ISHAK
v
LAXMAN PERERA, DIRECTOR GENERAL OF CUSTOMS AND OTHERS

COURT OF APPEAL
TILAKAWARDANE, J. (P/CA)
ABEYRATNE, J.
C.A. NO. 447/2001
MARCH 26, 27, 2003

Customs Ordinance – Section 12, 44, 137, 152, and 154 – Exchange Control Act – Foreign Currency forfeited – Seized – Is forfeiture amenable to writ jurisdiction? – Availability of alternative remedy.

The petitioner sought a writ of certiorari to quash the order of the Assistant Director of Customs – 2nd respondent, where he had forfeited the foreign currencies under the provisions of the Customs Ordinance, which were detained at the departure counter at the Airport.

Held :

(i). The goods were forfeited by operation of law and as a consequence of the imperative terms of the law it was not left to a decision or order to be made by an Inquiring Officer.

(ii). By implementation of law there was an automatic forfeiture of the goods followed by seizure. Therefore there is no order that can be challenged in the Court of Appeal by invoking its writ jurisdiction.

(III) He has already instituted action, therefore no writ lies.

APPLICATION for a Writ of Certiorari.

Cases referred to :

1. *Palasamy Nadar* v *Lanktree* - 51 NLR 520
2. *Attorney-General* vs *Lebbe Thamby* - 61 NLR 254
3. Attorney-General vs *W.Wimaladharma* - 78 NLR 327
4. *Fernando* v *Dharmasiri* - 72 NLR 320
5. *Gunasekera* v *Weerakoon* - 73 NLR 262
6. *Rodrigo* v *Municipal Council,* Galle, 49 NLR 89
7. *Samarakoon* v *Tikiri Banda* - 51 NLR 259
8. *Somasunderam Vanniasingham* v *Forbes & Another* 1993 - 2 Sri LR 362 (distinguished)

M.M. Zuhair P.C., with *A.M. Jeffry* for petitioner.

Janak de Silva, S.C. for 1st, 2nd and 4th respondents.

cur.adv.vult

June 2, 2003

SHIRANEE TILAKAWARDANE, J. (P/CA)

The petitioner has preferred this application seeking a *Writ of Certiorari* to quash the order of the 2nd respondent dated 07.03.2001 (P5). In this order the 2nd respondent had forfeited the foreign currencies valued at Rs. 8,531,153/- under Section 12 and 44 of the Customs Ordinance read with the Exchange Control Act, which were mentioned in the inventory, which had been marked P1 A1 to P1A 79, which were detained at the departure counter at the Katunayake International Airport on 23.03.2000. The order also imposed forfeiture of sum of Rs. 25,593,459 being treble the value of the currencies, and the forfeiture of Rs. 100,000/- on the Assistant Customs Officer Chandrasiri in terms of Section 137 of the Customs Ordinance.

The petitioner had also sought a Writ of Prohibition restraining the 1st and 2nd respondents and their servants and agents from taking any further steps in pursuance of the order marked P5 referred to above.

The petitioner has admitted in paragraph 17 of his Petition that on the 23rd of March 2001 he had taken currencies, namely, (1) 150,000,000.00 Italian Lira, (2) 14,450 Sterling Pound, (3) 11,000 Netherlands Guilder, (4) 17,900 Australian Dollars, (5) 21,500 Swedish Kroner, 2000 Denmark Kroner and 2500 Norwegian Kroner. In terms of the documents filed by the respondents it is clear that there had been a violation of the Exchange Control Circular 2R1 and 2R2 and X2 the affidavit of the 2nd respondent. Further position of the 2nd respondent was the possession of this currency by the petitioner in this case was unlawful and as he could not claim lawful possession in terms of the Exchange Control Act thereby the foreign exchange was forfeited by operation of Sections 12 and 44 of the Customs Ordinance read with the Exchange Control Act. In terms of Section 44 of the Customs Ordinance any goods exported or taken out of the island contrary to certain specified prohibitions shall be forfeited and shall be destroyed or disposed of as a Principal Collector of Customs may direct.

Section 12 of the Customs Ordinance states that;

1. The goods enumerated in the table of prohibitions and restrictions in Schedule B shall not be imported or brought into or exported or taken out of Sri Lanka save in accordance with the conditions expressed in the said Schedule.

2. Parliament may from time to time, by means of a resolution duly passed at any public session, amend Schedule B by the addition thereto of any goods other than those enumerated therein or by the omission therefrom of any goods enumerated therein or otherwise, and regulate the conditions subject to which the importation or bringing into or the exportation or taking out of Sri Lanka of any goods enumerated in the said Schedule is prohibited or restricted.

Section 44 of the Customs Ordinance states that;

If any person exports or attempts to export or take out of Sri Lanka any goods enumerated in the table of prohibitions and restrictions in Schedule B, in contravention of the prohibitions and restrictions contained in such table in respect thereof, such goods shall be forfeited, and shall be destroyed or disposed of as the Director General may direct.

Therefore it is clear that the goods that were forfeited by operation of law were as a consequence of an imperative term of the law and it was not left to the decision or order to be made by an Inquiring Officer.

Section 154 provides for the manner of instituting proceedings or claiming such seized goods and this remedy is available to the owner for challenging the validity of the seizure and the forfeiture of the goods. Furthermore in terms of Section 154 of the Customs Ordinance it is clear that the District Court has the jurisdiction to look into this matter and a party who is aggrieved by the forfeiture could bring an action to the District Court for adjudication upon the merits of seizure. Thus the aggrieved party could challenge both the seizure and the forfeiture of the goods taken in terms of these provisions of the Customs Ordinance in the relevant District Court of competent civil jurisdiction. This procedure that has been set out in terms of the Customs Ordinance appears to be on the basis that since the forfeiture was by the operation of law there was no adjudication or an order to declare forfeiture to have taken place. In other words by the implementation of law there was an automatic forfeiture of the goods followed by the seizure in terms of the Customs Ordinance. This decision has been clearly set out by Gratian J. in the case of *Palasamy Nadar* v *Lanktree* (1).

In considering whether forfeiture in terms of Section 44 is amenable to the writ jurisdiction of this Court it has to be appreciated that such is not consequent to an order of forfeiture preceded by inquiry by a Customs Officer who makes a "determination" or a "finding" as a prerequisite to the order, but in terms of the provisions under which these goods had been seized such was an order for forfeiture which was *imperative in terms of the law.* It is as a sequel to this forfeiture by the operation of law that the goods are seized in terms of the Customs Ordinance. Therefore these does not appear to be an order that can be challenged in the Court of Appeal by invoking its writ jurisdiction and accordingly this Court finds that such order is not one amenable to the writ jurisdiction of this Court and clearly therefore the only remedy available to the owner or aggrieved person/s would in terms of the Customs Ordinance be by the institution of an action in the District Court and the obtaining of interim relief if needed. Furthermore in terms of

Section 154 of the Customs Ordinance the burden of proof in civil and criminal matters in proving importation is on the State.

In the case of the *Attorney General* v *Lebbe Thamby*(2) it has been stated that :

> "If any goods are seized for non-payment of duties or any other cause of forfeiture, and any question shall arise in any proceedings whether civil, criminal or otherwise, whether the duties have been paid for the same or whether the same have been lawfully imported, or lawfully laden or exported, the proof thereof shall lie on the owner or claimer of such goods or on the person against whom any contravention of this Ordinance is alleged and not on the Attorney General or the officer who seized or stopped such goods or on the prosecution".

In the case of *Attorney General* v *W. Wimaladharma* (3) it has been held that once the State proves the fact of importation Section 152 of the Customs Ordinance was the burden of proving lawful importation on the claimant and release the Attorney General of such burden. In these circumstances the position urged by the petitioner that there would be an unfair burden placed upon him is not tenable in law.

Another matter that has been urged by the respondents in this case is that as a specific remedy has been set out in Section 154 of the Customs Ordinance that this would exclude the invocation of the writ jurisdiction as an alternative remedy was available in law.

"Where there is an alternative procedure which will provide the applicant with a satisfactory remedy the Courts will usually insist on an applicant exhausting that remedy before seeking judicial review. In doing so the Court is coming to a discretionary decision.". "Where there is a choice of another separate process outside the Courts, a true question for the exercise of discretion exists. For the Court to require the alternatvie procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being properly regarded as being a remedy of last resort. It is important that the process should not be clogged with unnecessary cases, which are perfectly capable of being dealt with in another tribunal. It can also be the situation that Parliament, by establishing an alternative procedure, indicated either expressly or by implication that it intends that procedure

to be used. In exercising its discretion the Court will attach importance to the indication of Parliament's intention".

Applying the provisions of Section 154 of the Customs Ordinance it is clear that there is an existent remedy provided in terms of the aforesaid section in the District Court of competent civil jurisdiction. This was followed in several cases: (*Fernando* v *Dharmasiri*[4]) (*Gunasekera* v *Weerakoon*,[5]) (*Rodrigo* v *The Municipal Council, Galle*[6]) and (*Samarakoon* v *Tikiribanda*.[7]). In other words where there was an alternative remedy that was adequate for the adjudication of the matter that was being challenged by the aggrieved party except under exceptional circumstances this Court would not invoke the writ jurisdiction of the Court. This is all the more important in this case in the circumstances that the petitioner himself has claimed that he has already invoked the jurisdiction of the District Court of Colombo in case No. 27132/MR and that such is on the identical facts that has been canvassed before that Court of competent civil jurisdiction.

In this context, the President's Counsel appearing for the petitioner has cited the case of *Somasunderam Vanniasingham* v *Forbes* and *Another*[8] and suggested that it represents a new approach to the rule relating to alternative remedies in exercising writ jurisdiction.

The respondents submit that this case has no application to the point urged by them. In that case the Court held that there is no rule requiring the exhaustion of administrative remedies. The point urged by these respondents is that there is an alternative statutory remedy for the petitioner before a Court of law and not the availability of any administrative remedy. In these circumstances this Court finds that as there is an alternative, adequate remedy provided in Section 154 of the Customs Ordinance, and as the petitioner himself has already instituted action admittedly in the competent Court of civil jurisdiction, the Court would not exercise its discretion in favour of the issue of its writ jurisdiction. In all the circumstances of this case, this application is dismissed with costs of Rs. 5000/-.

ABEYRATNE, J. - I agree.

Application dismissed.