

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

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

Regnis Lanka PLC

No. 52, Ferry Road, Off Borupana Road, Ratmalana.

Petitioner

Case No. CA (Writ) 252/2015

Vs.

1. M. M. Arthur Silva
Deputy Director of Customs,
Central Investigation Bureau,
Sri Lanka Customs,
No. 40, Main Street, Colombo 11.
2. D. P. M. Goonewardena
Superintendent of Customs,
Sri Lanka Customs,
No. 40, Main Street, Colombo 11.
3. S. P. Karunaratne
Superintendent of Customs,
Sri Lanka Customs,
No. 40, Main Street, Colombo 11.
4. Director General of Customs
Sri Lanka Customs,
No. 40, Main Street, Colombo 11.
5. Ravi Karunanayake
Minister of Finance and Planning,
Ministry of Finance and Planning,
The Secretariat, Colombo 01.

5A. Mangala Samaraweera
Minister of Finance and Mass Media,
Ministry of Finance and Mass Media,
The Secretariat, Lotus Road, Colombo 01.

Respondents

Before: Janak De Silva J.

N. Bandula Karunarathna J.

Counsel:

M.A. Sumanthiran P.C. with Viran Corea for the Petitioner

Manohara Jayasinghe SSC for the Respondents

Argued On: 03.10.2019

Written Submissions Filed On:

Petitioner on 04.11.2019 and 02.12.2019

Respondents on 31.10.2019 and 21.11.2019

Decided On: 29.05.2020

Janak De Silva J.

The Petitioner imported 11 consignments of, what was declared in the Customs Declarations (CusDecs) to be, polyether polyol under H.S. Code 3907.20.00. These consignments were cleared by the Petitioner between 2011 and 2013.

In or around 11th September 2013 a customs investigation was initiated which led to a customs inquiry in terms of section 8(1) of the Customs Ordinance. The basis of the inquiry was that the said 11 consignments in fact contained a polyether blend containing an environmentally hazardous chemical called Hydro Chloro Fluoro Carbons (HCFC) which is a restricted good in terms of the Customs Ordinance and requires an import licence under the Import and Export

(Control) Act No. 01 of 1969 as amended and that they were imported and cleared from Customs without such licence.

At the end of the Customs Inquiry, the 1st Respondent made order (P7) as follows:

- "1. I declare forfeit 50,275 Kg. of Polyether polyol blend containing Hydro Chloro Fluoro Carbons (HCFC) entered in Customs Goods declarations marked P1 to P11, with a total CIF value equivalent to SL Rs. 16,119,625/= in terms of Sections 12 and 43 of the Customs Ordinance (as amended) read with regulations framed under the Import and Export Control Act No. 01 of 1969. However, it is noted that the said goods have been utilized in the manufacturing process of Regnis Lanka PLC.
2. I impose a mitigated forfeiture of a sum of Rupees Three Million on Regnis Lanka PLC in terms of Sections 129 and 163 of the Customs Ordinance (as amended).
3. I impose a penalty of Rupees Ten Thousand (Rs. 10,000/=) on Mr. K.G. Gamini Perera, Commercial Manager of Regnis Lanka PLC, in terms of Sections 129 and 163 of the Customs Ordinance.
4. I order to release the other suspect namely, Mr. V.G.K. Vidyarthne, Mr. K.D. Kospelawatta and Mr. S.O.D. Amaraseekra."

The Petitioner in this application is seeking a writ of certiorari quashing the imposition of a mitigated forfeiture of a sum of Rupees Three Million on Regnis Lanka PLC in terms of Sections 129 and 163 of the Customs Ordinance (as amended).

The principal submissions of the Petitioner are that the 1st Respondent has failed to duly consider that the Petitioner:

- (1) was unaware of a need to obtain an import licence.
- (2) has not acted with stealth or with intent to deliberately conceal.
- (3) has been a responsible social actor.

Ignorantia Legis Neminem Excusat

The Petitioner does not dispute the fact that what was in fact imported is a polyether blend containing an environmentally hazardous chemical called Hydro Chloro Fluoro Carbons (HCFC) which is a restricted good in terms of the Customs Ordinance. However, it is submitted that the Petitioner did not know of the requirement to obtain an import licence for the said consignments.

I have no hesitation in rejecting this unusual position advanced by the Petitioner. On its own assertions, it is a well-established company and one which has abided by the laws and regulations of the country [paragraph 4 of the petition]. In fact, the name of the Petitioner is an anagram for SINGER which is one of the leading manufacturer/suppliers of household appliances and is admittedly one of its affiliates. In that context it is unflattering of the Petitioner to advance this excuse.

In any event, every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might be carried [per Lord Ellenborough in *Billbie v. Lumley* (1802) 2 East 469, (1802) Eng R 245, (1802) 102 ER 448]. In *Abeyasinghe v. Commercial Bank of Ceylon* [(1999) 1 Sri.L.R. 192] De Silva J. held that one should not be excused for his ignorance of the law and he must take the consequences of his actions.

Stealth or Intent to Deliberately Conceal

In addressing the next argument presented by the Petitioner, it is **necessary to appreciate the scope and ambit of the words *shall be forfeited and liable to forfeiture* in the Customs Ordinance.**

Some of the sections in the Customs Ordinance provide that in the event of the breach specified in the relevant section the goods *shall be forfeited* e.g. Sections 34(1), 43, 44, 50, 50A (1)(b), 52, 55, 65, 75, 100A(2), 107, 107A(1), 107A(2), 121, 131 and 142. Section 57 provides *that in the absence of any explanation* to the satisfaction of the Director General of Customs, the goods shall be forfeited. Sections 38 and 68 provide that the goods *shall be liable to forfeiture*.

In *Palasamy Nadar v. Lanktree* (51 N.L.R. 520 at 522) Gratiaen J. stated thus:

“Section 46 (which is the present Section 44) provides that any goods exported or taken out of the Island contrary to certain specified prohibitions and restrictions “*shall be forfeited*” and shall be destroyed or disposed of as the Principal Collector of Customs may direct.” The Customs Ordinance is an antiquated enactment Some of its provisions declare that in certain circumstances goods “shall be forfeited” while in other circumstances they are merely “liable to be forfeited” I am prepared to concede that the draftsmen must be given credit for having intended the terms “forfeited” and “liable to forfeiture” to convey different meanings. **If the goods are declared to be “forfeited” as opposed to “liable to forfeiture” on the happening of a given event, their owner is automatically and by operation of law divested of his property in the goods as soon as the event occurs. No adjudication declaring the forfeiture to have taken place is required to implement the automatic incident of forfeiture...**

A forfeiture of goods by operation of law would, of course, be of purely academic interest until the owner is in fact deprived of his property by some official intervention. Section 123 (present Section 125) of the Ordinance provides the machinery for this purpose... When that is done, the goods “shall be deemed and taken to be condemned” and may be dealt with in the manner directed by law unless the person from whom they have been seized or their owner “shall, *within one month from the date of seizure... give notice in writing to the Collector,,, that he intends to enter a claim to the... goods... and shall further give security to prosecute such claim before the Court having jurisdiction to entertain same.*” (Section 146) (This is the present Section 154)

The same analysis was adopted by the present Supreme Court in *Lanka Jathika Sarvodaya Shramadana Sangamaya v. Heengama Director General of Customs and Others* (1993) 1 Sri L.R.

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I must hasten to add that even where the forfeiture takes place by operation of law, a customs investigation and a customs inquiry must be conducted in order to comply with the rules of natural justice. At the end of the inquiry, if the facts are established the inquiring officer will make an order *declaring* that the forfeiture has taken place compared to a situation where the words "liable to be forfeited" appears in which case the inquiring officer will be making a *decision*.

However, the Petitioner contends that there was no stealth or intent to deliberately conceal the importations in issue and as such the penal consequences of any forfeiture by operation of law is not attracted. The decision of the Supreme Court in *Toyota Lanka (Pvt) Ltd. and Another v. Jayathilaka and Others* [(2009) 1 Sri.L.R. 276] was cited where Sarath N. Silva C.J. held (page 287):

"These mandatory consequences of forfeiture that are penal in nature demonstrate that the words "but if such goods shall not agree with the particulars in the bill of entry" apply to a situation of concealment and evasion to pay duties as distinct from a situation of misdescription and under payment of duties. In the latter situation the proper course would be to require the person to pay the "duties and dues which may be payable" being the statutory obligation of the importer in terms of Section 47 or in the event of a short levy to recover the amount due in terms of Section 18(2) and 93) of 18A referred to above."

However, the learned Senior State Counsel, while critiquing the decision with expressiveness, quite correctly submitted that the *ratio decidendi* of *Toyota Lanka* (supra) is limited to the question that arose for answer in the said appeal as formulated by Sarath N. Silva C.J. (page 278) which is as follows:

"...whether it is competent for an officer of customs to have recourse to section 125 of the Customs Ordinance and effect seizure of goods in respect of which a Bill of Entry (CUSDEC) had been submitted, as provided in Section 47 and the goods released consequent to a physical examination and payment of duties that were levied".

The learned Senior State Counsel further submitted that the decision in *Toyota Lanka* at best lays down a proposition that, having inspected goods and having failed to observe the incompatibility with the bill of entry, which a diligent physical examination would have revealed, the Customs cannot subsequently forfeit the goods but that this principle cannot be extended to prohibit a post-clearance forfeiture to cases where even a meticulous examination of the goods would not have revealed the inaccuracy of the entry in the CusDecs.

There is much merit in this submission. In *Toyota Lanka* (supra) His Lordship the Chief Justice clearly articulated the question that arose for in that case for determination in the context of section 47 of the Customs Ordinance. The question of importing goods that were restricted or prohibited in terms of sections 12 and 43 of the Customs Ordinance was not engaged. Such restrictions or prohibitions are imposed by the State for different reasons such as protecting the human health and environment and protecting the local industry. Can it be said that merely due to Customs allowing the importer to clear such goods no forfeiture and penal consequences can take place if the necessary ingredients are fulfilled? I have no doubt that it is not the correct position in law.

In fact, in *Toyota Lanka* (supra) case S.N. Silva C.J. did say (at page 289) that:

"In the context of customs it would mean the movement of goods by stealth and in concealment to evade payment of customs duties, prohibitions and restrictions attach to the goods. Hence, when the goods are conveyed by stealth and in concealment to evade payment of customs duties, or the applicable prohibitions and restrictions, by operation of law such goods and other goods packed together and packages are forfeited."

(Emphasis added)

In this case the Petitioner in the CusDecs declared the imported consignments to be polyether polyol under H.S. Code 3907.20.00 whereas what was in fact imported was polyether blend containing an environmentally hazardous chemical called Hydro Chloro Fluoro Carbons (HCFC) which has a different HS Code 3824.74. The Respondents submit that these two liquids cannot be distinguished without a laboratory examination. There is nothing to indicate the contrary.

In these circumstances, in any event the ratio of *Toyota Lanka* (supra) has no application.

The mitigated forfeiture was imposed in terms of section 129 and 163 of the Customs Ordinance.

The relevant part of Section 129 of the Customs Ordinance reads as follows:

"Every person who shall be **concerned** in importing or bringing into Sri Lanka any prohibited goods, or any goods the importation of which is restricted, contrary to such prohibition or restriction, and whether the same is unshipped or not...shall in each and every of the foregoing cases forfeit either treble the value of the goods, or be liable to a penalty of one hundred thousand rupees, at the election of the Collector of Customs."

The learned President's Counsel for the Petitioner submitted that "**being concerned** in" in this section most evidently contemplates its application to those concerned in contravening legal prohibitions and restrictions, **requiring a positive mental element** and that it clearly **does not envisage or sanction imposition of strict liability**. Reliance is placed on the *ejusdem generis* principle.

In *Sohli Eduljee Captain v. Commissioner of Inland Revenue* (77 N.L.R. 350 at 353) Wijayatilake J. explained the scope of the *ejusdem generis* rule of construction in the interpretation of statutes by summing up Maxwell on the Interpretation of Statutes, 12th Ed., pp. 297 to 305 as follows:

*"In the abstract, general words, like all others, receive their full and natural meaning, and the Courts will not impose on them limitations not called for by the sense or objects of the Enactment. But the general word which follows particular and specific words of the same nature as itself takes its meaning from them and is presumed to be restricted to the same **genus** as those words. For according to a well established rule, in the construction of Statutes, **general terms following particular ones apply only to such persons or things as are ejusdem generis with those comprehended in the language of the Legislature**. In other words, the **general expression is to be read as comprehending only things of the same kind as that designated by the preceding particular expressions**, unless there is something to show that a wider sense was intended as where there is a*

*provision specifically excepting certain classes clearly not within the suggested genus...The rule applies only to general words following words which are less general. Unless there is a **genus or class or category, there** is no room for any application of the ejusdem generis doctrine...The rule of ejusdem generis may apply despite the absence of the word 'other' at the end of the list of things specified."*

In my view the *ejusdem generis* principle has no application in this case as there is no genus.

Concerned

In *Attorney-General v. Rodriguez* (19 N.L.R. 65) Court considered the application of section 104 of the Customs Ordinance (present section 129). There the defendant was the Manager of the Colombo branch of a firm of bankers and commission and forwarding agents, carrying on business at Tuticorin and Colombo. In that case Ganja, the importation of which is prohibited by law, was concealed in some bags of bran consigned to the defendant by the Tuticorin branch as commission and forwarding agents for the shippers. The defendant was unaware of any ganja being contained in the bags and acted in good faith.

The Court held that in the circumstances of the case, the defendant was not "concerned" in importing any prohibited goods within the meaning of the term in section 104 of the Customs Ordinance which at that time read as follows:

"Every person who shall be concerned in importing or bringing into the Island any prohibited goods, or any goods the importation of which is restricted, contrary to such restriction or prohibition, and whether the same be unshipped or not, and every person who shall unship or assist, or be otherwise concerned in the unshipping of any goods which are prohibited, or of any goods which are restricted and imported contrary to such restriction, or of any goods liable to duty the duties for which have not been paid or secured, or who shall knowingly harbour, keep, or conceal, or shall knowingly permit, or suffer, or cause, or procure to be harboured, kept, or Concealed, any such goods, or any goods which have been illegally removed without payment of duty from any warehouse or place of security in which they have been deposited, or into whose hands

or possession any such goods shall knowingly come, or who shall assist or be **concerned** in the illegal removal of any goods from any warehouse or place of security in which they shall have been deposited as aforesaid, or who shall be in any way knowingly concerned in conveying, . removing, depositing, concealing, or in any manner dealing with any goods liable to duties of customs, with **intent** to defraud the revenue of such duties or any part thereof, or who shall be in any way **knowingly concerned** in any fraudulent evasion or attempt at evasion of such duties or any part thereof, shall in each and every of the foregoing cases forfeit either treble the value of the goods, or the penalty of one hundred pounds, at the election of the Collector of Customs."

Shaw J. having observed that the word "knowingly" found in the latter part of the section before "concerned" does not appear in the first line and that the word "knowingly" applied to "concerned" in the latter part of section 104 is in relation to dealing with goods after importation into the island, and in respect of which goods evasion of the Customs laws was committed on importation. He held that the effect of the use of the words throws the necessity of the proof of the knowledge on the plaintiff in those cases, but that it does not appear to him to in any way necessarily imply that a person is "concerned" in an importation of which he has no knowledge, and from which he acquires no benefit.

The interpretation of section 129 of the Customs Ordinance again arose in *Rauf and Another v. Chief Assistant Preventive Officer* [II Sriskantha's Law Reports 182] where Court observed that it has two limbs of which the first states, "Every person who shall be concerned in importing or bringing into Ceylon any prohibited goods or any goods the importation of which is restricted" and the other, "or who shall be in any way knowingly concerned in conveying, removing...or in any manner dealing with any goods liable to duties of customs with the intent to defraud the revenue of such duty or part thereof...".

It was further held that the word "concerned in" is common to both limbs of the section. The dictionary meaning of the words "concerned in", is to have a connection with, or to be interested in. In *Todd v. Robinson* (14 Q.B.D. 739) it has been held that a shareholder of the company which has a contract with a local authority could seem not to be "concerned in" that

contract. The owner of a vessel who knowingly lets it to be employed in smuggling, is "concerned in" the allegedly shipping of the goods - *Attorney-General v. Robinson* (20 L.J.V. 188). Thus, the meaning of the words "concerned in" has not been made equivalent to a physical act and the first limb of the section "concerned in" importing or bringing into Ceylon does not refer to a physical act. The second limb refers to "knowingly concerned in removing", and here, there must be the knowledge and physical act of removal to contravene the prohibition.

Here the maxim expression *Expressio Unius Est Exclusio Alterius* is applicable. An express reference to a particular thing excludes all other things [*R. v. Inhabitants of Sedgley* (1831) 2 B & Ad 65]. Section 129 of the Customs Ordinance uses the word "concerned" and "knowingly concerned". Hence they do not mean the same thing. There was no need for the drafters to have used them together if they were to have the same meaning.

The Petitioner imported the consignments in issue to Sri Lanka and was the beneficiary of them having cleared and used them in the manufacturing process. The Petitioner was aware that the imported consignments to be polyether blend containing an environmentally hazardous chemical called Hydro Chloro Fluoro Carbons (HCFC) which has a different HS Code 3824.74 whereas what it declared was polyether polyol under H.S. Code 3907.20.00. Hence the Petitioner was "concerned" in the importation of the restricted item.

Section 43 of the Customs Ordinance entails strict liability. No mental element is required. Section 129 of the Customs Ordinance applies to any person who is concerned in the importation of restricted goods. This does not require knowledge. The actions of the Petitioner fall within section 129 of the Customs Ordinance.

The Petitioner makes a further point that the 1st Respondent has ordered both a mitigated forfeiture and penalty which is not possible in terms of section 129 of the Customs Ordinance as he must make an election between the two. However, the mitigated forfeiture has been imposed on the Petitioner whereas the penalty has been imposed on an employee. There is nothing repugnant to this course of action in section 129 of the Customs Ordinance.

For all the foregoing reasons, the application of the Petitioner is dismissed. I make no order as to costs.

Judge of the Court of Appeal

N. Bandula Karunaratna J.

I agree.

Judge of the Court of Appeal