

MANS LANKA (PVT) LTD
v
LAKSHMAN PERERA,
DIRECTOR-GENERAL OF CUSTOMS AND OTHERS

COURT OF APPEAL
TILAKAWARDENA, J. (P/CA) AND
ABEYRATNE, J.
CA NO 1081/2001
MARCH 24, 2003

Writ of certiorari – Customs Ordinance, sections 8(1), 51, 52, 130, 145 and 167 – Under valuation – Forfeiture – Determination of the value – Is the order of forfeiture amenable to writ jurisdiction? – Alternative remedy – When does it not lie ?

On a suspicion to the possibility of undervaluation of a consignment of mammothies, an Inquiry was held under the provisions of the Customs Ordinance s.8(1) and the goods were forfeited (s. 52.)

The petitioner sought a *writ of certiorari* to quash the said forfeiture.

Held:

- (i) The Inquiring Officer had failed to take into consideration the most relevant and crucial facts in determining whether the petitioner has undervalued the consignment in question.
- (ii) Certiorari and prohibition have become general remedies which may be granted in respect of any decisive exercise of discretion by any authority having public functions, whether individual or collective.
- (iii) They will lie where there is some preliminary decision, as opposed to a mere recommendation, which is a prescribed step in a statutory process which leads to a decision affecting rights, even though the preliminary decision does not immediately affect rights itself.
- (iv) It cannot be said that the Director General of Customs when conducting an inquiry merely conducts a fact finding Inquiry.
- (v) A decision which is made in contravention of a statutory requirement becomes null and void then the question of alternative remedy would not arise.

Cases referred to:

1. *Jayawardena v Silva* – 73 NLR 289
2. *Amisminis Ltd., v Foreign Compensation Commission* (1969) – 2 AC 147
3. *Director of Public Prosecutions v Head* – (1959) AC 83 at 111.

Sanjeeva Jayawardena with *Faizer Markar* for petitioner

Farzana Jameel, Senior State Counsel for respondent

June 16, 2003

SHIRANEE TILAKAWARDENA, J. (P/CA)

The petitioner has filed this application seeking a *writ of certiorari* to quash forfeiture order dated 03.07.2001 made by the 4th respondent with regard to a consignment of mammoties and the penalty of Rs. 8,227,924 and for a *writ of mandamus* to compel the 1st respondent to release the said goods. However the said consignment was released on a bank guarantee as directed by this court. The petitioner company is engaged in the business of importing, exporting, merchandising and trading in hardware, timber paints and electric goods. 01

On 12./04.2001 the petitioner had entered into a contract with Fu Yuan Enterprises Pvt. Limited of Singapore for the purchase of 2280 dozens of Chillington Crocodile Brand Mammoties. The sales confirmation bears No. SC No. LKR/E/01, marked P3. The petitioner submits that the said Fu Yuan Enterprise of Singapore is the bona fide importer and distributor of Crocodile mammoties and other agricultural products by Chillington Tool (Thailand) Co. Limited. The "Crocodile" trademark and device are owned by the said Chillington Tool Co. Limited. 10

The said consignment arrived at Colombo Port on or about 26.05.2001 and the petitioner's clearing agent had produced the Customs Declaration bearing No. 54898 and had submitted the documents with Invoice bearing No. E 1029 for Singapore Dollars 56,520. (Cusdec and Invoices marked P4 and P5 respectively). 20

On 04.06.2001 the said cargo was inspected by the Customs Officials on a suspicion that they were not genuine "Crocodile"

brand mammoties. However after a physical inspection it was found that the mammoties were genuine.

Subsequently on another suspicion to the possibility of undervaluation of the said consignment, an inquiry was held under section 8(1) of the Customs Ordinance and the goods were forfeited under section 52 of the Customs Ordinance. 30

The main issue that needs to be considered in this application is whether the said inquiry held under section 8 (1) of the Customs Ordinance and the finding made thereupon could be justified according to the facts and circumstances of the present case.

Section 51, 52 and Schedule E of the Customs Ordinance contain the law relating to valuation of articles upon importation.

Section 51:-

“In all cases when the duties imposed upon the importation of articles are charged according to the value thereof, the respective value of each such article shall be stated in the entry together with the description and quantity of the same, and duly affirmed by declaration by the importer or his agent and such value shall be determined in accordance with the provision of Schedule E, and duties shall be paid on a value so determined”. 40

The word used in the provision is shall when determining value of an article. Therefore it has to be decided whether this word is used in a mandatory sense or not. Before attempting a definition of this provision it is necessary to consider the other relevant provisions in this regard. 50

Section 52:-

“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. Where such goods are not recoverable, the person making such false declaration shall forfeit either treble the value of such goods or be liable to a penalty of two thousand rupees, at the election 60

of the Director General”.

The phrase “where it says that where it shall appear to the officers of the Customs that the value declared is not in accordance with the provisions of Schedule E” makes it clear that the language used in section 51 is mandatory.

Therefore the value of such imported items should be determined in accordance with the provisions of schedule E and duties shall be paid on the value so determined.

Section 167 defines value as – the price of such goods detained in accordance with Schedule E. Schedule E Clause 1 states – “The value of any imported goods shall be the normal price, that is to say, the price which they would fetch at the time of importation on a sale in the open market between a buyer and a seller independent of each other as indicated in paragraph 2.7”. 70

Clause 2.7 states:

“That a sale in the open market between a buyer and a seller independent of each other presupposes”

2.7.1. - that the price is the sole consideration.

2.7.2 - that the price is not influenced by any commercial, financial or other relationship between the seller or any person associated in business with him, other than the relationship created by the sale itself. 80

However, Clause 3 states – “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 in paragraph 1 above and the price is adjusted if necessary to take account of the circumstances of the sale which differ from those on which the normal price is based.”

The question that has to be decided is the “price” that the goods would fetch at the time of importation. 90

It is utmost importance to analyze these provisions carefully to decide whether there was an undervaluation of the goods concerned in this case so as to warrant an inquiry under section 8(1)

of the Customs Ordinance.

As was submitted by the counsel for the respondents, citing Bindra on Interpretation of Statutes (9th Edition at page 1017) it is accepted that when interpreting a taxing statute, equitable consideration should not be taken into considerations and every word must be given its plain meaning.

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“The duty of the Judge in construing statutes is to adhere to the literal construction unless the context renders its plain that such a construction cannot be put on the words. The rule is specially important in cases of statutes which impose taxation.”

On perusing the relevant provisions it becomes clear that value of imported goods should be the normal price, that is the price they would fetch at the time of importation on a sale in the open market. That price should be the sole consideration and it should not be influenced by any commercial, financial or other relationship.

However as noted above, while accepting that the literal meaning of a fiscal statute should be given effect to, it is also accepted that it is a well established principle of statutory interpretation that a provision of a statute cannot be read in isolation, but should be read with the rest of the provisions of the statute.

It has to be noted that although the respondents have failed to make reference to Clause 3 of Schedule E, it is of importance when fixing the price of a good for the purpose of levying custom duties.

Clause 3 provides:-

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“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 in paragraph 1 above and the price is adjusted if necessary to take account of the circumstances of the sale which differ from those on which the normal price is based.”

This provision contain a qualification to the rules embodied in the provisions relating to fixing of the price. Therefore when computing the normal price, which is the price that the goods will fetch

at a sale in the open market, adjustment of the price according to 130
circumstances of the sale, has to be taken into account.

According to the facts and circumstances of the present case
the petitioner's submission is that they were able to obtain the con-
signment of Crocodile brand mammoties in question, at a lower
price as a result of a strategic move made by the supplier in order
to recapture the lost market.

In support of this contention, the document marked P13, which
is a letter issued by Fu Yuan Enterprise to the 1st respondent, is
submitted. P13 refers to invoice No. E 1029 in respect of the con-
signment in question. The letter reads "we refer the above ship- 140
ment and understand that there has been a query with regard to the
price of this commodity being lower than previous shipments from
our principals". Further clarifying this position it was stated that "we
confirm that we have decided to market the Chillington Crocodile
mammoties at a lower price as a strategic move to recapture the
lost market share for this product due to cheap fakes being import-
ed from China and India."

"We confirm that prices are lowered to facilitate our current dis-
tributor M/s Mans Lanka (Pvt) Ltd., to re-launch the product at an
attractive price supported by an aggressive marketing campaign." 150

In order to understand the market share of this particular
brand it is necessary to consider the history of the market for this
brand, other importers of the product, current market share of the
product etc. According to the materials produced in this court the
Brown and Company had been the sole agent of Crocodile brand
mammoties prior to 1971 and after 1991. However in January 2001
Chillingworth (Thailand) did away with the sole distributorship in Sri
Lanka and Brown and Company is no longer the sole agent.

The evidence of the other importers of the said Crocodile
brand mammoties led at the inquiry indicate that the prices afford- 160
ed by Fu Yuan Enterprises is not in conformity with the normal
price. The representative from Agrotechnica has given evidence to
the effect that the revised price offered to them on 23.3.2001 is US\$
2.20 for 9" x 9" size mammoties and US\$ 2.45 for 10" x 8" size
mammoties. According to the witness from Brown and Company,
for their last import, which was on 3.6.2000, the rates afforded were

US\$ 2.84 for 9" x 9" size mammoties and US\$ 3.24 for 10" x 8" size mammoties.

However according to the petitioner's contract, which was made on 12.04.2001, the reduce prices offered were US\$ 1.11 for 9" x 9" size and US\$ 1.24 for 10" x 8" size. 170

It was revealed during the inquiry that due to drop in sales, stocks were not moving. Evidence of Mr. Wickremasooriya, Director, Brown & Company at page 96 and evidence of Miss. Preethi Fernando, Agrotechnica Ltd., at page 98 of IR 7.

The evidence of the witness from the Brown & Company clearly states that when he negotiated with the supplier to obtain the lowest price, that he did not indicate the quantity he wanted to purchase. Also admitted the fact that they had stocks in hand at the time of negotiation of the prices and that no written confirmation was made as to the prices offered. The witness from Agrotechnica also admitted that they did not attempt to buy at the revised rates as they too had remaining stocks in hand. 180

What is significant to note is that this evidence reveals that the inquiring officer had not made specific reference and directed his mind to the fact that an increase in the quantity imported could attract a low price rate. Similarly, if new stocks were purchased at a lower price the possibility of having the lower prices of the existing stocks in the market is a crucial factor which should have been addressed by the inquiring officer. 190

The Respondent contended that the document P6 which is a letter dated 30.5.2001 addressed by Chillington (Thailand) only states that the Fu Yuan Enterprises is a *bona fide* importer and distributor of Crocodile mammoties but does not refer to the price at which the goods were sold by the manufacturer in Thailand, nor the price at which the agent sold to the petitioner.

This is a letter written upon inquiries made as to the genuineness of the product, when the issue first arose. However it must be noted that there was no plausible reason given as to why the 1st Respondent could not have requested, a clarification as to the lower prices offered to the petitioner, from the said Mr. Rod Buyers, Managing Director of Chillington (Thailand). 200

Another contention which has been made repeatedly by the counsel for the respondents is that the claim by the petitioner that it got the consignment at a reduced price as the agent in Singapore and wanted the petitioner to indulge in an aggressive Marketing Campaign is most implausible and is irrelevant to the statutory rules of valuation. The fact that the petitioner obtained the said consignment at a lower price just after two weeks from the date 23/3/2001, the Agrotechnica negotiated prices, were found unacceptable by the respondents. In a highly advanced consumer oriented society, market strategies need to be invented and implemented every now and then in order to face the challenges by competitions. Reduction of prices in order to recapture the lost market within a two weeks time cannot be termed as implausible. 210

The above contention of the respondents is based on Clause 2.7 of Schedule E. What the respondents have failed to consider is Clause 3 of Schedule E, wherein unequivocal terms provides that 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 and the price adjusted if necessary to take account of the circumstances of the sale which differ from those on which the normal price is based. 220

Therefore the inquiring officer had failed to take into consideration the most relevant and crucial facts in determining whether the petitioner has undervalued the consignment of mammoities in question.

Especially so as Schedule E does not envisage the prices of the goods that were imported previously but the prices, the goods would fetch at the time of importation. (Vide Clause 1 Schedule E). On perusing the observations of the Inquiring Officer at page 101 of IR 7 it becomes clear that the evidence was not assessed according to Clause 3 of Schedule E. Only Clause 2.7 of the said Schedule was considered, but again the assessment of evidence with Clause 2.7 is flawed as no evidence was led to the effect that the price was influenced by any commercial, financial or other relationship other than the relationship created by the sale itself between the petitioner and the supplier. 230

The contentions raised by the petitioner in relation to document marked IR 2, purported to be a guideline adopted in valuing

goods, need not be discussed as the respondent has admitted that this document was not the basis of valuation in respect of petitioner's goods. 240

The respondent on the other hand contends that an order for forfeiture is not liable to be quashed by way of a *Writ of Certiorari*. In support of this contention, the case *Jayawardene v Silva*,⁽¹⁾ was cited. It was held that where an order of forfeiture is made by the collector under Section 130 and the collector has not yet been asked to exercise his power of mitigation under Section 145, it cannot be said at this stage the collector had made any determination which can be described as quasi judicial. However it has to be emphasized that this decision is not in line with the development of administrative law principles of modern Law. 250

Wade 8th Edition page 601 states "As the law has developed, *certiorari* and prohibition have become general remedies which may be granted in respect of any decisive exercise of discretion by any authority having public functions, whether individual or collective". They will lie where there is some preliminary decision, as opposed to a mere recommendation, which is a prescribed step in a statutory process which leads to a decision affecting rights, even though the preliminary decision does not immediately affect rights itself. Accordingly it cannot be said that the Director General of Customs when conducting an inquiry merely conducted a fact finding inquiry. This is borne out by the Document IR 7, wherein an order was made forfeiting the subject matter of the inquiry. 260

The Counsel for the respondent too, submits that a decision of the Inquiry Officer can be set aside on the basis of no evidence or if the Inquiring Officer acted in contravention of statutory provisions.

In the present matter before this Court it is obvious that the Inquiry Officer conducted the inquiry without considering Clause 3 of Schedule, which was vital for the determination of the inquiry before him. 270

The issue raised as to the availability of an alternative remedy has to be decided only if there is an order which can be considered as valid. In the case of *Anisminic Ltd. v Foreign Compensation Commission*⁽²⁾, it was held that when a decision is made where the

authority had no jurisdiction to make, such decision becomes null and void.

Therefore a decision which is made in contravention of a statutory requirement becomes null and void and then the question of alternative remedy would not arise. Nevertheless here a question arise as to whether a certiorari will lie to quash nullities. Lord Denning in the case of *Director of Public Prosecution v Head*⁽³⁾ stated that "where an order is a nullity there is no need for an order to quash it and that it is automatically null and void without more ado." 280

However the view accepted now is that there is no means by which nullity can be established without invoking the jurisdiction of the Court.

Therefore this Court is of the view that the decision made by the Inquiry Officer dated 03/07/2001 is made in contravention of provisions of the Customs Ordinance. Accordingly a *Writ of Certiorari* is granted quashing the said decision of the Inquiry Officer. Application is allowed with costs of Rs. 5000/-. 290

ABEYRATNE, J. - I agree.

Application allowed