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DIGEST

පරීක්ෂා කර තීරණයට එළඹීම අවශ්‍ය වේ. විරෝධතාව දැක්වූ දෙමව්පියන් නිත්‍යානුකූලව භාරකරුවන් හා විරෝධතාවයට ලක් වූ දරුවන්ගේ දෙමාපියන් නිත්‍යානුකූලව භාරකරුවන් වෙත වෙනම කැඳවිය යුතුය. ප්‍රථම සම්මුඛ පරීක්ෂණයේ දී භාවිතා කළ සී ආර් පොතෙහි පරිගණක මුද්‍රිත ලේඛනයහි විශේෂ සටහන් තීරුවේ මේ පිළිබඳ විස්තර හා තීරණ රතු පාටින් ලියා දැක්විය යුතු අතර විරෝධතා පරීක්ෂණය සම්බන්ධව වෙනම වාර්තාවක් ද ලබා ගත යුතුය."

Respondents were not able to meet the above argument. However I will leave this matter open for a pronouncement in a subsequent case where it is fully argued.

In all the above circumstances of this case Respondents have not been able to disprove the requirement of 'residence' in terms of the Education Department Circulars produced in this application as regards the Petitioner. As such the initial selection of the Petitioner reflected in the temporary list would stand unaltered. Therefore there is a public duty cast on the official Respondents to admit the child concerned to Vishaka Vidyalaya. In any event this court does not intend to quash the selection of children whose names are reflected in document P20, but would quash the decision of the official Respondents non selection of the Petitioner more particularly the Appeals and Objections Panel. Subject to above we allow the Petitioner's application in terms of sub paragraphs 'c', 'd' & 'g' of the prayer to the petition, without costs.

SATHYA HETTIGE J. - I agree.

Application allowed.

ORIENTAL FINANCIAL SERVICES CORPORATION LTD VS. RANGE FOREST OFFICER AND ANOTHER

COURT OF APPEAL
SISIRA DE ABREW,
GOONERATNE, J.
CA (PHC) APN 26/2011
HC AMPARA 343/2009
MC AMPARA 317773
MARCH 15, 2011
APRIL 28, 2011

Forest Ordinance - 13 of 1982 - Section 40 - Registered owner - absolute owner - Registered owner convicted - Vehicle confiscated - Should the vehicle be released to the absolute owner? - Who is the owner of the vehicle?

The registered owner of a vehicle was convicted on his own plea for transporting timber without a permit. At the inquiry-whether the vehicle should be confiscated or not, the absolute owner (finance company) from whom the registered owner obtained financial assistance to purchase the vehicle gave evidence and claimed the vehicle. After inquiry the Magistrate made order confiscating the vehicle. The revision application filed by the Finance Company in the High Court was dismissed. The petitioner sought to revise the said judgment.

Held:

(1) The owner envisaged in the law cannot be the 'absolute owner' (Finance Company).

(2) The absolute owner has no control over the use of the vehicle except to retake the possession of the vehicle for non payment of installments. No injustice would be caused to him as he could recover the amount he spent from the registered owner by way of action in the District Court on the basis of a violation of the agreement.

APPLICATION in revision from an order of the High Court, Ampara.

Cases referred to :-

(1) *Manawadu vs. A.G.* 1987 2 Sri LR 30

(2) *Faris vs. OIC Galenbindunuwewa* 1992 1 Sri LR 167

(3) *Nizar vs. IP Wattegama* 1978 - 79 2 Sri LR 303.

(4) Umma Habeena vs. OIC Dehiattakandiya 1999 3 Sri LR 89

Asthika Devendra for Petitioner.

Respondents absent and unrepresented.

Cur.adv.vult

April 28th 2011

SISIRA DE ABREW, J.

In this case the registered owner of vehicle No. EPLE 3471 was convicted on his own plea for transporting timber without a permit. Thereafter an inquiry was held whether the vehicle should be confiscated or not. At the inquiry the absolute owner from whom the registered owner obtained financial assistance to purchase the vehicle, gave evidence and claimed the vehicle but the registered owner did not give evidence. After the inquiry the learned Magistrate made order confiscating the vehicle. Being aggrieved by the said order the petitioner moved the High Court in revision but the learned High Court Judge, by his order dated 2.11.2010, dismissed the petition of the petitioner. Being aggrieved by the said order of the learned High Court Judge (HCJ) the petitioner has filed the present petition to revise it.

The position taken up by the petitioner is that he is unaware of the commission of the offence and that he has no knowledge of the commission of the offence. He therefore contends that both orders of the learned Magistrate and the learned High Court Judge are wrong and the vehicle should be released to him. Learned Counsel for the petitioner relied on *Manawadu Vs Attorney General.*(1) In considering the contention of

learned counsel for the petitioner, it is necessary to consider Section 40 of the Forest Ordinance as amended by Act No. 13 of 1982 is as follows:

"Upon the conviction of any person for a Forest Offence

(a) all timber or forest produce which is not the property of the State in respect of which such offence has been committed and

(b) all tools, boats, carts, cattle and motor vehicles used in committing such offence (whether such tools, boats, carts, cattle and motor vehicles are owned by such person or not)

shall by reason of such conviction be forfeited to the State."

I have cited the above section since that was the section that was considered in the judgment of *Manawadu's case (supra).* For the purpose of completeness I would like to state that this section was repealed by Act No. 65 of 2009 and the following section was substituted in its place.

" Where any person is convicted of a forest offence -

(a) all timber or forest produce which is not the property of the State in respect

of which such offence has been committed; and

(b) all tools, vehicles, implements, cattle and machines used in committing such offence,

shall in addition to any other punishment specified for such offence, be confiscated by order of the convicting Magistrate:

Provided that in any case the owner of such tools, vehicles, implements and machines used in the commission of such offence, is a third party, no order of confiscating shall be made if such owner proves to the satisfaction of the court that he had taken all precautions to prevent the use of such tools, vehicles, implements, cattle and machines as the case may be, for the commission of the offence."

At this stage it is relevant to consider certain judicial decisions relating to confiscation of vehicles under the Animals Act.

In *Faris vs. OIC Galenbidunuwewa*[2] Justice SN Silva (as he then was) held: "In terms of the proviso to Section 3A of the Animals Act, an order for confiscation cannot be made if the owner establishes one of two matters. They are

(1) that he has taken all precautions to prevent the use of the vehicle for the commission of the offence;

(2) that the vehicle has been used for the commission of the offence without his knowledge.

In terms of the proviso, if the owner establishes any one of these matters on a balance of probability, an order for confiscation should not be made. An order for confiscation could be made only if the owner was present at the time of the detection or there was some evidence suggesting that the owner was privy to the offence."

In *Nizar vs IP Watthegama*[3] Justice Vythialingam and Justice Abdul Cader held: " The learned Magistrate was clearly wrong when he took the view that by reason of the removal of the proviso to section 3A by the Emergency Regulation, confiscation of the vehicle must automatically

follow on conviction and that he was under no obligation to consider the cause shown by the owner. The words "be liable to confiscation" used in section 3A gave a discretion to the Magistrate whether to confiscate the vehicle or not and accordingly the owner should be given an opportunity of showing cause that he had taken all precautions against the use of his vehicle for the commission of the offence and that he was not in any way a privy to the commission of the offence. The vehicle ought not to be confiscated where the owner succeeded in showing cause."

In U*mma Habeeba vs OIC Dehiattakandiya*[4] Justice Yapa and Justice Gunawardene observed: "The lorry in question had been used for illegally transporting nine heads of cattle and four accused were found guilty on their own pleas. The Driver of the lorry was the husband of the owner of the vehicle. The Court was of the view, that the fact that the Driver was the husband, itself proved knowledge on the part of the appellant (owner) that the offence in question was committed with the knowledge of the appellant."

Held : "What section 3A means is that the vehicle shall necessarily be confiscated if the owner fails to prove that the offence was committed without the knowledge but not otherwise. If, as contended, the Magistrate was given a discretion to consider whether to confiscate or not – the Magistrate could confiscate even when the offence was committed without the knowledge of the owner taking into consideration other damnable circumstances apart from knowledge or lack of it on the part of the owner. "

In *Manawadu vs The AG (supra)* Sharvananda CJ and Atukorale J held: "By Section 7 of Act No. 13 of 1982 it was not

intended to deprive an owner of his vehicle used by the offender in committing a forest offence without his (owner's) knowledge and without his participation. The word "forfeited" must be given the meaning "liable to be forfeited" so as to avoid the injustice that would flow on the construction that forfeiture of the vehicle is automatic on the conviction of the accused. The amended subsection 40 does not exclude by necessary implication the rule of *audi alteram partem*. The owner of the lorry not a party to the case is entitled to be heard on the question of forfeiture of the lorry. If he satisfies the court that the accused committed the offence without his knowledge or participation, his lorry will not be liable to forfeiture.

The Magistrate must hear the owner of the lorry on the question of showing cause why the lorry is not liable to be forfeited. If the Magistrate is satisfied with the cause shown, he must restore the lorry to the owner. The Magistrate may consider the question of releasing the lorry to the owner pending inquiry, on his entering into a bond with sufficient security to abide by the order that may ultimately be binding on him."

It is therefore seen under the existing law a vehicle transporting timber cannot be confiscated if the owner of the vehicle on a balance of probability establishes one of the following things.

1. That he has taken all precautions to prevent the use of the vehicle for the commission of the offence.

2. That the vehicle has been used for the commission of the offence without his knowledge.

Who is the owner of the vehicle? This is the most important question that must be decided in this case. Can it be said that the absolute owner (the finance company) committed the offence or it was committed with the knowledge or participation of the absolute owner. The answer is obviously no. Surely a finance company cannot participate in the commission of an offence of this nature when the vehicle is not with it. It cannot be said that the finance company had the knowledge of the commission of the offence when the vehicle was not with it. The owner envisaged in the law cannot be the absolute owner. In the present case the registered owner is the one who drove the vehicle at the time of the commission of the offence. He was convicted on his own plea. If the court is going to release the vehicle on the basis that the owner of the vehicle is the absolute owner, then after the release, it is possible for the absolute owner to give the vehicle to another person. If this person commits a similar offence, the finance company can take up the same position and the vehicle would be again released. Then where is the end to the commission of the offence? Where is the end of the violation of the Forest Ordinance? There will be no end. If the courts of this country take up this attitude the purpose of the legislature in enacting the said provisions of the Forest Ordinance would be defeated. In my view Courts should not interpret the law to give an absurd meaning to the law. In this connection I would like to consider a passage from 'Interpretation of Statutes by Bindra 7th edition page 235. "It is a well known rule of construction that a statute should not be construed so as to impute absurdity to the legislature." For these reasons I hold that the owner envisaged in law is not the absolute owner and the owner envisaged in law in a case of this nature is the person who has control over

the use of the vehicle. The absolute owner has no control over the use of the vehicle except to retake the possession of the vehicle for non payment of installments. If the vehicle is confiscated holding that the absolute owner is not the owner envisaged in law, no injustice would be caused to him as he could recover the amount he spent from the registered owner by way of action in the District Court on the basis of violation of the agreement. There may be other situations where a vehicle being used for transport of timber in violation of the Forest Ordinance, but it is difficult to give an answer to each and every situation. Such cases must be decided on the facts of the case and those decisions must be reserved for future.

I have earlier pointed out that the owner envisaged in law is not the absolute owner. Therefore even if the absolute owner proves that he had taken all precautions to prevent the use of the vehicle for the commission of the offence or that the vehicle had been used for the commission of the offence without his knowledge, he cannot succeed in this case.

For the above reasons I dismiss the petition of the petitioner and refuse to issue notice on the respondents.

GOONERATNE, J. - I agree.

Nova refused.

HASWI VS. JAYTISSA AND TWO OTHERS

COURT OF APPEAL
SISIRA DE ABREW. J
ABEYRATNE. J
CA (PHC) 13/2006
HC COLOMBO HCRA 429/2003
MC MT. LAVINIA 73167
JULY 5, 2010

Civil Procedure Code Section 29, Section 431 (1) – Hire Purchase Agreement – Non Payment of instalment - Vehicle seized – Vehicle produced in Court – Who is entitled to the Vehicle? – Absolute owner or the registered owner? – Rights of the person from whom the vehicle was seized?

Upon a hire purchase agreement between one D and K- respondent- an investment company- D acquired possession of a vehicle. K was the absolute owner and D the registered owner. Thereafter upon a contract between D and the appellant, the appellant acquired the possession of the vehicle and he had paid five installments to K. K seized the vehicle as instalments were not paid, and the Police on a complaint lodged by the appellant reported facts to the Magistrate, seized the vehicle as ordered and produced the vehicle in Court which held an inquiry and ordered the delivery of possession of the vehicle to the appellant. The High Court revised the said order and ordered that the vehicle be handed over to K.

On appeal -

Held:

(1) The respondent K on the purchase agreement has become the absolute owner. D is the registered owner, the appellant is neither the absolute owner nor the registered owner.

Per Sisira de Abrew.J

> "principle that property must be delivered to the person from whose possession it was seized is not an absolute one and there are limitations to the said principle. The applicability of this

principle depends on the facts of each case. I hold that when the property seized by the Police Officer does not fall into any of the categories mentioned in Section 431 (1) of the Criminal Procedure Code, the Magistrate only on that ground should not hand over the property from whose possession it was seized. He must on such occasions hand over the property to the true owner and not to the person from whose possession it was taken by the Police - words as it thinks fit in Section 431(1) gives discretion to the Magistrate to hand over property to the true owner or to the person who is entitled to the possession of the property".

APPEAL from a judgment of the High Court of Colombo.

Cases refferred to :-

(1) *De Alwis vs. De Alwis* - 78-79-80- SLR 17

(2) *Punchi Nona vs. Hinni Appuhami* - 60 NLR 518

(3) *Piyadasa vs. Punchibanda*- 62 NLR 307

(4) *Sugathapala vs. Thambirajah*- 67 NLR 91

(5) *Balagalla vs. Somaratne* 70 NLR 382

(6) *Maniyarthasan vs. Rose* 71 NLR 164

(7) *Freudenburg Industries Ltd vs. Dias Mechanical Engineering Ltd* CA 69/79 CAM 14.7.83

(8) *Silva and another vs. OIC Police station, Thambuthegama* 1991 2 Sri LR 83 (followed)

S.N. Vijithsinghe for 1st party respondent-appellant

C.R. de Silva PC with R.J. de Silva and D. Weerawardena for petitioner-respondent

September 09th 2010

SISIRA DE ABREW J.

Upon a hire purchase agreement between one Subash Dayananda and Kalutota Investment (Pvt) Ltd (hereinafter referred to as the respondent), Subash Dayananda acquired possession of vehicle No 58-7635. The respondent became the absolute owner of the vehicle whilst Subash Dayananda became the registered owner. Thereafter upon a contract between Subash Dayananda and the appellant, the latter

acquired the possession of the vehicle. Learned Counsel for the appellant submitted that the appellant had paid five installments to the respondent. He therefore tried to contend that the appellant is entitled to possess the vehicle and the respondent had no right to seize the vehicle. However the respondent seized the vehicle as installments were not paid as agreed in the hire purchase agreement. Police, on a complaint made by the appellant, reported facts to the Magistrate who made an order to produce the vehicle in court. Police in compliance with the said order produced the vehicle in court. The learned Magistrate, after inquiry, ordered the delivery of the vehicle to the appellant. The learned High Court Judge in revision set aside the order of the learned Magistrate and ordered the delivery of the vehicle to the respondent. Being aggrieved by the said judgment of the learned High Court Judge, the appellant has filed this appeal to set aside the said judgment.

Learned counsel for the appellant contended that the appellant was entitled to the possession of the vehicle since the respondent accepted the installments paid by him. Sunil Jayathissa who gave evidence on behalf of the respondent stated in evidence that anybody could pay installments in relation to the hire purchase agreement. It has to be stated here that the respondent did not sign any contract with the appellant. Therefore it has to be concluded that there was no hire purchase agreement between the appellant and the respondent although some installments were paid by the appellant. The appellant is neither the registered owner nor the absolute owner. But the respondent is the absolute owner.

In deciding the question as to who is entitled to the possession of the vehicle court must consider Section 431(1) of the Criminal Procedure Code (CPC) which reads as follows:

"The seizure by any police officer of property taken under section 29 or alleged or suspected to have been stolen or found under circumstances which create suspicion of the commission of any offence shall be immediately reported to a Magistrate who shall forthwith make such order as he thinks fit respecting the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained respecting the custody and production of such property."

This section deals with three categories of property seized by a police officer.

1. Property taken under Section 29 of the CPC.
2. Property alleged or suspected to have been stolen.
3. Property found under circumstances which create suspicion of the commission of any offence.

In *De Alwis vs De Alwis*[1] Justice Ismail held thus: "That for an order to be made for disposal of this property under section 102 of the Administration of Justice Law (which was based on section 419 of the Criminal Procedure Code) the car must have been property alleged to be stolen or suspected to have been stolen or found in circumstances which created the suspicion of the commission of any offence. As the vehicle did not fall into any of these categories the Magistrate had no jurisdiction to make an order for its disposal under this section and had no alternative but to order its return to the possession of the person from whose custody the police had apparently taken it."

Learned President's Counsel relying on this judgment contended that as the vehicle does not fall into any of the categories mentioned above the learned Magistrate could not

have delivered the vehicle to the appellant. I now advert to this contention. What is the position if the property does not fall into the categories mentioned in Section 431(1) of the CPC? Should the Magistrate, on that ground alone, hand over the property to the person from whose custody it was taken? To answer this question I would like to consider certain judicial decisions.

Justice HNG Fernando (as he then was) in *Punchinona Vs Hinniappuhamy*(2) held: "Where the seizure by a police officer of property alleged or suspected to have been stolen is reported to a Magistrate under section 419 of the Criminal Procedure Code, the Magistrate, if he does not consider "official" custody to be necessary, has no alternative but to order the property to be delivered back to the person from whose possession it was seized. The Magistrate has no power to order the property to be given to any other person on the ground that the latter is the true owner." Justice HNG Fernando expressed the same view in *Piyadasa Vs Punchibanda.*(3) But Justice Sri Skandaraja in *Sugathapala Vs Thambiraja*(4) did not follow the view expressed by Justice HNG Fernando in the said two cases. His Lordship observed: "That it is open to a Magistrate, when he acts under section 419 (1), to direct the property found in the possession of one person to be delivered to another person who is entitled to possess it. Section 419 has conferred jurisdiction on the Magistrate to decide who is entitled to the possession of such property. In exercising that power, the Magistrate is not deciding a civil dispute, but only the right of possession in respect of the property. In the absence of anything to show the title to the property, it should be ordered to be delivered to the person in whose possession it was when it was seized by the police."

His Lordship Justice Sirimanne in *Balagalla Vs Somarathne* [5] too did not follow the view expressed by Justice HNG Fernando in these two cases and remarked thus: "Where a person, after discovering that stolen property has been sold to him, surrenders the property to the police, the Magistrate has power under section 419 (1) of the Criminal Procedure Code to order the property to be handed over to the true owner and not to the person from whom it was taken by the police."

However later His Lordship Justice Thambiah in *Mariyathasan Vs Rose*[6] again followed the view expressed by Justice HNG Fernando in the said two cases.

I have else where in this judgment considered the judgment in *De Alwis Vs De Alwis (supra).*

His Lordship Justice Senevirathne in *Freudenburg Industries Ltd Dias Mechanical Engineering Ltd*[7] observed that the principle that property be delivered to the person who had possession of it at the time of seizure will not apply if there is an unlawful or criminal element in such possession.

Justice SN Silva (as he then was) following the said judgment of Justice Senevirathna in *Silva and Another Vs OIC Police Station Thambuththegama*[8] held: "There are limitations to the principle that property must be delivered to the person from whose possession it was seized, since it may result in the property being delivered to a person who may have obtained possession through criminal means. In such an event the Magistrate may have to consider the question of title."

Having considered all the above judicial decisions, I endorse the view expressed by Justice SN Silva in *Silva's case (supra)* and hold that the principle that property must be

delivered to the person from whose possession it was seized is not an absolute one and that there are limitations to the said principle. The applicability of this principle depends on the facts of each case. I further hold that when the property seized by the police officer does not fall into any of the categories mentioned in Section 431(1) of the CPC, the Magistrate, only on that ground, should not hand over the property to the person from whose possession it was seized. He must on such occasions, hand over the property to the true owner and not to the person from whose possession it was taken by the police. The words "as he thinks fit" in Section 431(1) of the CPC gives discretion to the Magistrate to hand over the property to the true owner or to the person who is entitled to the possession of such property.

In the instant case who is the true owner? The respondent, on the hire purchase agreement, has become the absolute owner. Subash Dayananda is the registered owner. The appellant is neither the absolute owner nor the registered owner. Situation would have been different if the registered owner, after paying 75% of the hire purchase price, made a claim for the possession of the vehicle. For the above reasons, I hold that the appellant is not entitled to claim the possession of the vehicle in the proceedings before the Magistrate. He may perhaps be entitled to pursue his claim in a case before the District Court.

For the above reasons, I hold that there is no merit in this appeal and dismiss the appeal but without costs.

ABEYRATHNE, J. - I agree.

Appeal dismissed.

UTSCH LANKA (PVT) LTD., AND ANOTHER VS. DEPUTY DIRECTOR OF CUSTOMS AND OTHERS

COURT OF APPEAL
SRISKANDARAJAH, J.
CA 82/2007
JANUARY 12, 2011
FEBRUARY 25, 2011
APRIL 1, 4, 2011

Customs Ordinance - Section 47, Section 51, Section 52 - Willfully failing to classify goods - Misdescription - Non declaration of royalty - Is it undervaluation?

Erich Utsch AG - a German Company - entered into an agreement with Commissioner of Motor Vehicles for the delivery of retro reflective number plates with embossed number and 3rd number plate sticker for windscreen for a period of 5 years. The 1st petitioner company was incorporated in Sri Lanka to facilitate the above agreement. Erich Utsch AG as the licensor granted an exclusive right to the 1st petitioner to use the necessary technology, expertise and to obtain training required by the 1st petitioner as licensee. The terms and conditions included a payment of a Royalty Fee of 10% per annum of the total turnover. A building belonging to the Commissioner of Motor Traffic was given to the 1st petitioner for the storage of imported blank plates and to emboss number in the blank plates.

The 1st petitioner imported blank plates and the raw materials from the German Company on a commercial basis. The tariff classification advice was 7616.00. The petitioner had been declaring the imported item under HS 7616 code until one of the imports were questioned at the examination point. After inquiry, the petitioners were charged by the Customs - for willfully failing to classify and pay the customs duties and other levies. At the conclusion of the inquiry order of forfeiture of goods in terms of Sections 47, 129,166B was made. Further an order on the importer to disclose all the relevant and material evidence to the customs in declaring the goods at the time

of importation. The Respondents contention was that the importer has willfully failed to classify and pay the custom duties and other levies correctly and that the petitioners have willfully classified aluminium plates under HS 7606.99.09 disregarding the fact that the invoice from the German Company state that the HS Code is 8310.00. The respondents further contended that as regards royalty payments, the importer has to declare the royalty payments to the Customs in order to determine the value of the goods imported. It was further contended the World Health Organization (W.H.O) had described the goods in issue under Heading 83.10.

Held:

(1) Blank plates imported contain several lion water marks, pre engraved secret numbers and the national emblem (Sri Lanka) security measures, after importation the importer as per the agreement embosses two letters, four numbers across the plate separated by a dash with a provincial identification (two) letters. The World Customs Organisation had described the goods in issue under heading 83.10 not because the blank plate contains key letters, number or designs on them but because the plate is designed for the subsequent insertion of details.

In view of this opinion all the consignments of aluminium plates imported by the 1st petitioner falls within the classification of HS Code 8310.00 and the duties short levied could be recovered as provided for in Section 18.

(2) Royalty payment is not related to the imported goods or it is a condition of sale of the imported goods, therefore the royalty payment need not be added to the price actually paid. Failure to enter the payment of royalties in the Customs Value Declaration Form will not amount to a false declaration to charge the petitioners under Section 52.

APPLICATION for a Writ of Certiorari.

Cases referred to :-

(1) *Toyota Lanka (Pvt.) Ltd vs. Jayatilaka Director General of Customs* - CA 2093/2005 - C.A.M. 1.10.07

(2) *Toyota Lanka (Pvt) Ltd vs. Director General of Customs SC 49/2008* - SCM 29.03.2009

(3) *Commissioner of Customs (Port) vs. M/s Toyota Kirloska Motor Pvt Apparel (Civil) 3635 or 20006* - 17.5.2007

(4) Chief Executive Officer of the New Zealand Customs Service vs. Nike New Zealand 2004 - 1 NZLR 238.

(5) *Commissioner for the South African Revenue service vs. Delta Motors (Corp) (Pvt) Ltd* - (SC) South Africa Case No. 279/2001 - Minutes of 23.9.2002.

Nigel Hatch PC with *Ranjith de Alwis, Ms. K. Geekiyanage* and *Ms. P. Abeywickrama* for Petitioner.

Farzana Jameel for Respondents.

Cur.adv.vult

April 28th 2011

SRISANDARAJAH, J.

Erich Utsch AG (a company incorporated under the laws of Germany) entered into an agreement with the Commissioner of Motor Traffic on the 11th of October 1999 (P3) for the manufacture, supply and delivery of retro-reflective number plates with embossed number and 3rd number plate sticker for windscreen for a period of five years subject to the terms and conditions of the said agreement. The 1st Petitioner Company was incorporated in Sri Lanka to facilitate the above agreement. The 1st Petitioner in order to perform its business entered into a license agreement with the said Erich Utsch AG of Germany on 21st March 2000 (P5). In terms of this agreement Erich Utsch AG as licensor granted an exclusive right to the 1st Petitioner to use the necessary technology expertise and to obtain the training required by the 1st Petitioner as licensee in connection with the manufacture, supply and delivery of retro-reflective number plates with embossed number and 3rd number plate sticker for windscreen. The terms and conditions of the said agreement include a payment

of royalty fee of ten per cent (10%) per annum of the total turnover of the 1st Petitioner as per the audited accounts. Even though the said agreement P5 did not specify the role of the 1st Petitioner in executing the agreement P3, according to the evidence the 1st Petitioner's role is engaging in the business of embossing and printing motor vehicle numbers in blank plates imported from Erich Utsch AG and delivering the completed number plates for vehicles as and when required by the Commissioner of Motor Traffic in terms of agreement P3. A building belonging to the Commissioner of Motor Traffic has been given to the 1st Petitioner for the storage of imported blank plates and to emboss numbers in the blank plates.

The 1st Petitioner imported blank plates and other raw materials for this purpose from Erich Utsch AG on a commercial basis after making the purchase price for the goods imported. For the purpose of this importation the Petitioners submitted that they relied on an advise sought and obtained by Asia Capital Ltd on a Tariff Classification on the applicable Harmonized System (HS code) to the samples attached to the application No. TC/99/177 dated 25.11.1999. The tariff classification advice was that the HS Code applicable to the product described in the application as per sample is 7616.00. The sample submitted with the said application according to the Petitioners is a blank aluminium plate containing yellow and white reflective sheeting with government emblem, laser branded serial number and ensure marks. The Respondents admitted that samples were given to the customs to obtain a ruling but denied any markings in the blank aluminium plates. As the samples submitted are not available with the customs it is not possible to verify this position. The Asia Capital Ltd sought and obtained this Tariff Classification as it was the local agent for Erich Utsch

AG prior to the incorporation of the 1st Petitioner Company. As advised the 1st Petitioner had been declaring the imported aluminium blank plates to customs under this HS Code until one of the imports was questioned at the examination point of customs in January 2003. This required the Petitioner to obtain a second ruling and it was obtained on 24.07.2003. According to the 2nd classification advise the goods are classified under Harmonized System (HS code) 8310.00.

The Customs investigations into the imports of blank number plates by the 1st Petitioner commenced in 2004. An inquiry was held under the Customs Ordinance in the year 2006. The Inquiry proceeded on the basis of suspicion that the offences of misdescription and undervaluation of the goods imported were committed.

The Petitioners were charged by the customs in relation to 53 consignments imported by M/S Utsch Lanka (Pvt) Ltd from M/s Erich Utsch AG of Germany since 25th April 2000 to 24th March 2005. The items imported are rectangular aluminium plates of various dimensions (with rounded corners and rased edges, covered with a reflective foil with several lion water marks pre-engraved secret numbers and the national emblem of Sri Lanka), hot stamping foils, 3rd licence plate stickers, TTR foils. These items were intended for the embossing and printing of motor vehicle number plates.

The charges levelled against the Petitioners were as follows:

(1) M/S Utsch Lanka (Pvt) Ltd pays annually a royalty to M/S Erich Utsch AG of Germany which is 10% of the total turnover of the respective financial year.

The importer has failed in all the instances to declare the royalty payments to the Customs which is dutiable. As a result the importer has defrauded Rs. 49,773,031/= of government revenue. The total actual value of the consignment is Rs. 392,088.184/= whereas the total declared value is Rs. 335,692,996/=. Therefore the importer and the declarant shall be dealt with in terms of Section 47 and 52 of the Customs Ordinance.

(2) Out of the 53 consignments the importer has failed wilfully to classify and pay the customs duty and other levies correctly on the aluminium based plates on 22 occasions.

The Petitioners' position with regard to the payment of royalty (1st charge); is that the payment of royalty by the Petitioners is on a local transaction between the 1st Petitioner and the Commissioner of Motor Traffic which is not within the scope of the Customs Ordinance as amended in 2003 and/or as royalties are not paid directly or indirectly by the 1st Petitioner as a condition of the sale of the goods being valued, instead it is paid by the 1st Petitioner for the provision of technology used in relation to the embossing and printing of numbers in imported blank plates.

With regard to the 2nd charge the Petitioners contended that at all material time the 1st Petitioner not only sought tariff classification ruling in relating to the classification of goods imported by the 1st Petitioner but also abided by the ruling given by the Customs in declaring the goods at the time of importation.

At the conclusion of the inquiry the Petitioners were called upon by the 1st Respondent to show cause for charges

framed against them and the order was delivered on 16.01.2007 as follows:

(a) Order forfeit M/s Utsch Lanka (Pvt) Ltd represented by Mr. George Salis Lopez, Director - General Manager, Mr. Jan Vlaskamp, Director and Mr. R. N. Hettiarachchi, Director, Rs. 184,260,095/- in terms of Section 47 of the Customs Ordinance (Chapter 235);

(b) Order forfeit M/s Utsch Lanka (Pvt) Ltd represented by Mr. George Salis Lopez, Director - General Manager, Mr. Jan Vlaskamp, Director and Mr. R. N. Hettiarachchi, Director Rs. 88,609,608/- at my election in terms of section 52 and 166B of Customs Ordinance (Chapter 235);

(c) Order forfeit Mr. George Salis Lopez, Director - General Manager, Rs. 10,000,000/- in terms of Section 129 and 166B of the Customs Ordinance (Chapter 235).

(d) Order forfeit Mr. Jan Vlaskamp, Director Rs. 10,000,000/- in terms of Section 129 and 166B of the Customs Ordinance (Chapter 235).

(e) Order the importer to disclose all the relevant and material evidence to the Customs valuation division in order to decide the actual ratio of the royalty payment which is liable for Customs valuation purpose, with respect to the imports whichever not considered at this inquiry for the purpose of recovering Customs duties and levies short paid.

The Petitioners in this application has sought a writ of certiorari to quash the aforesaid orders dated 16.01.2007 among other reliefs.

Offence of Misdescription

The order of forfeiture of the goods valued at Rs. 184,260,095/- in terms of Section 47 of the Customs Ordinance (Chapter 235) is based on the allegation that the importer has wilfully failed to classify and pay in relation to 22 consignments the customs duties and other levies correctly on the aluminium based plates.

In *Toyota Lanka (Pvt) Limited v. S.A.C.S.W. Jayathilaka Director General of Customs*[1], the Toyota Lanka (Pvt) Limited cleared 64 units of vehicles from customs after paying the duty attached to the relevant classifications. Subsequently the Customs Department issued a seizure notice acting in terms of Section 125 of the Customs Ordinance in relation to 31 units of the said vehicles and seized the vehicles on the basis that in the customs declaration the vans are incorrectly classified as buses under HS Code 8702.10.13.

This decision was challenged by way of a writ of certiorari in the above case and the Court of Appeal quashed the decision to seize the vehicles for the reason: "When a declarant enters a HS Code in the CUSDEC which in his opinion is the correct classification of the goods imported, the disagreement of the classification of the goods by the Director General of Customs will not attract the forfeiture contemplated in Section 47 and hence the vehicles cannot be seized under section 125 of the Customs Ordinance. The Court also observed:

> "If the Director General of Customs is of the opinion that in fact the correct classification (HS Code) has not been included in the CUSDEC and in consequence the customs has short levied any duty, it could make a determination

of the correct classification (H.S. Code) of the goods imported and the customs duty short levied could be recovered under Section 18 of the Customs Ordinance."

The Supreme Court in *Toyota Lanka (Pvt) Limited v. Director General of Customs*[2] held:

"Hence I am fortified in the view and hold that the provision in Section 47 *"but if such goods shall not agree with particulars in the bill of entry the same shall be forfeited. . ."* apply to a situation in which by means of a wrongful entry goods are conveyed by stealth, to evade payment of customs duties or dues or contrary to prohibitions or restrictions. In such a situation of a wrongful entry and evasion, since the consequence of forfeiture is by operation of law, even if the officer had delivered the goods upon the submission of a CUSDEC, such goods may be seized at any subsequent stage in terms of Section 125. I am further of the view and hold that the forfeiture provided for in Section 47 would not apply to a situation of a disputed classification of goods or an under payment of short levy of dues or duties. In such event the proper course would be a requirement for payment of the amount due prior to delivery of goods or the recovery of the amounts due in terms of Section 18."

Both the Court of Appeal and the Supreme Court held that the forfeiture provided for in Section 47 would not apply to a situation of a disputed classification of goods in the absence of an intention of defrauding the revenue.

The Respondents' contention in this instant case is that the importer has **wilfully** failed (intentionally defrauded the revenue) to classify and pay the customs duties and other levies correctly on the aluminium based plates. The Respondents'

contention is that the Petitioners have wilfully classified the "Aluminium Plates" under H. S. Code 7606.99.09 disregarding the fact that the invoices (2R1 to 2R4) from M/s Erich Utisch AG, state that the HS Code as 8310.00. In this regard the dates of the invoices are relevant. Invoice 2R1 is dated 20.10.1999 and invoices No 2R2 to No 2R4 are dated 03.11.1999. The Petitioners have relied on a Tariff Classification Advice dated 25.11.1999 bearing No TC/99/177. The Customs Department has a special unit to give such advice and according to this advice the advice sought is in relation to an article: 'Rectangular Aluminium Plates in sizes as per attached letter' and they are imported in the form: 'Aluminium plate form as per sample attached with reflective foil'. For this product the tariff classification given by the Customs Department is H. S. 7616.9909. The Petitioners are bound to rely on this advice given by the Customs Department even though the Petitioners or its supplier holds a different opinion in relation to HS code of the said product. The Petitioner relied on this advice until he was compelled to seek an advice on 24.07.2003 and by this advice the Petitioner was advised that the product in relation to which he has sought advice is HS 8310.00. It is admitted that the Petitioners thereafter classified this item under HS code 8310.00 for its imports.

The imports of the blank aluminium plates in issue with regard to classification are in relation to the period 17.12.1999 to 24.07.2003. The Petitioners' position is that he correctly described the article imported under HS Code 7616.9909 on the classification advice sought and obtained from the customs bearing No. TC/99/177 dated 17.12.1999. The position of the Respondents is that the classification given as HS 7616.9909 to a product described as "Aluminium

Plate form as per sample attached with reflective foil". In the said advice of the Customs bearing No. TC/99/177 dated 17.12.1999 in the **comments column** it has been specifically stated that "If the plates imported bear any letters, numbers or designs they would fall under 8310.00" It is admitted that the blank plates imported contains several lion water marks, pre-engraved secret numbers and the national emblem of Sri Lanka (here in after referred to as security features). After importation the importer as per agreement embosses, two letters, four numbers across the plate separated by a dash with a provincial identification (two) letters.

The position taken by the Petitioners is that the sample of the blank aluminium plate with the security features was submitted with the document by which the advice was sought (The Respondents states that the said sample is not available with the customs to confirm whether the said sample contained the security features but it was admitted by the Respondents that the sample of the blank plate was given) if the Customs officers had thought that the security features could be considered as letters, numbers or design then they need not make a special note that if the plates imported bear any letters, numbers or designs they would fall under 8310.00" instead they would have classified under HS code 8310.00 but as they have considered the aluminium plate submitted and advised that it will fall under the classification HS 7606.11 shows that the Customs Department has decided that the security features will not fall under the description stated by them in the comments. The Petitioners on this basis imported blank aluminium plates declaring HS Code No.7606.11 in the CUSDEC.

The position of the Respondents is that the sample submitted for advice is only a rectangular blank aluminium

plate without lion water marks, pre-engraved secret numbers and the national emblem of Sri Lanka (security features), this position was taken by the Respondents because of the comments made in the said advice that 'if the plates imported bear any letters, Nos or designs they would fall under 8310.00' .

It is in evidence that when these goods are cleared the advice bearing No TC/99/177 dated 17.12.1999 was also attached for easy reference. As contended by the Respondents that the position of the customs from the very inception that if the plates imported contained the security features (any letters, numbers or designs on them) they will be classified under HS 8310.00, is correct then the custom officers when passing the goods after inspection would not have released the goods to the importer as the goods are classified under HS 7606.11 based on the advice bearing No TC/99/177 dated 17.12.1999. Further if it is clear in the minds of the officers of the Customs that they security features could be considered as letters, numbers or design then they need not have referred this issue of classification to the world Customs Organization on 25.08.2003 after giving a second advice on 24.07.2003 informing the Petitioner that the same product falls under classification HS 8310.00.

The Director of Customs by his letter dated 25th August 2003 addressed a letter to the World Customs Organization and has given the description of the Article as follows:

"Rectangular aluminium plates of various dimensions, with rounded corners and raised edges, covered with a reflective foil with security features, intended to be used for the manufacture of motor vehicle license number plates.