducement and pressure that was proffered by the Plaintiff-Appellant. In my view these are items of evidence that are emphatic explanations but they were not contradicted at all by the Defendant-Respondent in rebuttal. The only witness who gave evidence for the Defendant-Respondent Mr. Anura Gunatilake was not called upon to address the explanation. This witness for the Defendant-Respondent was emphatic that he was nowhere there when the statement of the Plaintiff was recorded-see p212 of the Appeal Brief. If Mr.Anura Gunatilake was not competent to rebut allegations of undue pressure, the recorder of the statement could have been summoned to give evidence in order to impeach the explanation offered by the Plaintiff as to why he did not claim ownership of the gold in his statement. Therefore it is quite clear that the statement marked as **D1** does not establish that what was recorded in the statement as to ownership of the gold represents the correct position. The assertion that the because of the pressure exerted the Plaintiff did not utter the truth as to his ownership, has to be accepted because

there was a duty to speak on the part of the Defendant's witnesses in view of this allegation but they chose to remain silent. When there is a duty to speak, silence must be interpreted to mean an admission.

As **Peter Murphy on Evidence, 8th Ed., p. 597-598,** comments, there are two direct consequences of a failure to cross examine a witness or offer evidence in contradistinction to the evidence that has already been given. One is purely evidential in that, "failure to cross-examine a witness who has given relevant evidence for the other side is held technically to be an acceptance of the witness's evidence in chief."

So silence in the face of an allegation of undue pressure has to amount to its acceptance and the statement **D1** without more will not avail the Defendant-Respondent to disprove the claim of ownership that the Plaintiff has put forward. In this connection see **C.A.Case No 20/99** ***Athambawa Uthumanachi v Mohamed Thamby Asiya Umma*** (D.C.Kalmunai No 2079/L) and **CA Kananke Acharige Mithrananda (5th Defendant-Appellant) v Manage Sardajeewa and Others C.A. Case No. 722/1999 (F)** D.C. Tangalle Case No. P/3194, where this Court utilized Peter Murphy's comments.

So on a balance of probabilities it all boils down to the position that the Defendant-Respondent has not been successful to disprove the allegation of undue pressure. So the contradiction or omission remains unproved. The oral testimony of the Plaintiff as to his ownership remains unshaken because it is on a balance of probabilities that an issue in a civil trial is determined.

What else is there to establish ownership other than the oral testimony? A receipt for the purchase of gold was marked at the trial as **P9** but it was suggested to the witness that the production was belated and fabricated. No doubt the receipt was produced at the trial rather belatedly but on an analysis of the facts engulfed in the case one cannot escape the conclusion that this could not have been produced at the time of making the statement as the statement omits reference to Plaintiff's ownership for reasons adduced by the Plaintiff.

If the maker of the statement was told not to assert ownership, how does one expect hm to produce a receipt for purchase?

All this could have been shown to be false if evidence had been brought forward to contradict all that the Plaintiff said in the witness box.

So the mere marking of a prior statement and pointing out an omission or contradiction does not advance the case of a party if the inconsistency is satisfactorily explained and the other party offers no evidence to prove that the explanation is false. On a balance of probabilities, the oral testimony of the Plaintiff as to ownership, coupled with the production of the purchase receipt renders the story of the Plaintiff more probable. Apart from these items of evidence, there is another argument put forward by Mr Basheer Ahamed when he invoked section 110 of the Evidence Ordinance to bring home the claim of ownership.

Section 110 of the Evidence Ordinance-Burden of Proof as to Ownership

Mr. Basheer Ahamed invoked Section 110 of the Evidence Ordinance to argue that the burden of proof showing that the Plaintiff-Appellant is not the owner is on the Defendant-Respondent. Section 110 enacts the following:

> *When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.*

Section 110 of the Evidence Ordinance provides for a presumption of ownership from possession. Possession is a good title against all except the rightful owner. The presumption of ownership works only, if two conditions are satisfied, namely, (a) the possession is not *prima facie* wrongful and (b) the title of the other contesting party is not proved.

The only effect of this section is that if a person is in possession, his title is presumed until the title of some other person is established.

Section 110 is based on the premise that possession of movable or immovable property is presumptive proof of ownership, because men generally own the property which they possess. When, therefore, a person is in possession of anything, the presumption of ownership being in his favour, the burden of showing that the person is not the owner of that of which he has possession, is on the person who affirms it.

There is no such rebuttal in this case to defeat the ownership created by Section 110 and I proceed to hold that the Plaintiff has established his ownership to the property.

Before I part with the issue of ownership, let me quote **Woodroffe & Amir Ali**'s Law of Evidence (Volume 3, 20th Edition) at p 3866 wherein the learned authors quite poignantly state the proposition that Section 110 of the Evidence Ordinance is **an imperative presumption** - that is to say, the court is bound to regard the ownership of the possessor as proved, unless and until it is disproved. Where a person is shown to be in possession of property, he is under this section, to be presumed to be the owner of it.

So the uncontradicted testimony of the Plaintiff, the purchase receipt and the imperative presumption of Section 110 render the story of the Plaintiff more probable because in a civil trial we look to ascertain whose story is more probable than not.

This means that the burden is discharged by evidence satisfying the trier of the probability of the issue which the party has to prove.

This burden was defined most clearly by Denning J in ***Miller v Minister of Pensions*** {1947} 2 All E.R 372 when he said that it must carry a reasonable degree of probability, but not as high as required in a criminal case. If the evidence is such that the tribunal say: "we think it more probable than not", the burden is discharged, but if the probabilities are equal, it is not. See also Crown Court Bench Book Directions to the Jury (March 2010) www.judiciary.gov.uk which defines the standard as follows:

"the defendant proves the matter in issue if the jury concludes, having considered all the relevant evidence, that the matter asserted is more probable (or more likely) than not."

In ***Carr-Briant*** (1943) 1 K.B. 607 at 611, 612 , the Court of Criminal Appeal referred to the same proposition:

"What is the burden resting on a plaintiff or defendant in civil proceedings can, we think, best be stated in the words of the classic pronouncement on the subject by Miles J. in *Cooper v Slade*-(1857-1858) 6 HL Cas.746. That learned judge referred to an ancient authority in support of what he termed 'the elementary proposition that in civil cases the preponderance of probability may constitute sufficient ground for a verdict."

This Court followed these propositions previously in ***Manikpedige Gunasinghe v Liyanalage Siripina Hewapedige Chandrasena*** C.A. Case No.564/2000 (F) D.C. Kegalle Case No.23756/P decided on 07.09.2018.

There is no analysis by the learned District Judge of Colombo to conclude that ownership does not reside in the Plaintiff and the learned District Judge has been just content to say that there was insufficient evidence. This Court reverses this finding in view of the items of evidence that I have found on ownership.

In the circumstances I hold the view that the Plaintiff has established his right of ownership to the 50 slabs of gold. It then follows as a corollary that the Plaintiff-Appellant has *locus standi* to institute this action.

Next let me turn to the question of importation that figured in the case as another principal issue.

Did the Plaintiff import into Sri Lanka the 50 slabs of gold?

The principal submission on behalf of the Plaintiff-Appellant was that Section 21 (1) of the Exchange Control Act and Section 107 A (1) of the Customs Ordinance would not be applicable to the Plaintiff as he was only a "*Transit Passenger*".

Section 21 (1) of the Exchange Control Act as applicable to this case states thus:

"No person shall, except with the permission of the bank, import into Sri Lanka-

(a) any notes of a class which are, or have at any time been legal tender in Sri Lanka; or

(b) any such other notes as may be prescribed being notes issued by a bank or notes of a class which are or have at any time been legal tender in any territory; or

(c) any gold.

Section 21 (2) of the Exchange Control Act enacts:

"The bringing or sending into any port or other place in Sri Lanka of any gold intended to be taken out of the Sri Lanka without being removed from the vessel or aircraft in which that gold is being carried shall, for the purpose of this section, be deemed to be the importation of that gold....."

It is to be noted that nowhere in this legislation is the word invitation defined . In fact in the answer filed by the Defendant-Respondent and the issues more particularly in Issue No 13, both these two provisions were cited in support of the argument that the Plaintiff - Appellant infringed these two provisions. Section 21 (1) uses the word "person" and the learned SDSG contended that it catches up a transit passenger. But a provision in a statute has to be interpreted holistically along with the other sections and the context. Section 21 (1) aims at a person but the act prohibited is **importation into Sri Lanka** of gold without the permission of the bank which would mean the Central bank of Sri Lanka. So this case turns on the question whether the Plaintiff -Appellant-an Indian passport holder and a transit passenger on 15.07.1991 could be said to have *imported into Sri Lanka* the 50 slabs of

gold. The learned SDSG cited the case of ***Attorney General v Kumarasinghe*** (1995) 1 Sri.LR 2 to buttress his argument.

This was an appeal from an acquittal of the accused-respondent, Kumarasinghe who had been indicted in terms of Section 21 (1) read with Section 21 (2) of the Exchange Control Act, an offence made punishable under section 51 (1) read with Section 51 (4) (b) of the said Act. Kumarasinghe who was a Sri Lankan passport holder had arrived from Singapore on an Air Lanka flight and been at the transit lounge of the Katunayake International Airport in order to board a connecting flight to Male. Inside his brief case were found 40 pieces of gold and on being questioned, the accused-respondent had stated that he was carrying it to Male. The High Court of Negombo had acquitted the accused-respondent as it arrived at the finding that the provisions of the Exchange Control Act were not contravened by the accused-respondent Kumarasinghe.

The Court of Appeal (D.P.S.Gunasekera, J with H.S.Yapa, J concurring) reversed the findings of the learned High Court Judge of the Negombo. In the course of its judgement the Court of Appeal did not lay much stress on the question whether Section 21 (1) would apply to a transit passenger who was holding a foreign passport and there was no doubt that this question did not arise before their Lordships. There was no conclusion reached on the applicability of the aforesaid provisions -Sections 21 (1) and (2) to a transit passenger because upon an indictment for an offence punishable under Sections 51 (1) and 51 (4) of the Exchange Control Act, the accused person has to be a person in Sri Lanka or resident in Sri Lanka. It is axiomatic that Kumarsinghe holding a Sri Lankan passport was resident in Sri Lanka although on the question he did not cross the passport control and was only a transit passenger.

Section 51 of the Exchange Control makes this position patently clear:

51 (1)-any person *in or resident in Sri Lanka* who contravenes of this Act or of any regulation made under this Act or fails to comply with any direction given or condition or requirement imposed under this Act shall be guilty of an offence, notwithstanding the

offence may, by virtue of Part IV of this Act, they also punishable under the provisions of the Customs Ordinance.

So for a prosecution to succeed under Sections 21 (1) and (2) of the Exchange Control Act, the accused can be any person in Sri Lanka or resident in Sri Lanka. Certainly any person in Sri Lanka or resident in Sri Lanka can be a foreign national. But the additional requirement is that he must have imported into Sri Lanka the prohibited item. Should the goods, in possession of any foreign national, pass beyond the passport control of Sri Lanka or is it enough if he sets foot in Sri Lanka with the goods ? This specific question on the foreign element that has come up before me was not gone into by the Court of Appeal and to this extent *Kumarasighe* case is distinguishable from the case I am confronted with.

Any person ***in Sri Lanka or resident in Sr Lanka*** must be interpreted holistically and harmoniously and it cannot certainly embrace a foreign passport holder waiting or proceeding to the transit lounge to board a connecting flight. Even if it is interpreted that a foreign national is in Sri Lanka the moment he has set foot in Sri Lanka, has he imported into Sri Lanka the prohibited item? That is the relevant question that is before this Court.

Even if these words (*in Sri Lanka*) in Section 51 (1) are interpreted to embrace a foreign national who has landed in Sri Lanka with gold but has not crossed the passport control with the prohibited goods, would he have committed the offence? ***Kumarsinghe's*** case is no authority for that proposition because those were not facts in that case as they are in the instant case before me.

Can a foreign national transient as he is as he is transiting in Sri Lanka be categorized as a person who contravenes Section 21 (1) of the Exchange Control Act? Are these persons in transit required to seek and obtain a prior permit from the Central Bank? No doubt they need the authorization if it is an import.

Why was not the mere carrying of gold in transit by a foreign passport holder without a permit specifically provided for in the legislation? Is mere carrying without more

prohibited? If it is an import into Sri Lanka that is criminalized, is that foreign passport holder importing into Sri Lanka when he is *en route* to a different country with gold?

The principal question before this Court is whether the Plaintiff imported into this country the 50 slabs of gold. Undoubtedly D.P.S.Gunasekera, J in the *Kumarasinghe* case declared that the term "importation" is not defined in the Exchange Control Act. While holding that on the admitted facts Section 21 (2) had not application in the case, the learned judge posed the question whether *Kumarasinghe* who had removed the gold from the aircraft and brought it to the transit lounge can be said to have imported the gold. Since the Exchange Control Act had not defined the term "importation", Justice Gunasekera had recourse to Section 22 of the Imports and Exports Control Act No 1 of 1969 which lays down that "import" with its grammatical variations and cognate expressions when used in relation to any goods means *all importing or bringing into Sri Lanka or causing it to be brought into Sri Lanka* whether by sea or by air of such goods. With due respect, I must observe that without analysing the collocation of words inherent in Section 22 of the Imports and Exports Control Act No 1 of 1969, the Court of Appeal arrived at the conclusion:

> *"Going by this definition we are of the view that the moment the accused-respondent landed on Sri Lankan soil with the brief case containing gold the act of importation was complete and that if he failed to produce the requisite permit for possession of that gold he has contravened the provisions of Section 21 (1)."*

Apart from the fact that *Kumrasinghe* case does not deal with a foreign passport holder who is only transiting, with due respect I must observe that there is a paucity of discussion on the collation of words "*all importing or bringing into Sri Lanka or causing it to be brought into Sri Lanka* whether by sea or by air of such goods" found in Section 22 of the Imports and Exports Control Act No 1 of 1969 to which the case alluded. The words "importing into Sri Lanka" received scant attention in that case.

Interpretation on the word Import

"Import' is derived from the Latin word importare which means' to bring in' and 'export' from the Latin word exportare which means to carry out but these words are not to be interpreted only according to their literal derivations. Lexico logically they do not have any reference to goods in – 'transit'- a word derived from 'transire' bearing a meaning similar to transport, i.e., to go across. The dictionary meaning of the words 'import' and 'export' is not restricted to their derivative meaning but bear other connotations also."

See- ***The Central India Spinning and Weaving and Manufacturing Co. Ltd. vs. The Municipal Committee (Wardha)*** 1958 SCR 1102: 1958 SCJ 604: AIR 1958 SC 341: 1958 Nag LJ 595. So this case clearly put transit goods beyond the pale of imported goods.

"Import":

> Context: Customs Act, 1962 Sec. 29 to 35, 45 to 47, 14(1), 2(23), 2(27)
> "The 'import' of goods into India would commence **when the same cross into the territorial waters** but continues and is completed when the goods **become part of mass of goods within the country** the taxable event being reached at the time when the goods reached the custom barriers and the bill of entry for whole consumption is filed."

See ***Garden Silk Mills Ltd. vs. Union of India*** 113(1999) ELT 358: 1998 (8) SCC 744: AIR 2000 SC 33: 1999(8) Supreme 476: AIR 1999 SCW 4150: JT 1999(7) SC 522: 1999(6) SCALE 285.

See also: ***Udayani Ship Breakers Ltd. vs. Commissioner of Customs and Central Excise*** (Act of 'import' is over when the importer opened the letter of credit in favour of foreign seller and remitted the amount to seller) 195(2006) ELT 3: 2006(3) SCC 345 : 2006(2) SCALE 277 : JT 2006(2) SC 336 : 2006(2) Supreme 215 : 2006(2) SLT 170.

All these cases quite conclusively establish that import connotes the passing of goods beyond passport control and this never takes place when a transit passenger carries goods

to another country as a transit passenger. *Kumarasinghe* case never went into this and therefore it is distinguishable in this respect.

So the finding of the District Judge that the Plaintiff-Appellant had imported into Sri Lanka the gold is erroneous and I therefore proceed to reverse that finding and hold that the Plaintiff did not import into this country the 50 slabs of gold. In the circumstances the decision to forfeit the goods was erroneous and unlawful.

The learned SDSG has taken up in his written submissions the argument that Section 23 of the Interpretation Ordinance denudes the District Court of jurisdiction to grant declaratory relief.

Section 23 of the Interpretation Ordinance states the following:

> "...where a court of original civil jurisdiction is empowered by any enactment, whether passed or made before or after the commencement of this Ordinance, to declare a right or status, such enactment shall not be construed to empower such court to entertain or to enter decree or make any order in any action for a declaration of a right or status upon any ground whatsoever, arising out of or in respect of or in derogation of any order, decision, determination, direction or finding which any person, authority or tribunal is empowered to make or issue under any written law:
>
> Provided, however, that the provisions of this section shall not be deemed to affect the power of such court to make an order or decree relating to the payment of damages."

The District Judge never went into the propriety of the proceedings had before the Customs and supervised it. The record does not contain any proceedings had before the Customs nor is the order made by the Customs Officer to forfeit the goods part of the record. This is a declaratory relief which is permitted under Section 217 (G) of the Civil Procedure Code and it is trite law that the Supreme Court in ***Ranasinghe v The Ceylon State Mortgage Bank*** (1981) 1 Sri.LR 113 authoritatively held that a District Court is

entitled to set aside collaterally in its declaratory jurisdiction the decision of a statutory body that has wrongly decided an issue. A writ of certiorari is not the only remedy available.

The restriction mentioned in the above provision is clearly directed towards the District Court. However, in the *Ranasinghe* case the majority judgment circumvented the application of this provision by interpreting that the benefit of this section would accrue to a determination or decision which a tribunal was empowered to make under any written law and that if it was shown that the authority was not empowered to make the impugned order which was a nullity then the provision would not prevent a court from granting a declaration.

I would respectfully adopt these observations and would further observe that no order of the Customs Department is found on the record in this case and as such when the District Court tried this case, it was based on the pleadings and issues on the rights and liabilities of the parties and as such this case was argued on them and the evidence led in the case. But it is clear that even in the exercise of original jurisdiction of the District Court, the propriety of an order made by a statutory body may be challenged as erroneously reached and that exercise of original jurisdiction may entail the grant of a declaratory relief.

Thus I would set aside the judgement of the District Court dated 10th September 1999 but in allowing the appeal, this Court would allow the reliefs prayed for in the plaint but damages claimed in paragraph (e) of the plaint is disallowed for want of evidence.

JUDGE OF THE COURT OF APPEAL