

LANKA JATHIKA SARVODAYA SHRAMADANA SANGAMAYA
v.
HEENGAMA
DIRECTOR GENERAL OF CUSTOMS AND OTHERS

SUPREME COURT.

G.P.S. DE SILVA, C.J., KULATUNGA, J.
AND RAMANATHAN, J.

S.C. APPLICATION NO. 173/91.

OCTOBER 05, DECEMBER 11 AND 15, 1992.

JANUARY 18 AND 29, 1993.

Fundamental Rights – Constitution, Article 12 (1) – Seizure of goods as forfeited – Power to mitigate forfeiture – Customs Ordinance, Sections 52, 163.

The petitioner (a non-governmental organization) imported a "Harris Web V15A Press" and accessories for use in its printing business. The Director of Customs decided that the said goods are forfeited under s. 52 of the Customs Ordinance on the ground of undervaluation for purposes of customs duty, and detained the goods whereupon the petitioner applied to the Director General of Customs to mitigate the said forfeiture under s. 163 of that Ordinance on payment of duty on an uplifted value and to release the goods. This was refused. The petitioner complained that such refusal infringed his rights under Article 12(1) of the Constitution in that it was discriminatory vis-a-vis other importers whose requests for mitigation of the forfeiture of goods under s. 52 had been allowed in terms of s. 163 of the Ordinance.

Held :

- (1) The goods imported by the petitioner are forfeited by operation of law under s. 52 of the Ordinance and had been seized by customs as required by s. 125.
- (2) Ordinarily, the only remedy available to the petitioner for claiming the said goods is to institute proceedings in terms of s. 154, challenging the validity of the seizure. Article 126 of the Constitution has since provided an additional remedy in appropriate cases.
- (3) Mitigation of forfeiture of goods is a question to be decided in the discretion of the Director General of Customs, on the facts of each case. However, on the material placed before the Court the other cases relied upon by

the petitioner cannot be distinguished as being not similarly circumstanced; there has been a failure to fairly consider the petitioner's application for mitigation; and that by reason of such discrimination the petitioner's right to equal protection of the law under Article 12(1) has been infringed.

- (4) The seizure of the forfeited goods is vitiated by reason of discrimination in the exercise of the Director General's powers under s.163 of the Customs Ordinance.

Cases referred to :

1. *Moosajeets v. Attorney-General*, S.C. Appeal No. 62/87 - S.C. Minutes of 25.01.1991.
2. *C.W. Mackie & Co. v. Commissioner-General of Inland Revenue*, (1986) 1 Sri L.R. 300, 301,308.
3. *Abeywardena v. The I.G.P.*, S. C. Appeal 92/91 S.C. Minutes 23.8.1991.
4. *Neville Fernando v. Liyanage*, F.R.D. Vol. 2 p. 300.
5. *Yick Wo v. Hopkins*, 118 US 356.
6. *Gooneratne v. Commissioner of Elections*, (1987) 2 Sri L.R. 165.
7. *Jayanetti v. The Land Reform Commission*, (1984) 2 Sri L.R. 172.
8. *Roberts v. Ratnayake*, (1986) 2 Sri L.R. 36, 79.
9. *Elmore Perera v. Jayawickrema*, (1985) 1 Sri L.R. 285.
10. *Palasamy Nadar v. Lanktree*, 51 N.L.R. 520, 522, 523, 526.
11. *The Anandale* (1877) 38 L.T. 139.
12. *De Keyser v. Harris* (1936) 1 K.B. 224.
13. *Jayawardena v. Silva* 72 NLR 25, 29, 30, 38, 39.
14. *Arumugaperumal v. The Attorney-General* 48 N.L.R. 510, 514, 515.

APPLICATION for relief for infringement of fundamental rights under Article 12 (1) of the Constitution.

R. K. W. Goonesekera with Chandra Goonesekera, Javid Yusuf and J. C. Weliamuna for petitioner.

A. S. M. Perera, Deputy Solicitor-General for respondents.

Cur. adv. vult.

February 12, 1993.

KULATUNGA J.

This is an application arising upon the detention by Sri Lanka Customs of a "Harris Web V15A Press" and accessories imported by the petitioner (a non-governmental organization) for use in its printing business. The 2nd respondent (Director of Customs) decided that the said goods are forfeited under S. 52 of the Customs Ordinance on

the ground of undervaluation for purposes of customs duty whereupon the petitioner applied to the 1st respondent (The Director General of Customs) to mitigate the said forfeiture under S. 163 of the Ordinance on payment of duty on an uplifted value and to release the goods (*without prejudice to the petitioner's right to challenge such value in Court*). This was refused; whereupon the petitioner gave the 1st respondent a notice of an action in terms of S. 154(1) of the Customs Ordinance and filed an action in the District Court of Colombo praying for the following reliefs :

- (a) a declaration that the seizure and forfeiture of the said goods is wrongful and illegal ;
- (b) a declaration that the plaintiff is entitled to the restoration of the goods or their value ;
- (c) damages in a sum of Rs. 21,565,184/- upto the date of institution of the action and continuing damages in a sum of Rs. 700,000/- per month thereafter until satisfaction of decree ; and
- (d) costs.

THE CASE FOR THE PETITIONER

In this application the petitioner complains that the refusal of the 1st respondent to mitigate the forfeiture under section 163 of the Customs Ordinance is discriminatory and hence violative of Article 12 (1) of the Constitution in that it is the general practice in cases of undervaluation of goods to mitigate the forfeiture even where the customs valuation results in a 100% increase over the declared value of goods; in such cases goods have been released to the importer after payment of additional duty and in appropriate cases subject also to the payment of a penalty. In the instant case the request for mitigation was refused arbitrarily without due consideration of the merits of the petitioner's appeal. The petitioner prays for the following reliefs :

- (a) a declaration that the petitioner's rights under Article 12 (1) of the Constitution have been violated ;

(b) an order declaring the impugned forfeiture to be illegal and ordering the machine to be released on payment of duty on an uplifted value *without prejudice to the petitioner's right to challenge the validity of such additional value in an appropriate forum* ;

(c) compensation in a sum of Rs. 3,500,000/-.

Learned Deputy Solicitor General for the respondents conceded that the exercise of the power of mitigation under S. 163 of the Customs Ordinance constitutes executive and administrative action within the ambit of Articles 17 and 126 of the Constitution and that a person aggrieved by a forfeiture under S. 52 of the Ordinance is not confined to his remedy of a suit under the Ordinance but may seek relief from this Court in the exercise of its jurisdiction under Article 126 of the Constitution. However, this is the first such application in which relief has been sought both in this Court as well as in the District Court arising from a seizure of goods under the Customs Ordinance. It seems to me, therefore, that in making our determination we have to examine the relevant principles of Customs Law and further, in the event of the decision being in favour of the petitioner decide what relief he is entitled to bearing in mind the need to ensure that there will be no duplication of reliefs by reason of proceedings in this Court and in the District Court.

It has been alleged that the "government controlled newspapers" have engaged in a campaign to vilify the petitioner's organization and its President Dr. A. T. Ariyaratne. Two statements issued by Dr. A. T. Ariyaratne have been produced marked P24 and P25. It is urged that this campaign tends to establish that the refusal by the Customs Officers to release the printing press was *mala fide*; and that the motive for seizing it is to prevent criticism of the government by the petitioner's organization.

The printing press in question is a second hand machine from Denmark, purchased by the petitioner from Rotatech Grafiche Machines BV of Holland as per sale agreement dated 30.01.91 (P11). The price stated in P11 is DfI. 479,260/-, freight and insurance to be added. In a letter dated 23.08.90 addressed to the petitioner, (P5), Rotatech indicated that the exchange rate of the said currency was 1US \$ = DfI. 1.738. According to the pro forma invoice dated 07.02.91 (P13) the price is as follows :

Cost	DFI.	472.860
Insurance + Freight		
	DFI.	15,000
Total (Cost & Insurance)	DFI.	487,860

The said machine arrived in Sri Lanka by ship and was entered for duty at a value of Rs. 11,091,929/- in Customs Bill of Entry No. 04C 1833 dated 05.04.91 and a duty of Rs. 3,155,544/- was paid. The petitioner states that the said value of Rs. 11,091,929/- was the Sri Lankan Rupee equivalent of the "actual price" based on customs parity rate.

On 12.04.91 a customs inspection of the machine was held at the customs premises after opening the containers. Among those who conducted that inspection were the 1st and 2nd respondents, Messrs H. L. A. de Silva, Deputy Director of Customs (Intelligence) L. Gunawardena (Deputy Government Printer) Vas Gunawardena, Chairman of the Port Authority and Customs Officer Ranagala. On 23.04.91 there was another customs inspection at which the 1st respondent, Mr. Neville Nanayakkara (The Government Printer) and Mr. A. C. Lawrence retired Deputy Inspector General of Police were present. The petitioner states that an inspection attended by so many senior officials was *most unusual*.

On 06.05.91 Susiri de Silva, Managing Director of Vishva Lekha Press owned by the petitioner and his Counsel met the 1st respondent and inquired why the machine was not being released. The 1st respondent said that this was due to alleged undervaluation and that an investigation was in progress. By his letter dated 24.05.91 (P17) Susiri de Silva requested that steps be taken to have the machine released early. This was followed by a customs inquiry at which Susiri de Silva gave evidence and produced documents in proof of the value of the machine and the spares. The Superintendent of Customs Valuation, the Appraiser of the Customs Valuation Branch and the Government Printer also gave evidence on the valuation of the machine and the spares. The inquiry was held on nine dates at which the petitioner was represented by Counsel who also tendered written submissions. Consequently, the Customs fixed the value of the goods at Rs. 18 Million and on that basis the 2nd respondent addressed

a letter dated 05.09.91 (P18) calling upon Susiri de Silva to show cause why the machine and its accessories should not be declared forfeit under S. 52 of the Customs Ordinance on the ground of undervaluation.

By his letter dated 30.09.91 (P19), Susiri de Silva replied P18 requesting the 1st respondent to permit the removal of the goods on the payment of the full amount of duty payable on the value thereof fixed by the customs *without prejudice to the position that the true value of the goods is as set out in the relevant Bill of Entry dated 05.04.91*. In reply the 2nd respondent sent a letter dated 01.11.91 (P20) informing Susiri de Silva that the machine and its accessories were forfeit in terms of S. 52 of the Ordinance.

We then have the letter dated 11.11.92 (P23) addressed to the 1st respondent by Counsel for the petitioner which was an application for a mitigation of the forfeiture of the goods in the exercise of the powers of the 1st respondent under S. 163 of the Customs Ordinance. Counsel, however, made that application "*without prejudice to the (petitioner's) right to take steps in Court to have the order of forfeiture declared invalid*". Counsel insisted that the true value of the goods for purposes of duty was Rs. 11,091,929/- and not Rs. 18 Million. They argued that this was the first time a V15A model machine had been imported and that the Customs Officers or the Government Printer did not possess any expertise in valuing this type of printing machine. As additional grounds in support of the petitioner's valuation of the goods, Counsel submitted that :

- (i) the machine was no longer in production ;
- (ii) the machine was 11 years old ; and
- (iii) the fact that no penalty under S. 129 was imposed proved that there was no dealing by the petitioner with intent to defraud the revenue or to act fraudulently.

Counsel submitted that in the circumstances market price for purposes of duty should be the actual price paid by the petitioner namely Rs. 11,091,929/-. Counsel also cited the decision in *Moosajees v. Attorney General* ⁽¹⁾. In that case, where this Court invalidated a seizure of goods as forfeit under S. 57 of the Customs Ordinance the Court observed :

"It is difficult to imagine that the law gave an untrammelled discretion to the Collector to act in any manner he thinks fit; such discretion must undoubtedly be exercised reasonably with the purposes and objects of the Customs Ordinance in mind"

By his reply dated 23.11.91 (P22) the 1st respondent declined to vary the forfeiture of the goods.

As proof of discrimination, the petitioner has cited 15 cases of importation (giving reference to the relevant customs files) where the goods had been grossly undervalued but the 1st respondent had mitigated the forfeiture after payment of duty on an uplifted value; where the undervaluation is over 100%, the importer had been ordered to pay additional duty plus a penalty prior to the release of goods. The goods imported in the cases cited consist of radio cassette spare parts, ceiling fans in knocked down condition, spare parts for sewing machines, motor spare parts, used machines, printing machinery fabrics and electrical parts. In one such case the true value of the goods was Rs. 5,907,168/-. The petitioner states that there are many such instances, the records of which are in the possession of the 1st and 2nd respondents and to which the petitioner had no access and they establish the practice that forfeiture is not inflicted where there is a mere difference in valuation of the goods. Three of the 15 instances cited were in 1989, two in 1990 and remainder in 1991.

In his affidavit filed on 09.03.92, Susiri de Silva states that a Web offset machine similar to the one imported by the petitioner was imported by Express Newspapers Ceylon Ltd. on 24.12.91; that duty was charged on US \$ 262,015,00 (approximately Rs.11,004,630/-) which was the CIF value of the machine according to the *pro forma* invoice ; and that the said machine was thereafter cleared without delay. In rebuttal, the 1st respondent has filed an affidavit (together with a supporting affidavit (IRIA) from the Government Printer) wherein he states that the machine imported by Express Newspapers Ceylon Ltd. was not similar to the one imported by the petitioner in that whilst the former had 6 printing units, a folding unit and a stocking unit the latter had only 4 printing units and a folding unit. Susiri de Silva filed a further affidavit wherein he appears to have abandoned the position that the two machines are similar but maintains that

the machine imported by Express Newspapers Ceylon Ltd. had accessories which had not been separately valued and that the value of 11 Million declared by the importer was accepted without query. I observe from the Bill of Entry (P26) for the machine imported by Express Newspapers Ceylon Ltd. that the CIF value declared was for the machine with accessories and hence reject the petitioner's contention that its true value was more than the amount declared by the importer. I accept the 1st respondent's version that the said machine is not similar to the one imported by the petitioner. In the circumstances, the importation by Express Newspapers Ceylon Ltd. cannot be considered as evidence of discrimination.

THE CASE FOR THE RESPONDENTS

The case for the respondents is to be found in the counter affidavit of the 1st respondent filed on 06.03.92 together with counter submissions on behalf of the 1st and the 2nd respondents wherein they maintain that the customs valuation of the goods as Rs. 18 Million is supported by the available evidence; that the petitioner's declaration of the value of goods as 11 Million constitutes an undervaluation in view of which the said goods are forfeit by operation of law under S. 52 of the Customs Ordinance, as amended by Act No. 83 of 1988 ; that this was a gross undervaluation resulting in a heavy loss of revenue to the State ; that in view of the quantum of undervaluation the 1st respondent was satisfied that the forfeiture was not unduly severe, and hence rejected the application for mitigation of the forfeiture in terms of S. 163 of the Ordinance ; that the said goods have since been treated as state property ; and that in the circumstances, the petitioner is confined to his remedy in the District Court where he has challenged the said forfeiture under the provisions of the Customs Ordinance.

The 1st respondent denies the alleged infringement of the petitioner's rights under Article 12 (1) of the Constitution. He also denies the averment that the established practice in the Customs House is that a forfeiture is not inflicted on a mere undervaluation but that the goods are released on payment of additional duty together with a penalty where the undervaluation is over 100%. At the same time the 1st respondent denies the particular paragraph in Susiri de Silva's affidavit which refers to the cases of mitigation relied upon by the petitioner. However, there is no specific denial of the said

cases or the existence of the relevant files quoted in Susiri de Silva's affidavit. In view of this, Susiri de Silva, in his affidavit filed on 08.03.92, called upon the respondents to produce *inter alia* the files relating to the cases mentioned in his original affidavit. The 1st respondent filed an affidavit in reply to the said affidavit by Susiri de Silva in which he makes no references to the files called for. In these circumstances, I reject the 1st respondent's bald denial of the cases of mitigation relied upon by the petitioner. In fact the learned Deputy Solicitor General who represented the respondents at the hearing did not support the said denial but submitted *inter alia*, that the importers in the said cases were not similarly circumstanced as the petitioner and hence there is no infringement of Article 12 of the Constitution.

SUBMISSIONS OF COUNSEL

The learned Deputy Solicitor General made the following submissions in defence of the refusal by the 1st respondent to release the goods to the petitioner :

(i) On the basis of the evidence of the officers of the Customs Valuation Branch and the Government Printer, the machine imported by the petitioner with additional spares and accessories was worth Rs. 18 Million and not 11 Million as declared in the Bill of Entry. As such the said goods are forfeit by operation of law, under S. 52 of the Customs Ordinance and were duly seized by officers of the customs. He submitted that the customs valuation is supported by the certificate of inspection dated 31.12.90 (P7) which had been submitted to the National Development Bank by a Danish firm (SGS Inspection (Denmark) A/S) in connection with the petitioner's application for a loan for the purchase of the said machine. P7 states that the plant may work satisfactorily for another 12-15 years and that "an estimated value of a similar plant with the same function today would be approximately US \$ 1,200,000/-" (Rs. 48 Million).

(ii) On the question of mitigation of forfeiture, the Deputy Solicitor General submitted that S. 163 of the Customs Ordinance empowers the 1st respondent to exercise that power prior to the seizure of the goods which are forfeit. In the instant

case, when the application for a mitigation was received, goods had been seized as forfeit and hence S. 163 had no application; the 1st respondent had no power to mitigate (even if he had mistakenly thought otherwise); such goods can be restored only by the Minister, under S. 164. The petitioner has not applied to the Minister for such relief. He also submitted that it is S. 164 (and not S. 163) which empowers the restoration of goods "detained as undervalued". As such the 1st respondent had no power of mitigation not only in the instant case but also in the other cases relied upon by the petitioner. The purported mitigations in the other cases were invalid; if so, the petitioner cannot claim the right to an order for the restoration of the goods on the ground of discrimination. He submitted that S.12 (1) guaranteed the right to equal protection and not equal violation of the law and cited in support the decisions in *C. W. Mackie & Co. v. Commissioner General Inland Revenue*⁽²⁾ and *Abeywardena v. The I.G.P.*⁽³⁾

(iii) Assuming that the 1st respondent had the power of mitigation under S. 163, he has exercised that power reasonably when he declined to mitigate the forfeiture in view of the amount of undervaluation, which was as much as Rs. 6 Million. In none of the cases relied upon by the petitioner was there such undervaluation; the petitioner was not similarly circumstanced as the importers in the said cases; and as such the charge of discrimination has not been established.

Learned Counsel for the petitioner made the following submissions:

(i) On the question of the value of the machine he argued that in the absence of fraud the value declared by the petitioner on the basis of which a duty of Rs. 3 Million was computed and paid (in the light of import documents) should be accepted as the correct market value. He said that he would not challenge the integrity of Mr. Nanayakkara, the Government Printer who valued the machine at Rs. 18 Million but submitted that Mr. Nanayakkara is not an expert in valuing a second hand printing press not being in possession of any data for ascertaining the "market value" of such a machine, especially the model imported by the petitioner. As regards the SGS certificate (P7) referred to by the Deputy Solicitor General, Counsel submitted that

by their letter dated 25. 07.91 (P21), S.G.S. clarified that the value of 48 Million quoted in P7 for a new machine was for the more advanced V15D model but that the closest model to V15A imported by the petitioner (and no longer in production) was V15C which was priced about 27.6 Million and hence the machine in dispute should be valued having regard to the price of the V15C model and not the V15D model.

(ii) On the question of mitigation of forfeiture, Counsel submitted :

(a) that the D.S.G.' s contention that S. 163 of the Customs Ordinance had no application and that in the other cases of mitigation relied on by the petitioner the mitigations were invalid is untenable in that this position has not been taken either in the affidavit of the 1st respondent or in the counter submissions filed on behalf of the respondents. The position taken there is that the petitioner had sought mitigation under S. 163 "as he lawfully might" and this was refused in view of the amount of undervaluation and upon the view that the forfeiture was not unduly severe. Counsel argued, that in any event, if the goods were forfeit, S.163 is applicable and an application for a mitigation thereunder was duly made by the petitioner ;

(b) that the decision to refuse mitigation was not fairly taken having regard to the other importers and that it is tainted by extraneous considerations. He argued that the amount of undervaluation is not a rational guide for discrimination and that the discretion should be exercised in the context of the value of the article and other considerations. It was submitted that in other cases, the forfeiture had been mitigated even where the goods had been undervalued by over 100% ; here the undervaluation is much less percentage - wise but mitigation was refused, based on the amount of undervaluation. Such discrimination is unreasonable. Counsel further submitted that even though by reason of the decision in *Neville Fernando v. Liyanage* ⁽⁴⁾ the petitioner

(being a corporate body) is unable to complain of infringement of Article 14 (a) which guarantees freedom of expression, the Court should, in deciding whether the refusal to mitigate was violative of Article 12 (1), take into account the fact that the goods consist of a printing press used in the production of publications by the petitioner's organization which engages in social service activity in terms of its objects contained in S. 3 of Act No. 16 of 1972 by which the said organization has been incorporated ;

(c) that there are circumstances which indicate that the refusal to mitigate the forfeiture is tainted by extraneous considerations. Counsel drew our attention to the following allegations made in the petition :

(i) On 18.03.91, the Managing Director of the Press was informed by an officer of ABN Bank (which gave the petitioner a facility to purchase the machine) that the Controller of Exchange had personally come to the Bank to collect a copy of the letter of credit.

(ii) On 28.03.91, Superintendent of Police CID Mr. Ottanpitiya inquired from the Managing Director of the Press regarding the importation of the machine.

(iii) The unusual interest shown in the machine by a number of high ranking officials.

Counsel for the petitioner next set out the following legal principles in support of his submissions:

1. There can be discrimination in the application of a law.
2. Acts which appear to be neutral on their face but are in truth characterised by arbitrariness violate the right to equal protection of the law.
3. Exercise of unguided discretion constitutes arbitrariness and may *per se* justify a complaint of unequal treatment. If there is a motive for such conduct, it may strengthen the allegation.

4. Equals must be treated equally.

As authority for the said legal principles Counsel cited :

Yick Wo v. Hopkins 118 US 356 ⁽⁵⁾

Equal Protection of the Laws, Polyviou 649-650

Chaudhury and Chaturvedi's Law of Fundamental Rights 3rd Ed.
93, 103.

Gooneratne v. Commissioner of Elections ⁽⁶⁾

Jayanetti v. The Land Reform Commission ⁽⁷⁾

C.W. Mackie & Co. v. Commissioner of Inland Revenue ⁽²⁾

Roberts v. Ratnayake ⁽⁸⁾

Elmore Perera v. Jayawickrema ⁽⁹⁾

RELEVANT PRINCIPLES OF CUSTOMS LAW

(a) FORFEITURE & SEIZURE OF GOODS

The Customs Law applicable to forfeiture and seizure of goods is relevant to a proper determination of the application before us. Forfeiture of goods is one of the consequences of a breach of the provisions of the Customs Ordinance. Some of the sections provide that in the event of such breach the goods *shall be forfeited* e.g. Sections 34 (1), 43, 44, 50, 50A (1) (b), 52, 55, 65, 75, 100A (2), 107, 107A (1), 107A (2), 121, 131 and 142. Section 57 provides that *in the absence of any explanation* to the satisfaction of the Director General of Customs, the goods *shall be forfeited*. Sections 38 and 68 provide that the goods *shall be liable to forfeiture*.

In *Palasamy Nadar v. Lanktree* ⁽¹⁰⁾ (a case in which the goods became forfeited under S.46 (now 44) of the Ordinance) Gratiaen J. said (p. 522-523) :

"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 his 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. This seems to be the effect of the decisions of the English Courts in the

Anandale ⁽¹¹⁾ and *De Keyser v. Harris* ⁽¹²⁾. In *Jayawardena v. Silva* ⁽¹³⁾ Fernando CJ., Samarawickrema J. and Weeramantry J. adopted the above view with approval.

(b) FORFEITURE FOR UNDERVALUATION

S. 52 provides – "Where it shall appear to the officers of the customs that the value declared in respect of any goods is not in accordance with the provisions of Schedule E, the goods in respect of which such declaration has been made *shall be forfeited* together with the package in which they are contained.....". This provision for forfeiture was introduced by the amending Act No. 83 of 1988. Prior to this amendment, S. 52 only empowered the customs to detain goods which are undervalued and upon final examination for duty to take such goods for the use of the Crown after which the Collector was required to pay the amount of such valuation, together with the duties paid upon such goods to the importer or proprietor of such goods and to dispose of such goods for the benefit of the Crown. By the aforesaid amendment, the legislature has provided for the automatic forfeiture of undervalued goods, by operation of law and thereby effected a fundamental alteration of the law. This principle of automatic forfeiture is not affected by the decision of this Court in *Moosajees case (supra)* where the provision which was considered was S. 57 under which the goods are declared forfeited "in the absence of any explanation to the satisfaction of the Director-General". Such language invests the Director General with a measure of discretion in the matter of forfeiture; but S. 52 and other sections which provide for forfeiture of goods are not so qualified.

S. 125 of the Ordinance *inter alia*, requires the customs to seize goods which are declared to be forfeited. Such seizure (in the sense of a physical act of seizure) is necessary to complete the ownership of the State to the goods—*Arumugaperumal v. The Attorney – General* ⁽¹⁴⁾. Goods are seized when they are taken forcible possession of with the intention that ultimate loss by forfeiture and condemnation would result from the seizure – *Palasamy Nadar v. Lanktree* ⁽¹⁰⁾ S. 154 provides for the manner of instituting proceedings for claiming seized goods. This is the only remedy available to the owner for challenging the validity of the seizure and alleged forfeiture. It has been held that unless an action is instituted in a competent Court to so challenge the seizure, the property in the goods will be lost

to the owner. *Palasamy Nadar v. Lanktree* ⁽¹⁰⁾, *Jayawardena v. Silva* ⁽¹³⁾. Article 126 of the Constitution has since provided an additional remedy in appropriate cases.

(c) VALUE OF GOODS

Schedule 'E' of the Ordinance prescribes the following rules for fixing the value of imported goods :

1. It means their normal price i.e. the price in the open market between a buyer and a seller independent of each other.

2. Normal price is determined, *inter alia*, on the following assumptions :

(i) that the goods are delivered to the buyer at the port or place of introduction in Sri Lanka ;

(ii) that the seller bears the costs, charges and expenses of the sale and delivery of the goods at such port or place which are hence included in the normal price ;

Costs, charges and expenses referred to above include, *inter alia*, the following:

(a) carriage and freight to Sri Lanka ;

(b) insurance.

(iii) that the buyer bears all duties in Sri Lanka ;

(iv) that a sale in the open market between a buyer and a seller independent of each other presupposes *inter alia*, that the price is the sole consideration.

3. The price paid or payable may be accepted as the value for customs purposes if the price corresponds at the time of valuation to the normal price as indicated at 1 above and the price is adjusted if necessary to take account of circumstances of sale which differ from those on which the normal price is based.

To summarise, value of goods for customs purposes means the normal price or the open market price and the normal price includes costs, insurance and freight i.e. the CIF value. *Prima facie* the price paid or payable for goods i.e. the CIF value is acceptable as value for customs purposes provided, however, it corresponds to the normal price determined subject to the qualifications contained in Schedule E e.g. that in the matter of the sale between the buyer and the seller, price is the sole consideration; and if the circumstances of the sale differ from those on which the normal price is based, the price will be adjusted if necessary taking account of such circumstances. In other words, CIF value need not necessarily be the value of the goods for customs purposes.

APPLICATION OF THE LAW TO THE FACTS OF THIS CASE

Learned Counsel have addressed us on two issues namely the forfeiture of the goods (on the ground of undervaluation) and the refusal by the 1st respondent to mitigate the forfeiture. Both these issues have been agitated by the parties in their pleadings. This application is rooted in the second of these issues and hence we need not ordinarily have considered the first issue. It has, however, become relevant for the following reasons :

(a) The petitioner's application for a mitigation was without prejudice to the petitioner's right to take steps in Court to have the order of forfeiture declared invalid which is an unusual condition for an importer to insist on when applying for a mitigation. This condition is repeated in the petitioner's prayer for relief where he seeks an order from this Court declaring the impugned forfeiture to be illegal (for violation of Article 12 (1) and ordering the machine to be released on payment of an uplifted value without prejudice to the petitioner's right to challenge the validity of such additional value in an appropriate forum. He also seeks compensation in a sum of Rs. 3,500,000/-.

(b) In the pending District Court action too he claims the goods on the basis that their (seizure) and forfeiture are wrongful and illegal but this claim is made in terms of the Customs Ordinance. He also seeks to recover damages in a sum of Rs. 21,565,184/- and continuing damages.

It seems to me that the granting of relief subject to the aforesaid reservation and leading to such overlapping of reliefs as is likely to occur in the context of the proceedings before this Court and the District Court would not be "just and equitable" in terms of Article 126(4) of the Constitution. I am, therefore, compelled to decide both the said issues which the parties have raised before this Court for the purpose of ensuring that the relief, if any, that may be granted in these proceedings would be just and equitable.

FORFEITURE OF GOODS

The machine was seized as forfeit on the ground that Rs. 11 Million declared by the petitioner was an undervaluation. The respondents state that its value is Rs. 18 Million. The parties have placed the following material for the consideration of this Court :

(i) Susiri de Silva's affidavit in which he asserts that Rs. 11 Million (CIF value) is the correct value for customs purposes. In support of this value, the petitioner has annexed the SGS inspection certificate dated 31.12.90 (P7) according to which the machine had been manufactured in 1979 ; its value at the time of purchase (in 1979) was DKK 3,400,000 (Rs. 12 Million) ; and the plant may work satisfactorily for another 12-15 years. P7 also states that the estimated value of a similar plant with the same function as on the date of inspection was US 1,200,000 (Rs. 48 Million).

(ii) The 1st respondent's affidavit in which he states that the true value of the machine is Rs. 18 Million. This is supported by the affidavit of the Government Printer Mr. Neville Nanayakkara (1R1).

Mr. Nanayakkara states that he has been attached to the Department of Government Printing for a period of over 21 years of which for a period of 11 years he has been functioning as the Government Printer ; that he is called upon every month to give valuations to various banks on the post value and replacement value of printing machinery ; that accordingly every month he obtains information relating to the availability of second hand printing machines and their prices from U.S.A., U.K., Japan and India ; and that he is fully aware of the current price structure of second hand printing machinery.

(iii) Exhibit P23 (petitioners written submissions dated 11.11.91) addressed to the 1st respondent states that the officers of the Customs Valuation Branch fixed the value of the machine at 19 Million by depreciating 60% from the value of a similar new machine referred to in P7. In other words, it was their opinion that if a new machine with the same function would cost 48 Million, the value of the used machine imported by the petitioner should be 19 Million. This would mean that an increase in the price of a new machine could also result in the appreciation of the value of a used machine, which is not an unreasonable view. Mr. Nanayakkara has reduced a further 1 Million and fixed the value of the machine at 18 Million.

(iv) Exhibit P. 21 (SGS letter dated 25.07.91). This was obtained by the petitioner during the pendency of the customs inquiry presumably to neutralise the effect of Exhibit P7 in respect of the valuation of the machine imported by the petitioner. P21 seeks to achieve this by attempting a clarification which is briefly as follows :

- (a) V15A model which was imported is no longer produced:
- (b) the models were available in the market as follows :

- V 15A – 1966 to 1987
- V 15C – 1979 to 1990
- V 15D – 1979 – current

(c) V 15D is the newest and much better version than V 15A. In P7 reference was made to the V 15D model where it stated that "an estimated value of a similar plant with the same function today would be approximately US \$ 1,200,000" because from 1990 the only replacement model for V 15A was V 15D and the seller had been offered a V 15D model as replacement for the V 15A ;

(d) based on information since received they state, that a V 15C model with same capabilities as the V 15A under reference would be priced around US \$665,000 *ex plant*, (which is equivalent to about Rs. 27.6 Million CIF Colombo).

It has been submitted on behalf of the petitioner that going on the value of model V 15C, depreciated according to the percentage (60%) used by the customs, the value of the machine imported by the petitioner is only Rs. 11 Million. I am unable to agree with this submission because at the time of the said importation, V 15C model was no longer being produced. P21 itself states that from 1990 the only replacement model for V 15A was V 15D. If so, the valuation of the second hand V 15A machine with reference to the value of the V 15D *ex plant* cannot be faulted.

(v) Exhibit P5, Rotatech letter dated 23.08.90 addressed to Susiri de Silva. In this letter Rotatech informed "we have traded this press for US \$ 270,000 because our main interest is selling new presses nowadays and it is not necessary to make a big profit on second hand equipment". This indicates that it was not a sale in the open market between a buyer and a seller independent of each other where the price was the sole consideration as required by Schedule 'E' of the Ordinance. The seller's object was not so much to make a profit related to the demand but to dispose of the second hand machine quickly. In all the circumstances, I am of the view that this is a case in which the price paid cannot be accepted as the value for customs purposes and the customs officers were justified in inquiring into the value.

CONCLUSION

On the question of valuation, the petitioner relies on the CIF value and the fact that the machine was 11 years old at the time of importation. The respondent's case is supported by the evidence of the Government Printer and other circumstances which I have enumerated above. The Government Printer has set out his qualifications and experience to give an opinion and these have not been contradicted by the petitioner. As such, I am unable to accept the submission of the petitioner's Counsel that the Government Printer is not competent to assess the market value of the machine. On the available evidence, the customs decision that the value of the machine is Rs. 18 Million is justified. Accordingly, the petitioner had undervalued the goods when he declared its value as Rs. 11 Million. True, no fraud has been alleged in that regard. This, however, does not preclude the customs from determining the true value of the goods.

I hold that the goods are forfeit on the ground of undervaluation, in terms of S. 52 of the Ordinance, by operation of law. Such goods must be seized ; but in this case there is no express seizure of the goods. However, the 1st respondent's letter dated 25.11.91 (P22) wherein he refused to vary the forfeiture discloses a clear intention to permanently deprive the petitioner of the goods and hence it constitutes a seizure of the goods within the ambit of S. 125. The question then is whether the said seizure is vitiated on the ground of discrimination by reason of the 1st respondent's failure to mitigate the forfeiture under S. 163.

ALLEGED DISCRIMINATION WITH REFERENCE TO S. 163

I cannot accept the D.S.G.'s submission that S. 163 had no application because the goods had been seized as forfeit and that the proper remedy was for the petitioner to have appealed to the Minister under S. 164. The application for mitigation (though subject to an unusual reservation of the right to challenge the forfeiture in Court) was made prior to the seizure and hence it was a valid application. I am of the opinion that the other submission that goods "detained as undervalued" can only be released by the Minister under S. 164 is untenable.

That appears to have been the position prior to the amendment of S. 52 when the goods could only have been detained for undervaluation for the use of the Crown subject to payment of their value to the importer or the owner of such goods. Under the amended S. 52, undervalued goods are forfeit by operation of law. Such forfeiture attracts S. 163. It follows that in the other cases referred to by the petitioner, 1st respondent was competent to mitigate the forfeiture and he did mitigate such forfeitures validly, before the goods were seized in terms of S. 125. This Court will indeed presume that the said mitigations were validly made.

As regards the refusal to mitigate the forfeiture, I agree with the petitioner's Counsel that the amount of the undervaluation is not a reasonable guide for refusal, particularly for the reason that such amount would depend on the nature of the article. However, I do not agree that merely because the forfeiture had been mitigated even where the undervaluation was 100%, the 1st respondent is bound to mitigate in every such case. That is a question to be decided in

the discretion of the 1st respondent, on the facts of each case ; but upon a consideration of all the circumstances, I am satisfied that the refusal to mitigate the instant forfeiture was unreasonable and hence discriminatory. The fact that the goods consist of a printing press and that no fraud is alleged against the petitioner are very relevant circumstances which do not appear to have received consideration.

It is true that the application for mitigation was subject to an unusual condition namely, without prejudice to the petitioner's right to challenge in Court the forfeiture of the goods. It is unusual because a mitigation can be made on the assumption that the forfeiture is valid but unduly severe ; and if it was thought prudent to reserve any right, the appropriate course would have been to make the application without prejudice to the petitioner's right to challenge the forfeiture in Court, in the event of a refusal to mitigate the forfeiture. However, the 1st respondent's refusal to mitigate was not on that ground but in view of the amount of the undervaluation leading to "a heavy loss of revenue" to the State. (The D.S.G. informed us that the loss would be around Rupees 1.9 Million in duty). It is clear that in view of the said ground the 1st respondent was not prepared to release the goods, even if the application to mitigate was unqualified. Such conduct constitutes an arbitrary exercise of discretion which justifies the allegation of discrimination *vis a vis* others who are similarly circumstanced.

While there is no cogent evidence to establish the allegation that the seizure of the goods without mitigation was *mala fide* and for a collateral purpose, yet the material placed before us shows that there has been a failure to fairly consider the petitioner's application for mitigation. This in my view is a case of undervaluation of goods and automatic forfeiture under S. 52 and but for the discrimination that has been established in the instant application the petitioner would have been compelled to challenge the forfeiture by way of proceedings in the District Court. I hold that by reason of such discrimination the petitioner's right to the equal protection of the law under Article 12 (1) has been infringed.

RELIEF TO THE PETITIONER

In the light of my findings, I hold that the impugned forfeiture is valid. However, the seizure of the forfeited goods is vitiated by reason of discrimination in the exercise of the 1st respondent's powers under S. 163 of the Customs Ordinance. Accordingly, I grant :

(a) a declaration that the petitioner's rights under Article 12 (1) have been infringed ;

(b) an order directing the 1st respondent to release to the petitioner the said machine together with its accessories and spares on payment of duty on the value of Rs. 18 Million. In view of my finding upholding the said value, I disallow the prayer that this relief be without prejudice to the petitioner's right to challenge the validity of the additional duty elsewhere ;

(c) compensation in a sum of Rs. 662,664.24 (Rupees Six Hundred and Sixty Two Thousand, Six Hundred Sixty Four and Cents Twenty Four) being the sum equal to legal interest for 21 months on duty paid by the petitioner on the Bill of Entry dated 05.04.91 after which the petitioner was not permitted to clear the machine ;

(d) costs in a sum of Rs. 5500/- (Rupees Five Thousand Five Hundred).

G. P. S. DE SILVA, C.J. – I agree.

RAMANATHAN, J. – I agree.

Relief granted.
