

THE

Sri Lanka Law Reports

**Containing cases and other matters decided by the**

**Supreme Court and the Court of Appeal of the**

**Democratic Socialist Republic of Sri Lanka**

**[2011] 1 SRI L.R. - PART 4**

**PAGES 85 - 112**

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owner or the registered owner? – Rights of the person from whom the

vehicle was seized?

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**Principal, vishaka vidyalaya And 12 Others**

(Continued from Part 3)

*Sesadi Subasinghe (Appearing Through Her Next Friend) Vs. Principal,*

CA *Vishaka Vidyalaya And 12 Others (Anil Gooneratne, J.)* 85

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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 refected in the temporary

list would stand unaltered. Therefore there is a public duty

cast on the offcial 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 refected

in document P20, but would quash the decision of the offcial

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.*

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**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 confscated***

***- 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 confscated or not, the absolute owner (fnance

company) from whom the registered owner obtained fnancial assistance

to purchase the vehicle gave evidence and claimed the vehicle. After

inquiry the Magistrate made order confscating the vehicle. The revision

application fled 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.

*Oriental Financial Services Corporation Ltd Vs. Range Forest Offcer*

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**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 confscated or not. At the inquiry the

absolute owner from whom the registered owner obtained

fnancial 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

confscating 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 fled 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 con-

tends 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

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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 specifed*

*for such offence, be confscated by order of the convicting*

*Magistrate:*

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*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 confscating 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 confscation 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 confscation 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

confscation should not be made. An order for confscation

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, confscation of the vehicle must automatically

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follow on conviction and that he was under no obligation

to consider the cause shown by the owner. The words “be

liable to confscation” used in section 3A gave a discretion

to the Magistrate whether to confscate the vehicle

or not and accordingly the owner should be given an

opportunity of showing cause that he had taken all precau-

tions 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

confscated 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 confscated 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 confscate or not – the

Magistrate could confscate 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

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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 fow 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 satisfes

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 satisfed 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 suffcient

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 confscated 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.

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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 fnance company)

committed the offence or it was committed with the

knowledge or participation of the absolute owner. The answer

is obviously no. Surely a fnance company cannot partici-

pate in the commission of an offence of this nature when the

vehicle is not with it. It cannot be said that the fnance

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 fnance 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 legisla-

ture.” 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

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CA *And Another (Sisira de Abrew, J.)* 93

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

confscated 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 diffcult 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.*

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**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 fve 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

*Haswi Vs. Jaytissa and two others*

CA *(Sisira de Abrew, J.)* 95

principle depends on the facts of each case. I hold that when the

property seized by the Police Offcer 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 ft 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

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acquired the possession of the vehicle. learned Counsel for

the appellant submitted that the appellant had paid fve

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 fled 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:

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CA *(Sisira de Abrew, J.)* 97

*“The seizure by any police offcer 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 ft 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 offcer.

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

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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

offcer 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

“offcial” 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 *Sugathapa-*

*la 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.”

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His lordship justice Sirimanne in *Balagalla Vs Somara-*

*thne* (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

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delivered to the person from whose possession it was

seized is not an absolute one and that there are limita-

tions 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 offcer 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 ft” 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 respon-

dent, 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 posses-

sion 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*

CA *(Srisandarajah, J.)* 101

**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 refective

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 Traffc 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 classifcation

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

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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 classifed 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 identifcation (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 classifcation 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 Declara-

tion 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

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(3) *Commissioner of Customs (Port) vs. M/s Toyota Kirloska Motor Pvt*

*Apparel (Civil) 3635 or 20006* - 17.5.2007

*(4) Chief Executive Offcer 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 Com-

missioner of Motor Traffc on the 11th of October 1999 (P3)

for the manufacture, supply and delivery of retro-refective

number plates with embossed number and 3rd number plate

sticker for windscreen for a period of fve 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 ex-

pertise and to obtain the training required by the 1st Petitioner

as licensee in connection with the manufacture, supply and

delivery of retro-refective number plates with embossed

number and 3rd number plate sticker for windscreen. The

terms and conditions of the said agreement include a payment

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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 busi-

ness 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 Traffc in terms of agreement

P3. A building belonging to the Commissioner of Motor Traffc

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 Classifcation on

the applicable Harmonized System (HS code) to the samples

attached to the application no. TC/99/177 dated 25.11.1999.

The tariff classifcation 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 refective 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 Classifcation as it was the local agent for Erich Utsch

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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 classifcation advise the goods are

classifed 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 rela-

tion 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 refective 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 fnancial year.

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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 Traffc 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 classifcation ruling in relating to the classifcation 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

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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.

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**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 classifcations. 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

classifed as buses under HS Code 8702.10.13.

This decision was challenged by way of a writ of certio-

rari 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 classifcation of the goods imported, the

disagreement of the classifcation 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 classifcation (HS Code) has not been

included in the CuSDEC and in consequence the customs

has short levied any duty, it could make a determination

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of the correct classifcation (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 fortifed 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

offcer 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 classifcation 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 classifcation 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’

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contention is that the Petitioners have wilfully classifed the

“Aluminium Plates” under H. S. Code 7606.99.09 disregard-

ing 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 Classif-

cation 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 refective foil’. For

this product the tariff classifcation 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 classifed this item under HS code 8310.00 for its

imports.

The imports of the blank aluminium plates in issue with

regard to classifcation 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 classifcation advice sought and obtained from the

customs bearing no. TC/99/177 dated 17.12.1999. The

position of the Respondents is that the classifcation given

as HS 7616.9909 to a product described as “Aluminium

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Plate form as per sample attached with refective foil”. In the

said advice of the Customs bearing no. TC/99/177 dated

17.12.1999 in the **comments column** it has been specifcally

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 identifcation (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 confrm 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 offcers 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

classifed under HS code 8310.00 but as they have

considered the aluminium plate submitted and advised that

it will fall under the classifcation HS 7606.11 shows that

the Customs Department has decided that the security fea-

tures 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

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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 classifed

under HS 8310.00, is correct then the custom offcers when

passing the goods after inspection would not have released

the goods to the importer as the goods are classifed 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

offcers of the Customs that they security features could be

considered as letters, numbers or design then they need not

have referred this issue of classifcation 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 classifcation 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*

*refective foil with security features, intended to be used*

*for the manufacture of motor vehicle license number plates.*