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 a Writs of Certiorari, Prohibition and Mandamus in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A.(Writ)Application No. 703/2007

1. GAC Marine Services (Pvt.) Limited
   284, Vauxhall Street, Colombo 02.

2. J.R.U. de Silva, Director,
   Vauxhall Street, Colombo 02.

3. P.H.A.Silva, Vauxhall Street,
   Colombo 02.

Petitioners

Vs.

1. Sarath Jayatilake,
   Director General of Customs
   Customs House
   Colombo 01.

1A. Sudarma Karunarathna
   Director General of Customs
   Customs House
   Colombo 01.

1B. Dr. Nevil Goonawardena,
Director General of Customs
Customs House
Colombo 01.

1C. Director General of Customs
Customs House
Colombo 01.

1D. Ranasinghage Semasinghe
Acting Director General of Customs
Customs House
Colombo 01.
(Added 1D Respondent)

1E. Chulananda Perera,
Director General of Customs,
Customs House,
Colombo 01.
(Added 1E Respondent)

1F (Mrs.) P.S.M. Charles,
Director General of Customs
Customs House
Colombo 01.
(Added 1F Respondent)

2. P.Saman de Silva
Superintendent of Customs
Sri Lanka Customs, Customs House,
Colombo 01.

RESPONDENTS

BEFORE	:	**ACHALA WENGAPPULI, J.**
COUNSEL	:	Sanjeewa Jayawardane P.C. with Suren de Silva and Lakmini Warusawithana instructed by Sudath Perera Associates for the Petitioners. Manohara Jayasinghe SSC for the Respondents.
ARGUED ON	:	25.11. 2019 & 26.11.2019
WRITTEN SUBMISSIONS TENDERED ON	:	29.01.2020 (by the Petitioners)
DECICED ON	:	22.06. 2020

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ACHALA WENGAPPULI, J.

This is an application where the 1st to 3rd Petitioners (hereinafter referred to as the "Petitioners"), having invoked the jurisdiction conferred upon this Court by Article 140 of the Constitution, seeks issuance of Writs of *Certiorari* and *Prohibition* against the 1st and 2nd Respondents. The 1st Petitioner GAC Marine Services (Pvt.) Ltd., is a limited liability Company incorporated in Sri Lanka, while the 2nd Petitioner is one of its directors and the 3rd Petitioner is the skipper of the crew boat GAC Ship I and acting skipper of GAC Ship II respectively.

The 1st Respondent is the Director General of Customs and the 2nd Respondent is the Superintendent of Customs.

In seeking a Writ of *Certiorari* against the 1st and 2nd Respondents, the Petitioners move this Court to quash Notices of Seizure marked as "X1" and "X2" that had been issued by the said Respondents under Section 125 of the Customs Ordinance. The issuance of a Writ of Prohibition is sought by the Petitioners in order to prevent the two Respondents from "*taking any steps whatsoever under the Customs Ordinance or any other law in order to seize and/or forfeit*" the said crew boats, GAC Ship I and II, and imposing any other punitive sanctions on the Petitioners without first conducting a due and proper inquiry according to law, including framing formal charges and affording an opportunity to the Petitioners for an adequate opportunity to being heard.

Application of the Petitioners was supported *ex parte* before this Court on 3rd August 2007 and interim relief, as prayed for was granted upon their undertaking that the vessels GAC Ship I and II would not sail beyond 20 nautical miles of the Port of Galle. The said interim order was varied on several occasions after hearing the parties by this Court, in view of the contingencies that have arisen subsequently to the issuance of said interim order initially.

It is stated in the petition of the Petitioners that the 1st Petitioner Company was set up upon an agreement with the Board of Investments on 20th March 1996 as a "BOI Enterprise", primarily to engage in marine services. The 1st Petitioner Company, acting as shipping agent of Messrs International Shipping Agencies (Sharjah) Pvt. Ltd, a shipping Company based in the United Arab Emirates (hereinafter referred to as "ISA"), had obtained two crew boats (GAC Ship I and II) from the said Company, which retained its ownership. The two vessels GAC Ship I and II, arrived in Sri Lanka on 18.01.1994 and 24.02.1985 respectively. The 1st Petitioner Company, having obtained a shipping agents license in relation to GAC Ship I and II, stationed them in the Port of Galle to perform shipping related services in Sri Lanka.

The 1st Petitioner Company, at a later point of time had decided to purchase the two vessels from ISA and the transfer of purchase consideration of USD 400,000.00 was made on 31.10.1997 after obtaining an import license dated 20.10.1997 from the Controller of Imports and Exports. Thereafter, the two vessels were utilized and deployed by the 1st Petitioner Company in and around Port of Galle, for its shipping related business operations, in the manner contemplated by the provisions of the said BOI agreement.

On 27.01.2001, Sri Lanka Customs had commenced an investigation in respect of GAC Ship I and II and directed the 1st Petitioner to tender relevant documentation in respect of the two vessels, followed by another

directive dated 14.02.2001 to submit "Customs Declaration, the receipts of payment of taxes and a copy of the BOI agreement".

The 1st Petitioner Company, tendered the BOI agreement and informed Sri Lanka Customs that it *"... did not have any Customs entries etc. in its possession, since the 1st Petitioner Company had not imported the said crew boats but had merely purchased the same in Sri Lanka and that no duty had therefore become payable."*The Sri Lanka Customs directed the 1st Petitioner Company again on the 28.06.2001 to furnish Customs documents on the two vessels and the Company had reiterated its position.

Thereafter the 2nd Petitioner received notices dated 06.08.2001 and 16.08.2001, issued by Chief Assistant Preventive Officer of Sri Lanka Customs under Section 9 of the Customs Ordinance, requesting his presence for the purpose of "furnishing information". When the 2nd Petitioner presented himself to the Sri Lanka Customs, he was informed that *"the 1st Petitioner Company was liable to pay Turnover Tax and Defence Levy on account of "importation"* of the two vessels GAC Ship I and II. The 1st Respondent maintained its denial of importation of the two vessels. Thereafter, the 2nd Petitioner had received notice of a Customs inquiry under reference No. P/Misc/92/2001, informing him that it is to be held on 19.11.2001.

At this juncture the Petitioners have sought to quash the said notice of inquiry before this Court under Writ Application No. 1880/2001, by seeking Writ of *Certiorari*. They also sought Writ of *Prohibition* preventing Sri Lanka Customs proceeding with the inquiry. The Respondents have resisted the application. After an inquiry, the Court pronounced its judgment on 16.05.2007. With the delivery of its judgment, this Court had decided to dismiss the Petitioner's application.

In relation to the instant application, the Petitioners have encapsulated the factual basis on which they rely upon, in invoking the jurisdiction conferred upon this Court by Article 140 of the Constitution and thereby seeking to quash the Notices of Seizure, marked "X-1" and "X-2", referring to the subsequent events that took place after the pronouncement of the said judgment in Writ Application No. 1880/2001.

It is therefore appropriate to reproduce the said paragraph from their petition in full. The said paragraph states thus:-

> *"However, most startlingly, the Sri Lanka Customs, despite not having taken any steps since the said judgment (including not informing the 1st and/or 2nd Petitioner as to when the aforesaid inquiry was to recommence if at all, and/or without holding any inquiry whatsoever at which the petitioners were informed of any purported charges against them and/or affording any opportunity to be heard in respect thereof, on 1st August 2007), nevertheless, the 2nd*

Respondent entered the Galle Port at which the boats were berthed and purporting to act in terms of Section125 of the Customs Ordinance read with allegedly the Exchange Control Act, purported to illegally seize the boats "GAC Ship I and GAC Ship II" owned by the 1st Petitioner, by handing over to the 3rd Petitioner the skipper of the crew boat GAC Ship I and the acting skipper of crew boat GAC Ship II, the purported notices of seizure."

In these circumstances the Petitioners allege that the issuance of Notices of Seizure by 1st and 2nd Respondents, in respect of Crew boats GAC Ship I and II, is done;

a. "arbitrarily, illegally, unlawfully and *ultra vires*,
b. without proper inquiry,
c. With *mala fide* and due to other collateral motives,
d. upon deliberate misinterpretation of the judgment in Writ Application No. 1880/2001",

and therefore they would suffer "unbearable financial loss" as a result.

The Respondents resisted the application of the Petitioners and sought its dismissal and vacation of interim relief granted by this Court on the basis;

i. the matter is already *Res Judicata* among the parties,

ii. there is no requirement or determination that Sri Lanka Customs must give the Petitioners advance notice of the fact that it intends only to record a statement.

At the hearing of the instant application, learned President's Counsel for the Petitioners contended that the course of action adopted by the Respondent since the pronouncement of the judgment in Writ Application No. 1880/2001 on 16.05.2007 is clearly tainted as they proceeded to issue Notices of Seizure under Section 125 of the Customs Ordinance, where a prior Declaration of Forfeiture of the two Crew boats is a prerequisite. It is also alleged that the Respondents were in gross violation of the said judgment, when they failed to hold an inquiry subsequent to the dismissal of the Petitioner's application, as directed by Court. It was stressed by the learned President's Counsel that page 5 of the said judgment had clearly ordered on the Respondents to proceed with the inquiry. He also submitted that the approach of the preliminary inquiry would have been inquisitorial while the approach in the inquiry proper naturally would be adversarial. It was contended that the Respondents have therefore acted in gross violation of these well established procedures in relation to Customs inquiries, since they have decided to serve Notices of Seizure on the Petitioners without an inquiry as ordered by Court.

The Petitioners have relied on the judgment of ***Vallibel Lanka Pvt Ltd., v Director General of Customs and Others*** (2008) 1 Sri L.R. 219 where

it has been held that a "ship" could not be considered as an item of "importable goods" and therefore the reference to "all goods" in Section 125 of the Customs Ordinance has no application to the sea vessels, thus taking away the powers of the Respondent to act under the said Section. It was contended that the liability to pay taxes arises only if the vessel was used to bring in any "goods" and for not brining in the vessel itself, as in this particular instant.

Therefore, it was submitted that the Respondents have acted arbitrarily, illegally, unlawfully and *ultra vires,* warranting intervention of this Court with the issuance of Writs as prayed for.

The learned Deputy Solicitor General strenuously argued that the instant matter is *res judicata* among the parties since the Petitioners opted not to challenge the judgment in Writ Application No 1880/2001,by which the core dispute among parties whether there was an importation or not of the two crew boats GAC Ship I and II, had already been resolved by this Court. It was contended by the learned DSG that the Petitioners have "reformulated/ repackaged" the already decided dispute by filing the instant application. The inquiry too was to determine the same identical issue and if there was no distinct pronouncement by Court that the said two vessels have been "imported" into Sri Lanka, then only the 1st Respondent could have proceeded to hold an inquiry in order to determine the said issue.

In view of the submissions of the Respondents that the matter is *res judicata* and if that is the case, then the Petitioners cannot re-agitate for the second round what had already been decided by this Court. It is, therefore, appropriate to consider the said contention before this Court ventures to consider the Petitioner's challenge on the validity of the Notices of Seizure.

The Respondents rely on the judgment of ***Karunaratne v Amarisa***66 NLR 567, which had identified several considerations a Court would employ in making a ruling whether a matter is *res judicata* among the parties. *Tambiah* J stated that *"the doctrine operates when the following essentials are present"* and had thought it fit to list them by reproducing them as reflected in previous local judicial pronouncements. These identified *"essentials"* are as follows:-

(1) There must be a judgment of a Court of competent jurisdiction
(2) There must be a final judgment
(3) The case must have been decided on its merits
(4) The parties must be identical or be the representatives in interest of the original parties
(5) The causes of action must be identical

The then Supreme Court in ***Wijeshighe v Asilin Nona*** 80 NLR 213, considered the doctrine of *res judicata,* this time in the light of several English judgments. The judgment reads thus;

"The rule of res judicata is not confined to issues which the Court is actually asked to decide, but it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them." - per Somerville, L. J. in ***Greenhalgh v Mallard****(1947) 2 All E.R. 255. The locus classicus of this principle of res judicata is the judgment of Wigram, V.C. in* ***Henderson v Henderson****(1843) 3 Hare 114 where he says:*

> *"Where a given matter becomes the subject of litigation in and of adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising*

reasonable diligence, might have brought forward at the time."

This statement of the law has been cited with approval by the Privy Council in ***Hoystead v. Commissioner of Taxation****(1926) A.C. 155 and in* ***Yat Tung Investment Ltd., v. Dao Heng Bank Ltd****(1957) A.C. 581.*

These quotations embody most of the multiple facets in which the doctrine of *res judicata* is viewed by Courts and therefore the Respondent's submissions as well as the Petitioner's reply to it would have to be considered by this Court, in the light of the principles enunciated in these judgments.

There is no dispute that the judgment in the Writ Application No. 1880/2001 satisfies the "essentials" (per the judgment of ***Karunaratne v Amarisa***) that should be there to apply the doctrine of *res judicata* to the instant application. The Petitioner's reply on this contention by the Respondents aimed at its 5th "essential", the causes of action must be identical. It is their contention, that the Court had directed the Respondents to hold an inquiry under the Customs Ordinance by its judgment but what they did instead was to serve Notices of Seizure, having denied an opportunity for the Petitioner's to present its position.

In these circumstances, consideration of the judgment in Writ Application No. 1880/2001 is necessary in order to determine whether the "causes of action" are identical or not.

The judgment of this Court on Writ Application No. 1880/2001 indicates that the dispute presented before it by the parties were whether the Petitioners have bought the two Crew boats locally as they claim or whether the two vessels were "imported" in to Sri Lanka as the Respondents claim.

In considering this pivotal issue, the Court had considered the two fold submissions of the Petitioners that had been presented before it. The Petitioners have contended that when they bought the two vessels by transfer of funds to the Company which owned them, they were already in Sri Lankan waters and therefore the transaction should be considered as a local purchase. In addition, the Petitioners claimed that what can be imported is the cargo a vessel carries and not the vessel itself.

In relation to the contention of local purchase, the Court stated;

> *"The Petitioner after taking all the steps stated above that are necessary for the importation of the said vessels and took possession of the vessels with the intention of permanently*

stationed in Galle port cannot claim that they have not imported the vessels were in Sri Lanka waters.

If suppose the said vessels were anchored outside the territorial waters of Sri Lanka during the relevant time the Petitioners would have followed the same procedure to import the said vessels and they cannot claim that they have merely purchased the said vessels. Therefore, the fact that the vessels were brought into Sri Lanka waters (few days or few years) before the formalities of importations are completed will not change the character of importation."

In relation to the contention that a ship cannot be imported, the Court, having considered several authoritative texts and judicial precedents, stated;

"A ship or a vessel is imported or not depends on the purpose for which it is used and the intention of the owner of the ship or the vessel. Therefore, the contention of the Petitioners that a ship or a vessel cannot be imported under any circumstances is untenable."

The final paragraph of the judgment, it is ruled by Court;

"The Petitioners challenge to the notices issued on 6.8.2001 (P28), 16.08.2001 (P30), 6.9.2001 (P31) and 19.10.2001 (P32) by the 2nd and 3rd Respondents under Section 8 and 9 of the Customs Ordinance is based on the contention that the said vessels are not imported but purchased. On the material available the importation of these vehicles are prima facie

established. Therefore, the said customs inquiry for which the said notices were issued cannot be said to be unlawful, unwarranted or ultra vires or in excess of powers of the 2nd or 3rd Respondents."

Thus, it is clear that the contentious issue of whether the vessels were imported into Sri Lanka had been decided by this Court by its judgment in Writ Application 1880/2001 and therefore is *res judicata* among the parties since there was no challenge to the said pronouncement. In fact, the Petitioners, in filing the instant application, do not challenge that determination. In paragraph 3(v) it is stated " ...although the 1st Petitioner Company was not responsible in any manner whatsoever for the importation of the said crew boats ..." with this statement, the Petitioners seem to have admitted that there was importation of vessels.

The Petitioners, however, chose not to identify the entity responsible for the importation of the two vessels. They maintain the two vessels had been brought to_ Sri Lanka. In paragraphs 3(k) and (i), the Petitioners state the two crew boats have arrived in Sri Lanka on 18.01.1994 and 24.02.1995. The fact remains that the two vessels that were under the ownership of ISA, a Sharjah based Company, brought into Sri Lanka by GAC Shipping ltd., a subsidiary Company of the 1st Petitioner Company, acting as the local agent of ISA. The Petitioners have not disclosed the exact nature of the relationship between GAC Shipping Ltd. and ISA or the terms upon which the two vessels were brought into Sri Lanka. The Petitioners claim

that the ownership changed only when the two vessels were already in Sri Lanka.

Only way the Petitioners have sought to challenge the determination that the two vessels were imported is placing heavy reliance on the judgment of ***Vallibel Lanka (Pvt) Ltd., v Director General of Customs and Others*** (2008) 1 Sri L.R. 219, which had been decided after the determination by this Court in Writ Application No. 1880/2001 and also to the impugned issuance of Notices of Seizure.

It is clear form a closer examination of the reasoning of that judgment it will not assist the Petitioner's cause at this stage. In the said judgment what the Supreme Court had determined is that it is *"unable to find any provision on the Customs Ordinance which contemplates or makes provision for a sailing vessel as being a "good" within the meaning of Section 16".* The Supreme Court also held that it is " *...unable to hold that a vessel arriving in the ordinary course of navigation carrying goods on board falls within the definition of an "imported good" in terms of Section 16 read with section 47".*

The Petitioners, when they sought intervention of Court by filing Writ Application No. 1880/2001, have thereby enervated the Respondents from continuation of the inquiry beyond its nominal commencement with the issuance of notices under Section 9 of the Customs Ordinance. This inquiry was so initiated by the Respondents, in order to decide whether there was importation of the two vessels into Sri Lanka or they were merely purchased locally as the Petitioners claim. At that point of time, the

Respondents have not decided upon imposition of any pecuniary liability on the Petitioners, either by way of imposition of a Government tax or Customs duty as they did in ***Vallibel Lanka(Pvt Ltd., v Director General of Customs and Others*** (supra).

When the said Writ application reached its conclusion, the determination of the Court on this issue as referred to above, made it redundant for the Respondents to proceed with intended inquiry, during which the Petitioners are provided with an opportunity of presenting their position for consideration. The Petitioners have by then intimated their position by replying that they "*... did not have any Customs entries etc. in its possession, since the 1st Petitioner Company had not imported the said crew boats but had merely purchased the same in Sri Lanka and that no duty had therefore become payable.*"

Contrary to the Respondents claim, the issue of importation is not the crux of the contention of the Petitioners in this application. They instead focus on a particular event and its consequences that followed after the judgment of Writ Application No. 1880/2001, as the point of contest. This position is clearly indicative from the contents of paragraph 10 of the Petition that had been reproduced earlier in this judgment.

It is obvious that the Respondents have proceeded to serve Notices of Seizure, upon the strength of the pronouncement of this Court that the two vessels were in fact had been imported. The whole dispute fundamentally originates from that determination. However, a niche in

which the Petitioners have found to place this application is, the claim that they were served with a Notices of Seizure without an inquiry, an act of the Respondents, allegedly violative of the Court order and also to the established principles of public law.

This dispute could not be termed as identical with the point of dispute presented for adjudication by this Court, by the Petitioners in Writ Application No. 1880/2001 and therefore the present application of the Petitioners, in seeking to challenge Notices of Seizure, could not be considered as *res judicata*.

The Petitioners contend that by the judgment of this Court in Writ Application No. 1880/2001, there is an order of Court on the Respondent to hold an inquiry. Perusal of the said judgment did not reveal an order of Court to that effect. The relevant portion of the judgment reads thus;

> *"But the time of importation is a matter of fact and it has to be determined by the relevant authorities considering the facts and circumstances of each case."*

This particular direction could be referable to the provisions of Section 16 of the Customs Ordinance, which is intended to govern a situation where "... *it shall become necessary to determine the precise time at which an importation or exportation of any goods made and completed shall be deemed to have had effect, ...*" and not to determine whether there was an importation of the two vessels. If there is an act of importation in the first

place, then only this situation could arise as a secondary consideration. When the Respondents have issued the Notices of Seizure, it is not for the purpose of determining *"the precise time at which an importation of any goods made and completed"* the issue the Court had left to the Respondents to determine after an inquiry.

The Respondents have been served with Notices of Seizure issued under Section 125 of the Customs Ordinance. In ***Dias v The Director General of Customs*** (2001) 3 Sri L.R. 281, J.A.N. de Silva P/CA (as he was then) had the occasion to consider *"... the scope of the power of seizure under the Customs Ordinance."*

His Lordship, after evaluation of the scheme of the customs Ordinance *"... dealing with situations in which goods are forfeited"* concluded thus;

> *"... it is clear that a customs officer making seizure must act bona fide and on the basis of a reasonable suspicion. This denotes the commencement of a customs investigation. Further steps may also be taken under Section 9(1) of the Ordinance to issue statutory notices for production of relevant documents. Inquiries may also be made under Section 8(1) for this purpose any person could be examined on oath. These inquiries under Section 8(1) are generally a sequel to the investigation in which relevant evidence may be gathered to provide the foundation for an inquiry, charges are framed and the statutory election made under Section*

129 or 130 at the conclusion of this process. In terms of Section 163 the Director General of Customs may mitigate the forfeiture or penalty and the decision is subject to review by the Minister."

It was contended on behalf of the Petitioner before his Lordship in the said application, as in the instant application, that he "*should have been given a hearing before the seizure is effected*". The Court was not inclined to accept that argument as it concluded that;

"The scheme of the Customs Ordinance recognizes and gives an opportunity to the person whose goods are seized to vindicate himself at a subsequent inquiry. It should be kept in mind that the Court would interfere only if the statutory procedure laid down is insufficient to achieve justice. I hold that there is nothing wanting in the procedure set out in the Customs Ordinance."

In coming to this conclusion, his Lordship relied on the following statement of Lord Reid in the judgment of ***Wiseman v Borneman***1971 AC 298;

"Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a prima facie case, but no one supposes that justice requires that he should first seek the comments of the accused or the defendant on the material before him. So there is nothing inherently unjust in reaching such a decision in the absence of the other party."

The application of the Petitioner in ***Dias v The Director General of Customs*** (supra) was dismissed emphasising the only requirement for the Customs to hold an inquiry is the existence of prima facie material before the Respondent. In ***Jayaratne v Director General, Customs Department and Others*** (2005) 3 Sri L.R. 102, is an instance where *Sripavan* J (as he was then) with concurrence of *de Abrew* J, has cited the reasoning of ***Dias v The Director General of Customs*** with approval. This Court is therefore bound by that reasoning.

In this instance, the material before this Court indicate that there was prima facie material before the Respondent that the two vessels were imported (by way of a Court ruling) and, upon their own admission, the Petitioners had no Customs documentation to produce in relation to the said importation. Therefore, the issuance of the Notices of Seizure is not tainted by any of the defects that the Petitioners allege. It appears that the Petitioners have sought intervention of this Court rather prematurely, in view of the below quoted observation made by *HNG Fernando* CJ in the judgment of ***Kothari v Fernando*** 74 NLR 463;

> *"It thus appears that the Legislature did have it in mind that there may be a seizure of goods lawfully imported and therefore not subject to forfeiture. The fact that a competent Court may subsequently decide, in proceedings referred to in s. 154, that the goods were not forfeited by the operation of s. 43, does not by itself render the seizure unlawful."*

The Petitioners have in their submissions before this Court relied heavily on the determination of the Supreme Court in ***Vallibel Lanka (Pvt.) Ltd., v Director General of Customs and Others*** (supra) in their attempt to quash the Notices of Seizure. The Respondents have issued the impugned Notices of Seizure were served on 1st August 2007. The Petitioners have filed the instant application on the following day the 2nd August 2007. The judgment of ***Vallibel Lanka (Pvt.) Ltd., v Director General of Customs and Others*** (supra)was pronounced by the Supreme Court only in August 2008, while this application was pending its determination before this Court. Therefore, none of the parties have had the benefit of the determination of the apex Court, in the said judgment, when the Notices of Seizure were served or when the instant application was filed before this Court. In the circumstances, it is safe to assume that what the Petitioners seek from this Court is to apply the reasoning of ***Vallibel Lanka (Pvt.) Ltd., v Director General of Customs and Others*** (supra) which had been pronounced when the instant application was awaiting its final determination. If this Court were to apply the determination of the apex Court to the instant application as the Petitioners pray, then it must apply it in retrospectively.

In view of the contention of the Petitioners that the said judgment applies to their application, this Court must then consider whether a judgment of a Court could be applied retrospectively.

In the House of Lords Judgment of ***National Westminster Bank plc v Spectrum Plus Limited and Others and Others*** [2005] UKHL 41, their Lordships have held that legal principles enunciated in the judgment of Slade J in ***Siebe Gorman & Co Ltd v Barclays Bank Ltd*** [1979] 2 Lloyd's Rep 142 was wrong and should be overruled. Then the bank contended that if the House considered ***Siebe Gorman*** was wrongly decided the House should overrule that decision only for the future. This contention provided the opportunity for the House of Lords to examine the legality of application of a judgment, prospectively and retrospectively and of the consequences such an application would ensue.

Having heard the submissions for an against on prospective and retrospective application of their Lordships judgment, *Nicholls* LJ stated that "*...a Court ruling which changes the law from what it was previously thought to be operates retrospectively as well as prospectively. The ruling will have a retrospective effect so far as the parties to the particular dispute are concerned,* ...". (emphasis added).

His Lordship, in expressing out the underlying rationale of this determination, stated thus;

> *"People generally conduct their affairs on the basis of what they understand the law to be. This 'retrospective' effect of a change in the law of this nature can have disruptive and seemingly unfair consequences. 'Prospective overruling',*

sometimes described as 'non-retroactive overruling', is a judicial tool fashioned to mitigate these adverse consequences. It is a shorthand description for Court rulings on points of law which, to greater or lesser extent, are designed not to have the normal retrospective effect of judicial decisions."

In relation to the concept of prospective overruling, his Lordship states that;

"Prospective overruling takes several different forms. In its simplest form prospective overruling involves a Court giving a ruling of the character sought by the bank in the present case. Overruling of this simple or 'pure' type has the effect that the Court ruling has an exclusively prospective effect. The ruling applies only to transactions or happenings occurring after the date of the Court decision. All transactions entered into, or events occurring, before that date continue to be governed by the law as it was conceived to be before the Court gave its ruling."

In the instant application, although there was no "overruling" of its previously held view on the same point by the Supreme Court by the pronouncement of the judgment in ***Vallibel Lanka (Pvt.) Ltd., v Director General of Customs and Others*** (supra) as in the House of Lords judgment of ***National Westminster Bank plc v Spectrum Plus Limited and Others and Others*** (supra), when their Lordships have decided that a "ship" could not be considered as an item of "importable goods" thereby taking away

"ships"" from the description of "goods" as referred to in the provisions of Customs Ordinance.

The Petitioners were obviously not a party referred to in the judgment of ***Vallibel Lanka (Pvt.) Ltd., v Director General of Customs and Others*** (supra). Therefore, as far as the Petitioners are concerned, the determination of the Supreme Court in the said matter, applies to them only in prospectively and not in retrospectively. The Respondents, by serving Seizure Notices on the 3rd Petitioner, have accordingly, acted well within the law as it stood on the date of the issuance of said notices. Thus, the Petitioners have failed to establish that the Respondents have acted arbitrarily, illegally, unlawfully and *ultra vires* and thereby intervention of this Court is not warranted.

Accordingly, the application of the Petitioners is refused and their petition is dismissed.

JUDGE OF THE COURT OF APPEAL