

**JAWARD
VS
DIRECTOR GENERAL OF CUSTOMS AND OTHERS**

COURT OF APPEAL,
IMAM, J.
SRISKANDARAJAH, J.
CA (WRIT) 992/99,
JUNE 17, 2005

Writ of Certiorari-Customs Ordinance-Sections 154, 163,165-Passenger possessing foreign currency-Forfeiture-Penalty-Power to mitigate-Who has the right ?-Forfeited property-Is it State property ? - Can property which is seized as forfeit be restored ? - Part released -Subsequently order cancelled-Order to release - is it a nullity-Does writ lie ?

The petitioner a passenger to Bangkok possessed Japanese foreign currency, and he had failed to declare same at the Airport. After an inquiry, order was made forfeiting the foreign currency, and a further penalty was imposed. After paying the penalty, the petitioner gave notice to the 1st respondent under Section 154, this notice was rejected as being out of time. Another appeal was lodged, and a fresh inquiry was held and after the inquiry the petitioner was informed that out of 7,775,000 Yen, 5,000,000 Yen would be released but subsequently the said Order was cancelled. The petitioner sought to quash the said Order and further sought a writ of mandamus to enforce the earlier order. It was contended that, the 1st respondent was functus after the first Order.

HELD

- (i) Once goods become seized as forfeited the goods become State property.
- (ii) Specific provisions are laid down to release goods that are seized as forfeited under Section 164.
- (iii) The consideration under Section 163 could only mitigate punishments and he has no authority to release goods that are seized as forfeited.
- (iv) The decision of the 1st respondent releasing a part of the forfeited sum is ultra vires the powers of the Director General of Customs vested under Section 163. The said decision is a nullity.
- (v) The letter canceling the earlier order is not a decision of the 1st respondent but a correction informing the correct procedure.
- (vi) The said correction is not amenable to courts jurisdiction.

- (vii) A writ of mandamus cannot be used to enforce an Order that is a nullity.

APPLICATION for a Writ of Certiorari/Mandamus

Referred to :

- (1) *Bangamuwa vs. S. M. J. Senaratne, Director General of Customs and Another* 2000 1 Sri LR 106

J. S. Boange for petitioner

Sanjaya Rajaratnam, Senior State Counsel for 1st and 2nd respondents.

A. S. M. Perera, P. C. with *Herath Ananda* for intervenient petitioner,

Cur. adv. vult

11th July, 2005.

SRISKANDARAJAH, J

The Petitioner in this application has sought a writ of certiorari to quash a decision of the 1st Respondent dated 27th September, 1999 P4 cancelling an earlier order dated 20th September 1999 P3 informing the Petitioner that a sum of Japanese Yen 5,000,000 will be released to the Petitioner. The Petitioner also has sought a writ of mandamus on the 1st Respondent to enforce the order dated 20th September, 1999 by which a sum of Japanese Yen 5,000,000 was to be released to the Petitioner.

The Petitioner a passenger to Bangkok was possessing foreign currency of 7,755,000 Japanese Yen but he has failed to declare the same at the Airport to the customs. On detection of this currency an inquiry was held by the customs and an order was made forfeiting the foreign currency of 7,755,000 Japanese Yen and a further penalty of Rs. 100,000 was imposed. This penalty was paid by the Petitioner. Thereafter the Petitioner had given notice to the 1st Respondent under Section 154 of the Customs Ordinance but this notice was rejected as being out of time. The Petitioner submitted that he thereafter made an Appeal to the Respondent and a fresh inquiry was held at which the key witnesses gave evidence. After the inquiry he received a letter dated 20 September, 1999 stating that a sum of 5 million Japanese Yen would be released out of the sum of 7,775,000 Japanese Yen. Subsequently the 1st Respondent had cancelled the said order by the letter of 27.09.1999. The Petitioner submitted that the 1st Respondent had no power or jurisdiction to vary his earlier Order as he was functus after the first order of 20.09.1999 and that the purported cancellation was *mala fide* and/or made at the instance of interested parties who were seeking to gain a reward in the event of the cancellation of the

order of 20.09.1999. The Petitioner further submitted that in this instant case the Petitioner had already paid the penalty and therefore there was no question of mitigation of penalty. The Petitioner's appeal to the Director General of Customs is to mitigate the forfeiture of the Japanese Yen and the 1st Respondent has retained the forfeiture in respect of a certain amount of Japanese Yen thereby mitigating the earlier forfeiture and released part of the Japanese Yen and thereby he was acting within the relevant Section. The Petitioner further submitted that in any event he becomes functus, and only a Court of Law or the Minister could review the order that the 1st Respondent had made.

The respondents submitted that in terms of Section 163 of the Customs Ordinance it is only the Director General of Customs who has the power to mitigate the forfeiture. It does not authorize the Director General to restore any property which is seized as forfeit. The only power the Director General has in terms of Section 163 is to mitigate a forfeiture or penalty if it is deemed such forfeiture or penalty is unduly severe. In support of this contention the Senior State Counsel cited *Bangamuwa vs. S. M. J. Seneratne, Director General of customs and Another*¹¹ at 111 in which case J. A. N. D Silva J after considering Section 163, 164 and 165 of the Customs Ordinance held, that the order of the Director General to release the vehicle to Haskell Lanka (Pvt.) Ltd. is ultra vires the powers vested in him.

In reply to the above submission the Petitioner submitted that it is necessary to look into the definition of the terms 'mitigation', 'forfeiture' and 'release' and thereafter consider the context in which these terms have been used and the general tenure of the enabling Act or Law. Forfeiture has been defined in the Law Lexicon by P. Ramanatha Aiyar *inter-alia* as the "divestiture of specific property without compensation in consequence of some default or act forbidden by law". Mitigation is reduction in punishment or penalty. Release *inter-alia* is construed as discharge of an existing obligation or right of action by the person, in whom the obligation or right is vested to the person against whom it exists. Therefore applying these definitions to the phrase to "mitigate a forfeiture" it could be interpreted to mean a reduction in the amount in respect of which a forfeiture has been imposed and it would necessarily follow that this sort of in-

stance would cover items or goods which are of a divisible nature. For example bales of cloth, bags of lentils, currency etc., and not in the case of vehicles and machinery, which are not divisible visible in nature.

In this instant case after an inquiry an order was made by the inquiring officer of Customs on 24. 03.1997 forfeiting the foreign currency amounting to Japanese Yen 7,755,000 under Section 12, 44 and 107A (2) and also imposed a penalty of Rs. 1,000,000.00 which penalty had been paid by the Petitioner. Thereafter the Petitioner had given notice lodging his claim to the currency under Section 154 of the Customs Ordinance to the 1st Respondent ; however he was informed by the 1st Respondent that he was out of time. As provided by Section 154 unless the person from whom such goods shall have been seized, or the owner of them, or some person authorized by him, shall within one month from the date of seizure of the same, give notice in writing to the Collector that he intends to enter a claim to the goods seized and proceedings for the recovery of the goods are instituted in the proper Courts within 30 days from the date of notice the goods seized shall be deemed to be forfeited and it shall be dealt with as goods seized as forfeited. Once the goods become seized as forfeited under this Ordinance the goods become state property. Specific provisions are laid down to release goods that are seized as forfeited under Section 164. On the other hand the Collector under Section 163 could only mitigate punishments and he has no authority to release goods that are seized as forfeited. The title and position of the goods seized as forfeited are with the state and this property cannot be a subject matter of mitigation. Therefore the decision of the 1st Respondent communicated by his letter of 20th September, 1999 P3 stating that a sum of Japanese Yen 5 million would be released out of the sum of 7,775,000 was ultra vires the powers of the Director General of Customs vested under Section 163. Hence the decision communicated by the letter P3 is a nullity. The letter of 28th of September, 1999 P4 by which the 1st Respondent informed the Petitioner that "he has ordered the release of a portion of the Japanese currency forfeited is on misreading the Law in connection with it. Hence

please treat the order made to release Japanese Yen 5,000,000 to you as cancelled" is not a decision of the 1st Respondent but a communication informing the correct position. Hence this communication is not amenable to writ jurisdiction. A writ of mandamus cannot be issued to enforce the order marked P3 as it is a nullity. For these reasons this Court dismisses this application without costs.

Imam — I agree.

Application dismissed
