

Shiabdeen and others

v.

Attorney-General

COURT OF APPEAL
WIMALARATNE, P. AND ATUKORALE, J.
C.A. (S.C.) 321/73 (F)—D.C. COLOMBO 68971/M.
JUNE 18, 19, 1979

Customs Ordinance (Cap. 235), sections 43, 124, 152 and 154—Forfeiture of goods as being unlawfully imported—Action instituted for declaration that such forfeiture a nullity and recovery of the goods—Burden on State to prove that goods were imported—Proof beyond reasonable doubt—Notice of action to be within one month of forfeiture—Lack of requisite notice—Can action be maintained.

Where four pieces of gold were forfeited by the Principal Collector of Customs in terms of section 43 of the Customs Ordinance the plaintiffs after giving notice purporting to be under section 154, subsequently instituted action seeking a declaration *inter alia* that the forfeiture was a nullity, that they were the lawful owners and for their return or the recovery of their value. The Attorney-General in answer to the plaint pleaded that the said pieces of gold had been imported or brought into Ceylon contrary to the restrictions contained in section 43 of the Customs Ordinance read with section 21(1)(c) of the Exchange Control Act and they were forfeited under section 125 of the Customs Ordinance. He also pleaded that as the action had not been instituted within the period specified in section 154 of the Customs Ordinance the Court had no jurisdiction to hear and determine the action.

Held

(1) That in such a case the burden of proving that these pieces of gold had been imported or brought into Sri Lanka lay on the defendant who must prove this beyond reasonable doubt. Where this burden of proof was not discharged the forfeiture by the Customs was a nullity.

(2) That however the requisite notice under section 154 of the Customs Ordinance must be given within one month of the date of seizure and as the plaintiffs had failed so to do, they could not succeed in this action.

Cases referred to

- (1) *Attorney General v. Lebbe Thamby*, (1958) 61 N.L.R. 254.
- (2) *Paiasamy Nadar v. Lanktree*, (1949) 51 N.L.R. 520.

APPEAL from the District Court, Colombo.

A. Mahendrarajah, with Dr. N. Thiruchelvam and Y. M. Faiz, for the plaintiffs-appellants.
K. M. M. B. Kulaunga, Additional Solicitor-General, with S. Ratnapala, State Counsel, for the defendant-respondent.

Cur. adv. vult

July 25, 1979.

WIMALARATNE, P.

On 21.3.67 two parcels containing four pieces of gold weighing 999.807 grammes sent by the plaintiffs-appellants from Colombo to Jaffna were taken over by officers of the Customs at the Jaffna Post Office. They were brought to Colombo, and after inquiry, the Principal Collector of Customs informed the 1st plaintiff-appellant by letter dated 26. 1. 68 that the four pieces of gold were forfeited in terms of section 43 of the Customs Ordinance (Cap. 235). The plaintiffs gave notice on 22.2.68, in terms of section 154 of the Ordinance, and subsequently instituted the present action on 22.3.68 seeking a declaration that the forfeiture is a nullity and not warranted by any provision of law, that the plaintiffs are the lawful owners, and for an order for their return or in the alternative their value, namely Rs. 18,496.00 together with legal interest thereon.

The Attorney-General answered that as the four pieces of gold had been imported or brought into Ceylon contrary to the restrictions contained in section 43 of the Customs Ordinance read with section 21 (1) (c) of the Exchange Control Act, they were forfeited by the Assistant Collector of Customs, Jaffna under section 125 of the Customs Ordinance on 21.3.67; that the Principal Collector of Customs held an inquiry into alleged contravention of the provisions of section 129 by the plaintiffs, and that by letter dated 26.1.68 the Principal Collector informed them that although they were not liable to a further forfeiture under section 129, the four pieces of gold were forfeited under section 125 read with section 43 of the Ordinance. The Attorney-General also pleaded that as the action had not been instituted within the period specified in section 154 the District Court had no jurisdiction to hear and determine the action.

The 1st plaintiff gave evidence to the effect that the four gold bars were the property of the plaintiff; that they had been made by melting old gold jewellery which they had purchased from various persons. They are a firm of jewellers which was established in 1923, and which carries on business in 2nd Cross Street, Colombo. Because of the restriction in the import of gold since 1950, they used to buy old gold jewellery for the purpose of manufacturing new jewellery. The old gold used to be melted and purified into rectangular blocks of 24 carat purity by one Somasunderam of Sea Street. The 4 pieces of gold seized by the Customs officers were made by Somasundaram out of jewellery purchased by plaintiffs in March 1967. They were then sent by post to one Sahib of Jaffna for the purpose of

making new jewellery in terms of the instructions contained in a letter, a copy of which was marked as P1a. The 4 pieces of gold were sent by registered insured post.

About 3 or 4 days after he posted them on 20.3.67 he received instructions from Sahib about what had happened to them. Subsequently on 11.4.67 some customs officers came to his establishment and informed him that they had "seized the gold in Jaffna". When he claimed the gold, they said that they would have to hold an investigation. It was only by letter P2 dated 21.1.68 that he was informed that the goods were forfeited. He thereupon gave notice in terms of section 154.

The plaintiff called witness A. B. Hemachandra, proprietor of Hemachandra Bros. Jewellers of Colombo to establish that the plaintiffs' firm and their associate firm of A. K. M. Abdul Cader and Co. were well-known jewellers in Colombo who had at one time supplied gold to the Government of Ceylon. He testified also to the fact that gold bars were being produced locally to the purity of 99.9 per cent by melting old gold, and that the hall marks of foreign assayers were sometimes placed on such bars.

The defendant called the Assistant Collector of Customs, Jaffna, to establish that the gold bars were forfeited at Jaffna on 21.3.67, under section 43 and 125 of the Customs Ordinance, and that he made a record of that fact in his order D3. He also recorded the statement of one I. I. Abdul Gaffoor, the agent of Sahib who had gone to the post office to take delivery of the parcels.

The evidence referred to above was recorded by Mr. C. V. Udalagama, District Judge. Mr. A. Vythialingam had succeeded him on 29.5.73 and it was agreed that Mr. Vythialingam should act and decide on the evidence already recorded by Mr. Udalagama. Learned State Counsel then closed the case for the defence, and the Judge put off addresses for 30.5.73. On that date State Counsel moved to lead the evidence of the former Government Analyst, Mr. Sirimane. In spite of objection by Counsel for the plaintiffs, the learned District Judge allowed the application as in his view no prejudice would be caused to the plaintiffs.

Before I deal with the evidence of Mr. Sirimane it is necessary to set out the law applicable in a situation such as this. In *The Attorney-General v. Lebbe Thamby* (1) the question for decision was whether certain gold bars found in the possession of an employee of the respondent on 24.2.55 were unlawfully imported and therefore liable to be seized as forfeited under the Customs Ordinance. After the Exchange Control Act came into operation on 15.8.53, the importation of gold, except with the permission of the Central Bank was prohibited. The Attorney-General conceded that the burden of proving lawful importation

would not lie on the owner under section 144 (present section 152) of the Customs Ordinance unless the Crown proved that the gold bars were imported. Basnayake, C.J. held that the Crown should have established that fact beyond reasonable doubt as in a criminal case. The reason for insisting on such a heavy burden is that the Customs Ordinance is a penal enactment which imposes severe penalties on those who violate its provisions, and that any breach of such provisions must be established beyond reasonable doubt.

Had the evidence been what it was when the defendant closed its case on 29.5.73, then there was no proof, even on a balance of probability, that the gold bars had been imported. Mr. Sirimane's evidence was that he examined the gold bars produced in court sometime in July 1967. They were produced by some Customs officers. There was no evidence as to who produced them, or as to where they were between the date of "seizure" in Jaffna on 21.3.67 and the date of examination in July 1967. Mr. Sirimane testified to having observed certain markings resembling a trace of a circular impression and certain figures which could be deciphered as 999; and that these impressions appeared to have been obliterated by hammer marks sited at the places where the original impressions were. He was then asked the question whether he could express an opinion as to the possible source of manufacture of the gold bars and he replied that "they could have been marks made by an assayer" in Switzerland. Even this opinion was based on what someone else had written to him in correspondence.

The learned District Judge says in his judgment that the fact of the existence of these marks shows that the gold bars could not be the ones Somasunderam made out of the old gold jewelry, as he had not been given instructions to place any marks. Here the District Judge has clearly misdirected himself on the burden of proof. Instead of looking for proof beyond reasonable doubt of the fact of importation, which burden had to be discharged by the Crown, he appears to have cast the burden on the plaintiff of proving that these bars were locally manufactured. He should, on the evidence have held that the Crown had not proved that the articles were imported, and that consequently their forfeiture by the Customs officers was a nullity. The answer to issue 5 should, in my view, have been in favour of the plaintiffs.

The next question for determination is as to whether the District Judge was right in holding that the plaintiff has not complied with the provisions of section 154 of the Customs Ordinance which requires the owner of the goods seized as

forfeited under the Ordinance to give notice in writing to the Collector, within one month of the date of the seizure, of his intention to claim the goods. If the date of seizure was 21.3.67, then the plaintiff was out of time. For the plaintiff it was contended that the date of seizure was not 21.3.67 but 26.1.68, on which date he received the letter P 2.

The present case is distinguishable from the case of *Palasamy Nadar v. Lanktree* (2) where an entire cargo in a ship was detained by the customs officers on a certain date, but on a subsequent date some of the goods were released and others forfeited. It was held that for the purposes of section 154 the material date of seizure was the latter date, and not the earlier date because on the earlier date the entire cargo was merely detained pending a decision as to what part of it should be forfeited. Gratiaen, J. observed, however, that "if goods are declared to be 'forfeited' as opposed to liable to forfeiture on the happening of a given event, their owner is automatically and by operation of law divested of this property in the goods as soon as the event occurs. No adjudication declaring the forfeiture to have taken place is required to implement the automatic incident of forfeiture" at 522.

D3 says that the gold bars were forfeited under sections 43 and 125 of the Customs Ordinance read with the Exchange Control Act, and it is dated 21.3.67. It has been signed by the Assistant Collector, Kandasamy, as well as by Gaffoor who had gone to take delivery at the post office on behalf of Sahib. No seizure notice was issued apparently because Gaffoor was present, and was informed of the next date of inquiry.

The 1st plaintiff's evidence is that when the Customs officers came to record his statement on 11.4.67, they told him that they had "seized the gold in Jaffna". He thereafter received a letter D1 dated 13.5.67, informing him that an inquiry would be held in respect of gold bars seized in Jaffna on 21.3.67, and requesting him to show cause why he should not be dealt with for being concerned in importing them into Ceylon contrary to section 129 of the Customs Ordinance. That inquiry under section 129 was held on several dates. It is thereafter that plaintiffs received P2. The learned District Judge was therefore right in holding that the gold bars were seized as forfeited on 21.3.67. As the plaintiffs had not given the requisite notice under section 154 within one month of that date, the plaintiffs cannot succeed in this action. I would therefore dismiss this appeal with costs.

ATUKORALE, J.—I agree.

Appeal dismissed.