

1951

Present: Dias S.P.J. and Gunasekara J.

SILVA, Appellant, and THE ATTORNEY-GENERAL, Respondent

S. C. 301—D. C. Colombo, 18,416 M

Contract—Crown—Liability of Attorney-General for contracts of public servants—Customs Ordinance (Cap. 185), ss. 17, 22, 108, 148-150—Sale of Service goods for non-payment of warehouse rent—Validity of such sale—Non-delivery to purchaser—Purchaser's remedy is against Attorney-General and not against Principal Collector.

Goods belonging to the Forces, although they are exempted from import duty by virtue of section 22 of the Customs Ordinance, are chargeable with warehouse rent, and are liable, under section 108, to be sold by the Principal Collector for non-payment of warehouse rent.

Where the Principal Collector of Customs enters into a contract of sale under section 108 of the Customs Ordinance, he is an agent of the Crown and the Crown will be liable for a breach of such contract, whether the Collector acted under statutory powers or on the express orders of Government. Where a public officer enters into a contract in the *bona fide* exercise of the powers of his office, any action in regard to such act must be against the Attorney-General as representing the Crown, and not against the public officer personally. Sections 148-150 of the Customs Ordinance do not lay down substantive law and do not create any rights of action against a Customs officer.

A PPEAL from a judgment of the District Court, Colombo.

During the Second World War certain Service goods which had been brought into Ceylon free of Customs duty were sold under section 108 of the Customs Ordinance for non-payment of warehouse rent. The plaintiff bought the goods at the sale for Rs. 1,068, but when he tried to take delivery he was prevented from so doing on the ground that subsequent to the sale the Services Disposals Board, which was a local branch of the Ministry of Supply of the Imperial Government, had sold the goods to a third party. The plaintiff thereupon sued the Attorney-General of Ceylon, as representing the Crown in Ceylon, claiming Rs. 40,000 as damages for breach of contract.

H. V. Perera, K.C., with *G. T. Samarawickreme* and *G. L. L. de Silva*, for the plaintiff appellant.

H. W. R. Weerasooriya, Acting Solicitor-General, with *Walter Jayawardene*, Crown Counsel, for the defendant respondent.

Cur. adv. vult.

May 31, 1951. DIAS S.P.J.—

During the Second World War when Ceylon became a theatre of operations and eventually the headquarters of the South East Asia Command, large quantities of Service goods from overseas were brought into the Island and for lack of space were dumped in various parts of the country, including the Customs premises in Colombo. Amongst

these goods were about 11,000 tons of steel plates of assorted sizes. This action relates to a part of those goods, estimated as being about 250 or 272 tons.

After the cessation of hostilities, the Colombo Customs authorities required the space occupied by these Service goods which had been imported into the Island free of customs duty—see s. 22 of the Customs Ordinance (Chapter 185). S. 17 of the Customs Ordinance and the regulations made thereunder (see Volume 3 of the Subsidiary Legislation of Ceylon, pages 151 to 157) provide for the levying of *warehouse rent* in respect of “all goods” irrespective of whether they are public or private property. It was conceded by the learned acting Solicitor-General at the argument that these steel plates even though exempted for import or export duty would, nevertheless, be liable to warehouse rent. S. 108 of the Customs Ordinance empowers and authorizes the Principal Collector of Customs after public advertisement to sell goods which are lying in the customs premises for a period longer than three months in respect of which warehouse rent is due.

The evidence shows that so far back as 1944 the Principal Collector of Customs was inconvenienced by these service goods, and he had been trying to ascertain whether he would be justified in selling them under the provisions of s. 108—see D 2 and D 3. He wrote to the Financial Secretary in 1945—D 5. On February 25, 1946, he addressed the heads of various service units requesting them to clear the articles claimed by them. On March 6, 1946, the Principal Collector complained to the Financial Secretary that there was no improvement in the position—D 7. He said “The continued presence of these packages in the warehouses not only lessens storage essential for other cargo, but also affects the sanitation of the warehouses In the circumstances I invite reference to my letter of September 10, 1945, and request that the General Officer Commanding’s approval may be obtained to dispose of the articles under s. 106 or 108 of the Customs Ordinance”. By D 9 dated June 26, 1946, the Principal Collector notified all Service heads that he proposed to dispose of these goods under the Customs Ordinance as they “appear to have been abandoned”. By D 10 dated November 28, 1946, the Principal Collector informed the Chief Secretary of Ceylon through the Financial Secretary that he proposed advertising these goods for sale. *By his letter D 11 of December 27, 1946, the Chief Secretary approved the proposal of the Principal Collector to advertise and sell the goods.*

Thereupon by *Gazette* notice P 1 dated February 21, 1947, the Principal Collector intimated that “the undernoted articles which have been lying in the Customs premises will be sold by public auction on Tuesday, March 4, 1947” The plaintiff having seen this notification attended the auction and purchased the steel plates for the sum of Rs. 1,068. He duly paid his deposit and eventually the balance of the price, but when he tried to take delivery he was prevented from so doing. It appears that in the interval the Services Disposals Board, which is a local branch of the Ministry of Supply of the Imperial Government, had sold these goods to a firm called Maharaja & Co.

The plaintiff now sues the Attorney-General of Ceylon, as representing the Crown in Ceylon, for breach of contract claiming Rs. 40,000 as damages. The District Judge dismissed the plaintiff's claim.

The submissions of the learned acting Solicitor-General on behalf of the Crown may be summarised as follows: (a) Having regard to the evidence in the case the Solicitor-General was prepared to concede that warehouse rent had become due in respect of these goods; but he contended that they could not be sold under section 108, for the reason that they had been imported into Ceylon and left in the warehouse by the Crown, and the Crown is not bound by section 108. (b) He submitted that even if the Principal Collector of Customs had authority under s. 108 to sell the goods, such sale could not in law bind the Crown because, in acting under s. 108, the Principal Collector was performing a statutory duty, and was not acting as the servant or agent of the Crown. (c) Counsel further contended that no action lies against the Crown in this case for the further reason that the Customs Ordinance itself (ss. 148-150) provided the remedy available to this plaintiff, namely to proceed against the Principal Collector of Customs.

The liability of the goods to be sold depends, however, not on the Crown being bound by s. 108 but on the Crown being authorized by that section to sell through its officers goods in respect of which warehouse rent is due. Once it is conceded that these goods, which were left in a warehouse for a longer period than three months; were goods in respect of which warehouse rent was due to the Crown under section 17, they were clearly goods which were liable to be sold under s. 108 for the recovery of the debt due to the Crown.

"The Crown" in the various countries forming the British Commonwealth of Nations cannot carry on public business without revenue. The chief sources of revenue of the Government of Ceylon are Income Tax, Estate Duty, Excise duties, Stamp duties, the duties on Salt, the income from the Railway, the Post Office, the Pearl Fisheries, and the Customs duties levied on imports and exports, &c.—see *Walter Pereira's Laws of Ceylon*, p. 58. These revenues are collected by the servants of the Crown acting through various departments: "The various Government offices and departments through the medium of which the general executive administration of the country is carried on, owe their creation and present internal organization largely to the direct exercise of the discretionary authority of the Crown as the head of the executive. But though this is so, the constitution of the more modern departments, and the powers and duties of the various officers and functionaries of whom their staff is composed, as well in the modern as in the older departments, are now principally regulated by direct parliamentary enactment or by Orders in Council issued under statutory authority"—*6 Laws of England (Haitsham Edition)* p. 675. In other words "public servants" when carrying out their duties are precisely what their designation means. They are public agents of the Crown.

The Customs Department of Ceylon is a revenue collecting department of the Crown. It is not an incorporated body, and is therefore not a distinctive legal *persona* which can sue or be sued under its own name.

The official head of the Customs Department is the Principal Collector of Customs. He is a public servant remunerated from the public revenue. Therefore, when the Principal Collector acts under s. 108 of the Customs Ordinance he is obviously not acting on his own behalf or for his private benefit, but on behalf of someone else. Who is that person? Obviously it is the Crown to whom the warehouse rent was due.

S. 17 and the Regulations made thereunder empower the Principal Collector to levy warehouse rent even on goods which are exempted from import or export duty. The learned Solicitor-General does not dispute this. Therefore, warehouse rent was due in regard to the goods in question. That being so, under s. 108 the goods were liable to be sold for non-payment of warehouse rent. The Solicitor-General argues that under s. 108 the Principal Collector does not act as the servant or the agent of the Crown but is acting under statutory powers.

I am unable to accede to this argument. Clearly the Principal Collector when acting under s. 108 is not acting for his own benefit, or on behalf of the owner of the goods from whom warehouse rent was due. He is acting solely for and on behalf of the Crown to whom the warehouse rent is due. S. 108 clearly empowers the Principal Collector to enter into contracts to sell goods to another. This action is for a breach of such a contract.

It seems to be irrelevant to consider whether the Principal Collector of Customs was or was not acting under statutory powers. In my view whether the Principal Collector acted under statutory powers or on the express orders of Government, in either case so long as he acts *bona fide* and within the scope of his authority, he is an agent of the Crown and his acts bind the Crown. The documentary evidence supports the view that all his acts were transacted *bona fide* for and on behalf of the Crown. It being conceded that there has been a breach of contract, the question is whether the plaintiff's remedy is against the Principal Collector as contended by the Solicitor-General, or against the Attorney-General?

In Britain the Crown cannot be sued in contract. The procedure to obtain redress against the Crown for a breach of contract is by what is called "a petition of right". On the other hand in Ceylon the Crown can be sued in contract—*Siman Appu v. Queen's Advocate*¹. Therefore, in all cases of alleged breach of contract by the Crown, unless there exists some statutory bar, the action must be instituted against the Attorney-General as representing the Crown.

Does an action lie against a servant of the Crown personally for an alleged breach of contract entered into by him in his official capacity and not for his personal benefit? The law on this point is clear and can thus be summarised: Where a public officer enters into a contract in the *bona fide* exercise of the powers of his office, any action in regard to such act must be against the Attorney-General as representing the

¹ 9 A. C. 571 Privy Council. (*In Ceylon the remedy by petition of right does not lie.—Jayawardene v. Queen's Advocate (1881) 4 S. C. C. 77.*)

Crown, and not against the public officer personally—*Singer Sewing Machine Co. v. Bowes*¹ following *Muttupillai v. Bowes*². If the Crown desires to sue the subject in contract, it is the Attorney-General, and not the public officer who entered into the contract on behalf of the Crown, who must sue—*Assistant Government Agent, Chilaw, v. Velappuhamy*³. If, however, the public servant acted without authority, actual or ostensible, or where there has been no holding out by the Crown of that public servant as its agent, the maxim *respondet superior* cannot apply, and no action will lie against the Crown in such circumstances—*Arachchille v. Kira*⁴, *Deen v. Attorney-General*⁵ and *Wijesuriya v. Attorney-General*⁶.

An action will lie against a public officer personally when the action is in tort, where he acts *mala fide* and not in the *bona fide* exercise of his office. Where, however, the case is one of a mere *breach of contract*, whether the public servant acted under statutory powers or not, the cases cited above show that the action must be brought against the Attorney-General, unless the Crown can show that the public servant acted without authority, actual or ostensible, or that there was no holding out by the Crown that the public servant was its agent. This the Crown cannot do in this case.

Mr. H. V. Perera for the appellant cited certain passages from *Robinson on Public Authorities (1925 edition)* page 8 *et seq.* The law in England appears to be the same as in Ceylon. Robinson says (at p. 8): "As regards contracts entered into by a servant of the Crown in such capacity, he is under no personal responsibility, unless he expressly contracted to be personally liable". At page 9 he says: "An agent who purports to contract on behalf of a private person may be held liable in an action for breach of an implied warranty that he had authority so to contract, if in fact he had no authority, or if he exceeded any authority which he had. In *Dunn v. Macdonald*⁷ it was sought to make the defendant, who was a public servant acting on behalf of the Crown, liable on this ground; but it was held that the doctrine was not applicable in the case of public servants acting on behalf of the Crown." The writer points out at page 10 "The principles underlying and justifying the immunity of servants of the Crown was stated as follows by Dallas C.J. . . . On principles of public policy an action will not lie against persons acting in a public character and situation, which from their very nature would expose them to an infinite multiplicity of actions. The very liability to an unlimited multiplicity of suits would in all probability prevent any proper or prudent person from accepting a public situation at the hazard of such peril to himself".

I am, therefore, unable to accede to the argument of the Crown that no action lies against the Crown in this case. If the argument of the Crown is sound then in this case the subject would be without a remedy, for he cannot sue the Crown, and, on the authorities, no action will lie against the Principal Collector of Customs. 3

¹ (1917) 4 C. W. R. 78.

² (1914) 17 N. L. R. 453.

³ (1922) 5 T. L. R. 34.

⁴ (1884) 6 S. C. C. 22.

⁵ (1923) 25 N. L. R. 333.

⁶ (1950) 51 N. L. R. at pp. 366-367.

⁷ (1897) 1 Q. B. 555.

Finally, it was submitted for the Crown that the plaintiff's remedy in this case was provided by ss. 148-150 of the Customs Ordinance. In my opinion these sections do not lay down substantive law, and do not create any rights of action against a Customs Officer. They merely indicate certain rules of procedure which must be observed if and when a customs officer is sued. The law relating to the right to sue a customs officer personally must be sought for elsewhere. Ss. 148-150 do not have the effect of diverting the subject's cause of action from the Crown to the public officer.

I am, therefore, of opinion that the learned District Judge has reached a wrong conclusion, and that his judgment must be set aside. The facts of this case are not in dispute and therefore this Court is in as good a position as the Court of trial to reach a conclusion on the facts and law.

On the question of damages, there is an expert engineer, and a person who made an offer to the plaintiff to buy the goods, who prove that the amount claimed by the plaintiff is not excessive. The learned Solicitor-General did not dispute that in the event of our holding against the Crown these damages are excessive.

The judgment and decree of the District Court are therefore set aside. Judgment will be entered in favour of the plaintiff appellant for a sum of Rs. 40,000 as prayed for with costs both here and below.

GUNASEKARA J.—I agree.

Appeal allowed.
