TOYOTA LANKA (PVT) LTD., AND ANOTHER V. JAYATHILAKA AND OTHERS

SUPREME COURT
SARATH N. SILVA, C. J.,
AMARATUNGA, J. AND
SRIPAVAN, J.
S.C. APPEAL NO. 49/2008
C.A. NO. 2118/2005
JUNE 30TH, 2008

Certiorari – Discretionary remedy- Quash a decision which is ultra vires – Customs Ordinance – Section 125 – Seizure of goods in respect of which a Bill of Entry (CUSDEC) had been submitted – Sections. 18 and 18A – Recovery of additional dues that maybe claimed instead of seizure – Section 153 – Disbursement of forfeitures and penalties in favour of Customs Officers and informers – Section 47 – Applicability in a situation of a disputed classification of goods or underpayment or short levy of duties or dues.

This is an appeal from the judgment of the Court of Appeal, refusing a writ of certiorari sought by the plaintiff-appellant to quash an order made by an officer of the customs seizing nine Toyota Land Cruiser Prado motor vehicles imported by the 1st appellant company. The Order states that it is made under Section 125 of the Customs Ordinance. One of the issues before the Supreme Court was whether it is competent for an officer of the Customs to have recourse to Section 125 of the Customs Ordinance and effect seizure of goods in respect of which a Bill of Entry (CUSDEC) had been submitted, as provided by Section 47 and goods released consequent to a physical examination and payment of duties that were levied, or whether, in such a situation instead of seizure the lawful course of action is for the Customs to seek recovery of the additional dues that maybe claimed by recourse to provisions of Sections 18 or 18A of the Customs Ordinance.

Held :

(1) The mandatory consequences of forfeiture that are penal in nature in Section 47 which states *"but if such goods shall not agree with*

particulars in the bill of entry the same shall be forfeited" apply to a situation of concealment and evasion to pay duties as distinct from a situation of misdescription and under payment of duties.

In a situation of wrongful entry and evasion, since the consequence of forfeiture is by operation of law, even if the officer had delivered the goods upon the submission of Bill of Entry (CUSDEC), such goods maybe seized at any subsequent stage in terms of Section 125.

In a situation of misdescription and underpayment of duties the proper course would be to require the person concerned to pay "the duties and dues which may be payable" being the statutory obligation of the importer in terms of Section 47 or in the event of a short levy to recover the amount due in terms of Section 18(2) and 18(3) or 18A of the Customs Ordinance. Where a person has been charged in excess, he has a statutory right to seek a refund in terms of Section 18(1) of the Ordinance.

(2) The forfeiture provided for in Section 47 would not apply to a situation of a disputed classification of goods or an underpayment or short levy of duties or dues. In such an 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.

Per Sarath N. Silva, C. J.,

"It is preposterous that officers of Customs recovered as much as 129.75% of the value as duties and thereafter seized the goods as well. The preceding analysis establishes that such action does not come within the scope of Sections 47 and 125 and is inconsistent with the scheme and structure of the Ordinance."

(3) "Audit or examination" in terms of Sections 128A (1) relates to the records an importer is required to maintain for a period of 3 years from the date of importation in terms of Section 51B. There is no provision for the examination of goods at the stage and any such examination is *ispo facto ultra vires.*

(4) There is no provision for a forfeiture of goods by operation of law in the event of an alleged undervaluation. Such a provision would render importation of goods well nigh impossible except by the grace of an officer of the Customs. Hence the purported seizure at the 'post audit stage' is ultra vires and of no force or effect in law.

Case referred to :

1. *Palasamy Nadar v. Lanktree* – 52 NLR 520

APPEAL from judgment of the Court of Appeal.

Faiz Musthapha P. C., with *Riyad Ameen, Mrs. Faizer Marker* and *Ms. T. Machado* for the Appellants.

Ms. F. Jameel, D.S.G., with *Arjuna Obeysekera*, S.S.C., for the Respondnets.

Cur.adv.vult.

March 20, 2009

SARATH N. SILVA, C. J.

This is an appeal from the judgment of the Court of Appeal dated 01.10.2007 refusing a writ of certiorari sought by the Petitioner Appellant to quash the order dated 08.12.2005 made by an officer of the Customs, seizing nine Toyota Land Cruiser Prado motor vehicles imported by the 1st Appellant Company. The Order states that it is made under Section 125 of the Customs Ordinance read with the Exchange Control Act.

After hearing submissions of counsel on certain dates to which the matter was adjourned, it was agreed by counsel that the issue to be decided could be narrowed down to the question, whether it is competent for an officer of customs to have recourse to Section 125 of the Customs Ordinance and effect seizure of goods in respect of which a Bill of Entry (CUSDEC) had been submitted, as provided in Section 47 and the goods released consequent to a physical examination and payment of duties that were levied. Whether, in such a situation instead of seizure the lawful course of action is for the Customs to seek a recovery of the additional dues that may be claimed, by recourse to provisions of Sections 18

or 18A of the Customs Ordinance. Counsel agreed to tender written submissions on this question. The question was thus narrowed since there are other matters pending in Court involving the identical issue of seizure of goods under Section 125 of the Customs Ordinance after goods have been delivered upon payment of duties.

The submission of the Petitioner Appellants in this case and in other similar cases is that the officers of customs resort to the procedure of seizure, after delivery of goods upon tender of a CUSDEC and examination of goods in view of the statutory scheme for the disbursement of amounts recovered as forfeitures and penalties upon such seizure. In terms of Section 153 one half of the amount recovered as forfeitures and penalties is paid into a "Fund" under the control of the Director General of Customs for distribution in accordance with the scheme approved by the Minister, "amongst customs officers concerned and the "informers". From the other half also 40% is credited to the Customs Officers Management and Compensation Fund and only the balance is credited to the Consolidated Fund of the State. Thus out of the amounts recovered as forfeitures and penalties under the Customs Ordinance or any other provision of written law read with the Ordinance as much as 70% go to customs officers and informers through one means or another and only 30% get credited to revenue.

The submission of the Appellants is that this statutory provision in Section 153, as amended by Act No. 83 of 1988, for disbursement of forfeitures and penalties heavily weighed in favour of officers of customs, induce these officers to harass importers by effecting seizures in terms of Section 125 of the goods in respect of which CUSDEC forms have been submitted and duties paid. The submission is that in such a situation the proper recourse should be not to effect a seizure of goods and impose penalties but to recover in terms of

Section 18 any additional amounts that may be claimed as duties. In terms of Section 18(3) if the amount so demanded is not paid, it is lawful for an officer of the customs to refuse to pass any goods which that person imports or exports until such amount is paid. Section 18A in addition provides for the recovery of any duties omitted to be levied or short levied by recourse to the Magistrate's Court where the sum due is deemed to be a fine which carries a term of imprisonment in the event of non payment. However, the amounts so recovered in terms of Sections 18(3) or 18A would not be forfeitures or penalties and as such the provisions of Section 153 referred to above which provides for as much as 70% of the amounts recovered to be distributed to customs officers and informers would not be attracted.

The submission of the Appellants is that a seizure is effected in a situation where a recovery process is the proper course solely for the benefit of officers of customs and not for the benefit of the State and public revenue. It was further argued that in view of the statutory scheme stated above officers of customs effect purported seizures on tenuous grounds causing harassment to importers and traders, for the purpose of enhancing their rewards and other gains.

On the other hand Deputy Solicitor General submitted that a misdescription of goods would be a fraudulent act on the part of the importer and the mere recovery of the additional duties that may be due is not an "adequate deterrent." As regards the initial inspection of goods upon a CUSDEC at the time of delivery to the importer, it is contended that if goods are mis described inspite of delivery of such goods on a short levy of duties, the goods are forfeited by operation of law and may be seized at any subsequent point by an officer of customs in terms of Section 125 of the Ordinance.

The reply of the Petitioners is that the submission of the State is inconsistent with Section 47 of the Ordinance being

the applicable provision. That, upon the submission of a CUSDEC signed by the authorized officer and transmitted to the officer charged with clearance in terms of Section 47 the goods are either inspected and delivered or forfeited on the basis that the goods do not agree with the particulars in the CUSDEC by a lawful and proper exercise of such power and that the section does not envisage an examination and delivery and also a forfeiture by operation of law of the same goods.

I would now examine the submissions referred to above in the light of the relevant facts and the applicable provisions of the Customs Ordinance.

The 1st petitioner Appellant is a fully owned subsidiary of Toyota Tsusho Corporation of Japan. The Toyota Land Cruiser Prado being the vehicle in question is a product of the Toyota Motor Corporation. At the time of importation a Bill of Entry (CUSDEC) was submitted by the 1st Petitioner Appellant describing the vehicles under HS Code 8702.10.01. The HS Code that is adopted for revenue purposes in Sri Lanka is based on a Harmonized System being an internationally recognized classification. The first six digits is the local variant. The applicable gazette notification of 12.02.2004 states the title of Code 87.02 as:

"Motor vehicles for the transport of 10 or more persons, including the driver."

The description of the item in HS Code 87.02.10.01 states as follows:

"Ten seater passenger van of the Nissan Petrol, Mitsubishi pajero, Toyota Land Cruiser, Range Rover and similar type of not more than three years old."

The petitioner Appellant submitted a CUSDEC on the said HS Code 8702.10.01 and paid the following duties:

Customs Duty	25%
Surcharge on Customs Duty	10%
Port & Aviation Levy	1.5%
VAT	18%
Excise Duty	72%
Social Responsibility Levy	0.25%
Total	129.75%

The submission of the CUSDEC and the payment of duties and levies amounting to 129.75% of the value of a vehicle by the Appellants is not disputed. The goods were released to the Appellants by the 2nd Respondent who processed the CUSDEC that was submitted.

The Appellants claim that the vehicles were examined by the 2nd Respondent prior to its release. The 2nd respondent has not filed an affidavit in the Court of Appeal denying this specific contention of the Appellants. The impugned seizure under Section 125 of the Customs Ordinance was effected subsequently by the 3rd Respondent who played no role in the clearance of the CUSDEC and the delivery of the vehicles. The contention of the state is that the vehicles should be properly classified under HS Code 8703.32.07. The description of this HS Code in the gazette notification is as follows:

> *"Motor cars including Station Wagons and racing cars of a cylinder capacity not exceeding 2000 cc. And not more than 3½ years old."*

This classification is relied on by the State on the basis that the particular motor vehicle although a Toyota

Land Cruiser as described in the HS Code 8702.10.01 has only 9 seats and not 10 seats. In the circumstances the higher duty rate under the latter classification would apply to the vehicle. On that basis it was contended that the Excise Duty that should be paid is not 72% but 115%.It was submitted by the Deputy Solicitor General that the mis description was to secure a lesser Excise Duty of 72% and being a fraudulent act which resulted in the vehicles being forfeited by operation of Section 47 and as such liable for seizure in terms of Section 125 of the Ordinance.

Since the issue is whether the vehicle has 10 seats or 9 seats, the Appellants contend that the physical examination of the vehicle done by the 2nd Respondent at the time of delivery should be the determinant factor. It was contended that since the 2nd Respondent, being the officer of customs to whom the Bill of Entry (CUSDEC) was "transmitted" in terms of Section 47, duly examined the vehicles and released them upon payment of duties and levies, the vehicles cannot be considered as being forfeited in terms of the alternative limb of Section 47. As noted above the 2nd Respondent had not filed an affidavit but in paragraph 100 of the written submissions of the State it is stated that; "Assuming the vehicles had been examined and the officer had mistakenly counted the number of seats as 10, and at Post audit stage after a physical examination, it was revealed that the vehicle did not have 10 seats, then, the Petitioner would not be able to claim a benefit out of the mistake of the officer". The legal implications of this submission would be considered hereafter but it suffices to observe for the present that the 2nd Respondent has not stated anywhere that he made a mistake in counting upto 10.

The submissions of the Appellants and of the State relate primarily to the interpretation of the provisions of Section 47 of the Customs Ordinance and in particular to the last

limb thereof. Section 47 requires an importer to deliver to the Director General of Customs a Bill of Entry of goods on a form as may be specified by the Director General. It is common ground that in usage the Bill of Entry to be submitted is now described as the CUSDEC, the contents of which have been specified by notification. The CUSDEC has been introduced for use in a computerized system and to be in accord with the practice operative internationally. Section 47 is a long provision coming well within the description stated by Gratiaen J., in the case of *Palasamy Nader vs Lanktree*[1], where he observed as follows"

> *"Customs Ordinance is an antiquated enactment which first found its way into the Statute Book in 1869, and has been subject to various amendments from time to time thereafter."*

The situation described by Gratiaen J., in 1949 has been compounded further by many amendments that have been later introduced to the antiquated language of Section 47. For purposes of interpretation the provision could be suitably paraphrased to encompass the different stages of clearance of goods by Customs at the time of importation. The 1st step, as noted above is the submissions of CUSDEC with the particulars that have been specified by the Director General. The next sentence requires that the importer *"Shall pay any duties which may be payable upon the goods mentioned in such entry."* The next portion of Section provides that the CUSDEC when signed by the Director General of Customs or a person authorized by him and "transmitted" to the proper officer "shall be the warrant to him for the examination and delivery of such goods". Thus it is clear that the importer is required to present the CUSDEC with all the relevant information, as specified, pay the duties and dues and await action on the part of the officer to whom the CUSDEC is transmitted by the Director General or a person authorized

by him and who is "warranted" (empowered) to examine and deliver the goods. The next set of words read as follows:

> *"but if such goods shall not agree with the particulars in the bill of entry the same shall be forfeited, and such forfeiture shall include all other goods which shall be entered or packed with them as well as the packages in which they are contained."*

Counsel for the Appellants contended that these words commencing with the word "but" is an alternative to the delivery of the goods provided for in the preceding words that when the officer empowered to carry out the examination, delivers the goods pursuant to such examination, the question of forfeiture on the basis that the goods do not agree with the particulars in the "bill" CUSDEC would not arise. It is submitted that these are alternative provisions, the action of the officer of customs would be one of delivery after examination or one of declaring a forfeiture and seizing the goods. On that basis Counsel submitted that since the goods have been delivered upon examination (which is not disputed by the State) there is no question of a forfeiture and seizure of such goods.

The submission of the Deputy Solicitor General is that the words "shall be forfeited" is by operation of law and a necessary consequence of goods not being in agreement with the particulars in the bill. In support of this proposition Deputy Solicitor General relied on the judgment of Gratiaen J., in *Palasamy Nadar vs Lanktree,(supra)* where a distinction is noted by in the use of the words "shall be forfeited" and "liable to forfeiture". It was observed in that judgment that the former is forfeiture of goods by operation of law.

I have to note that in *Palasamy Nadar's case (supra)* Gratiean J., sitting alone did not consider the provisions of

Section 47 or of the corresponding provisions with regard to importation. The question considered related to an instance of exportation and more specifically related to the issue whether a notice of claim for goods that have been seized as forfeited has been given within time, as provided in Section 147 (the present section 154). Significantly, Gratiaen J., was not called upon in the case to consider the specific content of Section 47 dealt with above.

The content and sequence of Section 47 analyzed above tends to support the submission of the Appellants that action on the part of the officer to whom the CUSDEC is transmitted for clearance, should be one of the two courses, the first being the examination and delivery of goods and the second being a refusal to do so on the basis that the goods do not agree with particulars in the entry which will be followed by the declaration that the goods are forfeited and a seizure thereof.

However, since the State seeks to support the forfeiture on the basis that the last limb of Section 47 is a consequence of law which would not be precluded by the delivery of the goods by the officer to whom the CUSDEC is transmitted, it is necessary to consider this aspect as well.

The submission of the Deputy Solicitor General is that the words.

> *"but if such goods shall not agree with the particulars in the bill of entry the same shall be forfeited."*

apply by operation of law to a situation in which the HS Code is incorrectly stated in the CUSDEC to attract a lower rate of duty;

The HS Code is replete with manifold distinctions including fine variants such as between vehicles having 10 seats and more and 9 seats and less, being the particular issue in this case. In my opinion the words *"but if such goods shall not*

agree with the particulars in the bill of entry...." which taken in isolation have a seemingly wide ambit should be interpreted in the context in which these words appear which state the consequences that follow. The mandatory consequences are not restricted to a forfeiture of the goods in question as revealed by the words that follow:

> *"and such forfeiture shall include all other goods which shall be entered or packed with them as well as the packages in which they are contained."*

These mandatory consequences of forfeiture that are penal in nature demonstrate that the words "but if such goods shall not agree with the particulars in the bill of entry" apply to a situation of concealment and evasion to pay duties as distinct from a situation of misdescription and under payment of duties. In the latter situation the proper course would be to require the person to pay the "duties and dues which may be payable" being the statutory obligation of the importer in terms of Section 47 or in the event of a short levy to recover the amount due in terms of Sections 18 (2) and (3) or 18A referred to above. Where the person has been charged in excess, he has a statutory right to seek a refund in terms of Section 18(1).

In the former situation where the goods sought to be cleared do not agree with the Bill manifesting a concealment and an evasion of duties and dues, the penal consequences of forfeiture stated above follow by operation of law. The official intervention which gives effect to the forfeiture by operation of law is seizure of such goods by any officer of the customs as provided in Section 125. The seizure impugned in this case was purportedly made in terms of this section and it is necessary now to consider its provision which reads as follows:

"All goods and all ships and boats which by this Ordinance are declared to be forfeited shall and may be seized *by any officer of the customs; and such forfeiture of any ship or boat shall include the guns, tackle, apparel, and furniture of the same, and such forfeiture of any goods shall include all other goods which shall be packed with them, as well as the packages in which they are contained; and all carriages or other means of conveyance, together with all horses and all other animals and all other things made use of in any way in the concealment or removal of any goods liable to forfeiture under this Ordinance, shall be forfeited."*

It is significant that this is the first section in Part XIII of the Ordinance which bears the following title:

'SMUGGLING, SEIZURES AND PROSECUTONS GENERALLY

The marginal note to Section 125 also contains the same words:

"Smuggling, Seizure and Prosecutions generally"

Ordinarily, marginal notes and the title would not be taken into account in interpreting the provisions of a Section since they are considered to be editorial inclusions. However, as observed by Gratiaen J., we are dealing with a law that is antiquated and amended several times over a period of nearly 150 years. In this background it would be reasonable to ascertain the legislative intent by looking at not only the words of a section but also by taking into account the context both within (the entirety of the provisions in a section and inter se (the relation of one provision to another), the titles and marginal notes. All of which, in my view constitute the moorings of wide and ambiguous words of a section that should not be read in isolation. "Smuggling" stated in the title and marginal note is a word of ordinary usage which means, to take send

or bring goods or people secretly and illegally into or out of a country. In the context of customs it would mean the movement of goods by stealth and in concealment to evade payment of customs duties. Customs duties, prohibitions and restrictions attach to the goods. Hence, when the goods are conveyed by stealth and in concealment to evade payment of customs duties, or the applicable prohibitions and restrictions, by operation of law such goods and other goods packed together and packages are forfeited. Since they are forfeited by law as being smuggled goods they may be seized by an officer of the customs at any stage in terms of Section 125. Thus a harmonious interpretation could be made of the two related Sections 47 and 125 that arise for consideration in this case.

The view stated above that the words in the last limb of Section 47 *"but if such goods shall not agree with the 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 and dues or contrary to prohibitions, restrictions and that such goods and other goods and packages as provided are forfeited by operation of law is supported by a brief survey of the other sections in which the same phrase "shall be forfeited" is used:

They are:

(i) Section 30 provides that "any goods found to be concealed on board any ship (that has arrived at the Port) shall be forfeited. This would relate to a non disclosure in the manifest;

(ii) Section 33 provides that goods unshipped or carried contrary to rules and regulations "shall be forfeited";

(iii) Section 34 provides that goods "unladen from any ship or removal from a warehouse contrary to the provisions "shall be forfeited";

(iv) Section 43 provides that goods imported contrary to the prohibitions and restrictions in schedule B "shall be forfeited";

(v) Section 50A provides that goods exempted from customs duty are subject to conditions and when the conditions are not complied with the "goods shall be forfeited."

(vi) Section 75 provides that goods carried from one port to another in Sri Lanka contrary to regulations and restrictions "shall be forfeited"

Hence I am fortified 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 officer 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 classification of goods or an underpayment or short levy of duties or dues. 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.

In this case the officer who was charged with the function of examining and delivering the goods in fact agreed with the classification of the importer and delivered the goods as provided in Section 47 cited above.

The item is a motor vehicle and the issue is the number of seats being a fact which could be easily perceived by the

senses at a physical examination. The excuse of a mistake in counting the seats is unacceptable and cannot be availed of to ascribe a conveyance by stealth and a concealment to evade payment of dues by the importer. Infact there had been no evasion and as much as 129.75% of the value has been paid as duties. The only issue, if any, would be one of recovery of any additional amounts that may be due.

It is preposterous that officers of customs recovered as much as 129.75% of the value as duties and thereafter seized the goods as well. The preceding analysis establishes that such action does not come within the scope of Section 47 and 125 and is inconsistent with the scheme and structure of the Ordinance. The manifestly illegal action lends credence to the submissions of the Appellants as to the reward oriented motivation which induces overzealous action in effecting seizures and imposing penalties where the proper cause would be to recover any additional amounts that may be due according to the due process of law.

The Deputy Solicitor General submitted that the act of the 3rd Respondent and another Customs Officer in effecting the seizure under Section 125 is valid since "this fraud was discovered by the Post Audit Branch of the Customs". It was submitted that the 3rd Respondent (Post Audit Branch) visited the premises of the 1st Petitioner for the purpose of conducting further inquiries and examined the vehicles. The implication of their submission is that an examination of the goods is not restricted to the stage prior to delivery as stated in Section 47 but that such examination could be done at a subsequent stage described as the "Post Audit Stage".

It appears that the stage contemplated in the submission is that referred to in Section 128A of the Customs Ordinance introduced by the Amending Act No. 2 of 2003. In this regard I have to note initially that the "audit or examination". . .

terms of Section 128A(1) relates to the records an importer is required to maintain for a period of 3 years from the date of importation in terms of Section 51B. There is no provision for the examination of goods at that stage and any such examination is *ipso facto ultra vires*. Further, provisions of Section 128A read with Section 51A (2) show that the audit is carried out to determine the value of the goods. This could lead to an amendment of the value and an importer who is dissatisfied with any decision to amend the value has a right of appeal to the Director General in terms of Section 51A(6). There is no provision for a forfeiture of goods by operation of law in the event of an alleged undervaluation. Indeed such a provision would render importation of goods well nigh impossible except by the grace of an officer of the customs. Hence the purported seizure effected by document P10 at the 'post audit stage' is in any event *ultra vires* and of no force or effect in law.

For the reasons stated above I allow this appeal and set aside the judgment of the Court of Appeal dated 1.10.2007. I direct that a writ of certiorari issue quashing the seizure notified by document marked P10 in the Court of Appeal and thereby grant to the Appellants the relief prayed for in prayer (a) of the petition filed in the Court of Appeal. This order will not prejudice the authority of an officer of customs ro recover any sums that are due according to law. No costs.

AMARATUNGA J - I agree

SRIPAVAN J - I agree

Appeal Allowed.