

[IN THE PRIVY COUNCIL]

1953 Present : Lord Porter, Lord Tucker, Lord Asquith of Bishopstone and Mr. L. M. D. de Silva

THE ATTORNEY-GENERAL, Appellant, and
A. D. SILVA, Respondent

PRIVY COUNCIL APPEAL No. 46 OF 1951

S. C. 301—D. C. Colombo, 18,416

Customs Ordinance (Cap. 185)—Sections 17, 22, 47, 108—Sale of Crown property for failure to pay warehouse rent—Validity of such sale—Interpretation Ordinance (Cap. 2), s. 3—Public officer—Scope of his right to act for and on behalf of Crown—Principal and agent—"Ostensible" authority of agent—Admission on a question of law—Not binding on appellate court.

The Customs Ordinance is not binding on the Crown by virtue of section 3 of the Interpretation Ordinance which provides that "no enactment shall in any manner affect the right of the Crown unless it is therein expressly stated, or unless it appears by necessary implication that the Crown is bound thereby". Its provisions, therefore, relating to payment of dues and charges on goods are not applicable to goods which belong to the Crown.

Where the Principal Collector of Customs, who had been appointed to his office under the Customs Ordinance, sold by public auction in March, 1947, with the sanction of the Chief Secretary, certain goods of the Crown for non-payment of warehouse rent in respect of them—

Held, that the Principal Collector of Customs had neither actual authority under sections 17 and 108 of the Customs Ordinance nor ostensible authority on behalf of the Crown to sell the goods. The Crown could not, therefore, be sued by the purchaser for damages for the failure of the Principal Collector of Customs to deliver the goods.

Held further, that an appellate court cannot be bound on a question of law by an admission in the lower court which would involve an erroneous construction of a statute.

APPPEAL from a judgment of the Supreme Court reported in (1951) 52 N. L. R. 481.

Gilbert Paull, Q.C., with *Frank Gahan, Q.C.* and *Walter Jayawardene*, for the defendant appellant.

Phineas Quass, Q.C., with *R. K. Handoo* and *Carl Jayasinghe*, for the plaintiff respondent.

Cur. adv. vult.

May 12, 1953. [Delivered by Mr. L. M. D. DE SILVA]—

In this case the plaintiff sued the Attorney General of Ceylon representing the Crown for damages which, according to him, were payable in respect of a breach of contract between himself and the Crown. His case was that by a notification in the *Government Gazette* of the 21st February, 1947, the Principal Collector of Customs acting for and on behalf of the Crown advertised certain goods for sale by public auction. He said that he purchased these goods at an auction on the 4th March, 1947, and that thereafter the Principal Collector wrongfully refused to deliver the goods although he had done everything necessary to entitle him to delivery. The defendant pleaded *inter alia* that there had been no contract binding on the Crown and prayed that the action be dismissed.

In the courts below the learned District Judge held that no valid contract between the plaintiff and the Crown had been established and dismissed the plaintiff's action. The Supreme Court on appeal held that there had been a valid contract and awarded the plaintiff Rs. 40,000 by way of damages. The question before their Lordships is whether a contract binding on the Crown has been shown to have arisen.

Prior to the 21st February, 1947, the goods which are the subject matter of this case together with other goods belonging to various units of His Majesty's Forces were lying on the customs premises. There is no doubt that they were Crown property. The units to which they belonged were not showing any interest in these goods which by causing congestion and in other ways inconvenienced the customs authorities. The full correspondence which passed between the Principal Collector, his superiors in the Government of Ceylon, and the different units of the Forces has not been produced, and what transpired in that correspondence is not altogether clear but certain facts emerge with reasonable certainty. The Principal Collector described the goods as "unclaimed cargo" in the correspondence. The Flag Officer of Ceylon on the 13th May, 1946, stated that certain steel plates which constitute the greater part of the subject matter of this action were not "unclaimed cargo". Several attempts to get the Services to remove the goods proved unsuccessful and on the 24th December, 1946, the Principal Collector obtained the sanction of the Chief Secretary to sell them. The sale by auction already referred to was accordingly held on the 4th March, 1947, and the plaintiff declared the purchaser. Meanwhile the Ministry of Supply in Britain had appointed an officer of the Services Disposal Board which was a local branch of the Ministry of Supply in England to take charge, and dispose of the goods. This officer after receiving offers from various people contracted to sell the goods to Maharajan & Co. on the 23rd January, 1947. The facts stated above are not in dispute.

Before leaving the correspondence it is necessary to refer to a letter of the 28th November, 1946, in which the Principal Collector writing to the Chief Secretary made the observation "Presumably the goods have been abandoned." On the strength of this it was sought to argue before their Lordships that the Crown had abandoned the goods. This point was not canvassed in the Courts below and has not even been raised in the Case for the plaintiff. Upon the meagre material before them their Lordships

cannot take any view other than that taken by parties in the Courts below and by the Courts themselves, namely, that the property was the property of the Crown until at any rate the sale to Maharajan and Co.

The precise question which arises for their Lordships' decision is whether the Principal Collector of Customs had authority to enter into a contract binding on the Crown for the sale of the goods in question to the plaintiff. This question can conveniently be dealt with under two heads: had the Principal Collector actual authority to enter into a contract, if not did he have ostensible authority to do so?

It is argued that the Principal Collector had actual authority to enter into the contract by reason of the provisions of sections 17 and 108 of the Customs Ordinance (Chapter 185 Legislative Enactments of Ceylon). Section 17 makes warehouse rent payable in respect of goods left in Customs Warehouses. It reads:—

“ On all goods lodged in any King's warehouse, warehouse, or place of deposit provided by Government, it shall be lawful for the Collector to charge, demand, and receive warehouse rent for all such time as the same shall remain in such warehouse, at such rates and under such regulations as may from time to time be fixed by the Governor, as warehouse rent payable on goods so lodged, and no goods upon which warehouse rent may be due shall be removed until the same be paid. ”

Section 108 authorises the sale of goods left for more than three months in Customs Warehouses “ to answer ” the charges due thereon. It reads:—

“ All goods left in any King's warehouse or on the customs premises for a longer period than three months, unless permitted to remain by the special permission of the Collector, shall, after public advertisement, be sold by auction to answer the duties, warehouse rent, or other charges due thereon, and any overplus shall be paid, if claimed within twelve months from the date of sale, to the owner of such goods, who shall have no further claim touching the same, but if there be no claimant such overplus shall be brought to account as revenue.”

It is claimed by the plaintiff that the Customs Ordinance was binding on the Crown, that warehouse rent was due under section 17 of the Ordinance on the goods in question, and that as they had been left on the Customs premises for a period longer than three months, they were liable to be sold after public advertisement under section 108. This was in fact the basis upon which the Principal Collector held the sale and it would without doubt have been a sound basis if the property had all the time been private property. But it is argued by the Crown that, no matter what the Principal Collector thought or did, the Customs Ordinance was not binding on the Crown, that it, or at any rate the provisions in it relevant to this case, were inapplicable to property belonging to the Crown and that therefore the plaintiff's contention fails.

The first matter which arises for consideration is whether the Ordinance binds the Crown. Under section 3 of the Interpretation Ordinance (Chapter 2, Legislative Enactments of Ceylon) :—

“ No enactment shall in any manner affect the right of the Crown unless it is therein expressly stated, or unless it appears by necessary implication that the Crown is bound thereby. ”

It is not expressly stated in the Customs Ordinance that the Crown is to be bound thereby, and therefore the question which arises is whether the Crown is bound by necessary implication.

Certain sections of the Ordinance and certain items in the schedules thereof are relied on by the plaintiff as giving rise to such an implication.

Two sections of the Ordinance are relied on as giving rise to the implication that the Customs Ordinance binds the Crown, namely, sections 22 and 47. It has to be remembered that the Ordinance relates to Customs and that it would be remarkable if its provisions, particularly those relating to the payment of dues and charges, were applicable to the Crown as this involves *ex facie* a liability on the Crown to pay itself. Section 22 reads :—

(1) The following articles shall be exempted from payment of import duties and export duties :—

(a) articles of every description imported or exported for the public use of His Majesty's Regular Naval, Military and Air Forces in Ceylon, and all articles sold for the public use of His Majesty's Regular Naval, Military and Air Forces in Ceylon, though not directly imported for that purpose ;

(b) all wines, spirits and stores which are imported or purchased or procured locally for the use of the Naval Commander-in-Chief when residing in the Island, or which are supplied from His Majesty's dockyard at Trincomalee for the use of his servants and of the sailors on duty at his place of residence ;

(c) articles, clothing and materials for clothing imported for the use in athletic sports and games of His Majesty's Regular Naval Military and Air Forces in Ceylon ;

(d) articles imported, purchased, or procured or exported for the use of any mess or canteen of His Majesty's Regular Naval, Military and Air Forces in Ceylon.

It will be seen that paragraph (a) is applicable to all articles to be put to “ public use ” by Her Majesty's Regular Forces. It extends to articles not directly imported for the purpose. Paragraphs (c) and (d) are applicable to certain specified articles which are to be put by the Forces to what may be described as “ private use ” (for example in sports and games) by way of contrast to “ public use ” in paragraph (a). Paragraph (b) is applicable to certain specified articles to be used by the Naval Commander-in-Chief, his servants and sailors on duty at his residence.

The language of the section, when looked at independently of other considerations, is applicable to articles imported by the Crown and also to

those which are imported by private dealers and others. It has to be noted in this connection that articles "supplied from His Majesty's dock-yard" are not necessarily articles imported by the Crown.

The ground upon which it is contended that the Ordinance generally is applicable to the Crown is that the legislature has expressly made certain specific exemptions in favour of the Crown and thereby by implication negated the general exemption from the provisions of the Ordinance, which it would otherwise have had. It is said that such exemptions would have been unnecessary if the Crown had not been bound by the Ordinance as a whole, and that the implication that arises therefrom is that the Crown is bound except where exemptions are expressly conferred on it. Their Lordships are of opinion that upon a correct view of section 22 it confers no exemption on the Crown and therefore does not imply, necessarily, or at all, a liability which would exist but for such exemption.

The language of section 22 must be looked at in the light of the fact that the Crown enjoys immunity normally from statutory provisions. Their Lordships are of opinion that every word of the section possesses significance, and is effective, in respect of articles imported or exported by private persons, and only in that respect. Articles imported or exported by the Crown enjoy exemption from duty under the general immunity of the Crown. There is nothing in the section which compels the view that it confers an exemption on the Crown.

Again it has been argued that section 47 (relating to Port dues) confers certain exemptions on the Crown. It reads :—

47.—(1) All articles :—

(a) consigned to any officer of a public department in Ceylon and being the property of the Crown ; or

(b) consigned to any person for the purpose of being delivered to any officer of a public department for the use or service of the Crown ; or

(c) purchased out of bond by any officer of a public department for the use or service of the Crown ;

shall be passed duty free on any such public officer delivering to the Collector a list of the articles and certifying at the foot thereof that such articles are the property of the Crown or have been consigned to some person named in the certificate for the use or service of the Crown, or have been purchased out of bond for the use or service of the Crown.

(2) All such articles passed duty free as aforesaid shall in case of the sale thereof be liable to and be charged with such and the same duties of customs as may by law be payable or charged on the like articles not exempted from duties of customs under this section and the officer of the public department in whose charge such goods may be shall furnish the Collector with the particulars of the sale thereof and out of the proceeds of the same pay to the said Collector the duties which may be due thereon.

Paragraph (a) relates clearly to the property of the Crown but the effect of the section is merely to provide a convenient, but not exclusive, procedure by way of a certificate whereby a public officer to whom Crown property is consigned can assert the immunity from duty which it enjoys. Its effect is limited to this. Paragraphs (b) and (c) provide a convenient procedure by way of a certificate whereby a public officer may in certain circumstances obtain free of duty articles which are not the property of the Crown for "the use or service of the Crown". The language of paragraph (b), unlike the language of paragraph (c), is wide enough to apply to the property of the Crown. Their Lordships are of opinion that the effect of paragraph (b) in its application to the property of the Crown is not to grant exemption to the Crown but merely to provide a convenient procedure similar to that provided by paragraph (a) whereby the Crown can assert the immunity from duty which it enjoys. There is nothing in subsection (2) which makes it necessary to qualify what has been said. The duties recoverable under the subsection are recoverable from the subject and not from the Crown.

Certain items in the schedules to the Ordinance have also been relied on in support of the argument just discussed. Schedule A specifies the import duties payable on various articles and in the table of exemptions there is the item "regimental clothing, arms and accoutrements imported for His Majesty's land and sea forces including the Ceylon Defence Force." Schedule C prescribes the "Dues leviable at the Port of Colombo" and exempts from "entering" dues (l.vii) and "over-hour and buoy rent charges" (4.iv) :—

"men of war, vessels of the Imperial Light Service, troopships, hospital ships, and Royal Fleet Auxiliaries belonging to the Admiralty or on Admiralty Charter which normally fly the Blue Ensign with Admiralty Badge and carry no cargo on which freight is paid, and private yachts."

It also contains provision (5.iii) to the effect that :—

"men of war, troopships, hospital ships, and Royal Fleet Auxiliaries belonging to the Admiralty or on Admiralty Charter, which normally fly the Blue Ensign with Admiralty Badge and carry no cargo on which freight is paid shall be exempt from tonnage dues in respect of any cargo discharged or loaded which is exempt from duty under sections 22 and 23 of the Customs Ordinance."

In the same schedule "Government cargo" is exempted from first harbour dues on imported (7.i) and exported (10.i) goods.

In part II of the same schedule dealing with ports other than Colombo exemption from port dues is conferred on

"any private yacht, vessel of the Imperial Light Service, man of war, troopship, hospital ship or Royal Fleet Auxiliary, belonging to the Admiralty or on Admiralty Charter, normally flying the Blue Ensign with Admiralty Badge and carrying no cargo on which freight is payable."

•The charging section under which customs duties are levied is section 9 which enacts :—

“ The several duties of customs, as the same are respectively inserted, described, and set forth in figures in the table of duties (Schedule A) shall be levied and paid upon all goods, wares, and merchandise imported into this Island.”

It goes on :

“ Provided that

(a) the State Council may from time to time, by means of a resolution duly passed at any public session of the Council and sanctioned by the Governor, increase, reduce, abolish, or otherwise alter the customs duty leviable on any goods imported into or exported from the Island or into or from any specified port therein, or subject to such terms or conditions, if any, as may be expressed in the said resolution, may impose customs duty upon any goods so imported or exported whereon customs duty at the time when such resolution is passed is not leviable ; or may add other goods to the goods enumerated in the said Schedule as exempt from customs duty ; or may add to, rescind, or vary any of the conditions, exceptions, or provisions of the said Schedule with regard to the payment of customs duty ;

(b) no such resolution shall take effect unless it shall have been submitted to and sanctioned by the Secretary of State, and such sanction shall have been notified in the *Government Gazette* .”

A similar proviso exists (section 25 (2)) in respect of Schedule C. The items in the schedules are thus seen to be capable of alteration by subsidiary legislation. Such legislation would no doubt indicate the view of the Statute taken by the authority to whom subsidiary legislative power has been delegated. But the terms of such legislation made under a Statute cannot serve to determine the meaning of the Statute itself. Their Lordships have not in the course of the argument been made aware whether or not the items relied on were introduced into the Schedules by subsequent subsidiary legislation. But they do not think it necessary to investigate this matter because they are of opinion that, in any case, the implications that arise from the items of the schedules referred to above are not strong enough to oust the applicability of the general principle that the Crown is not bound by the Statute. Their Lordships do not think it necessary to say anything more about them except, perhaps, that they appear to be largely concerned with provisions for the regulation of business between Government departments which do not need the force of law for their proper execution.

Their Lordships therefore are of opinion that the Ordinance does not bind the Crown. It has been argued that apart from the Ordinance the Principal Collector has actual authority to do what he did, and that this

authority was reinforced by the letter written to him by the Chief Secretary. It is a simple and clear proposition that a public officer has not by reason of the fact that he is in the service of the Crown the right to act for and on behalf of the Crown in all matters which concern the Crown. The right to act for the Crown in any particular matter must be established by reference to statute or otherwise. It has not been shown that the Principal Collector had any authority to sell property of the Crown or to enter into a contract on its behalf for its sale: nor has it been shown that the Chief Secretary who authorised the sale had any such authority. His functions were defined by the Ceylon (State Council) Order in Council 1931 and under this Order the most that can be said is that he was authorised to deal with certain Crown property under the direct administration of the Government of Ceylon. It is therefore clear that the Principal Collector of Customs had no actual authority to enter into a contract for the sale of the goods which are the subject matter of this action.

Next comes the question whether the Principal Collector of Customs had ostensible authority, such as would bind the Crown, to enter into the contract sued on. All "ostensible" authority involves a representation by the principal as to the extent of the agent's authority. No representation by the agent as to the extent of his authority can amount to a "holding out" by the principal. No public officer, unless he possesses some special power, can hold out on behalf of the Crown that he or some other public officer has the right to enter into a contract in respect of the property of the Crown when in fact no such right exists. Their Lordships think therefore that nothing done by the Principal Collector or the Chief Secretary amounted to a holding out by the Crown that the Principal Collector had the right to enter into a contract to sell the goods which are the subject-matter of this action. It is not necessary to consider whether the Ministry of Supply or the Disposals Board could have held out the Principal Collector as having such a right because they did nothing from which a "holding out" can be inferred.

In advertising the goods for sale the Principal Collector no doubt represented to the public that the goods were saleable. But the question is whether this act of the Principal Collector can be said to be an act of the Crown. Their Lordships have considered whether by reason of the fact that the Principal Collector had been appointed to his office under the Customs Ordinance, and was the proper officer to administer it, he must be regarded as having had ostensible authority on behalf of the Crown to represent to the public that goods advertised for sale under the Customs Ordinance were in fact saleable under that Ordinance. It is argued that, if so, although the goods were in fact not saleable under the Ordinance because they were Crown property, or property to which the sections of the Ordinance authorising sale were not applicable or for some other reason, the contract would be binding on the Crown and the Crown would be liable in damages as it could not fulfil it.

Their Lordships think that the Principal Collector cannot be regarded as having any such authority. He had no doubt authority to do acts of a particular class, namely, to enter on behalf of the Crown into sales of certain goods. But that authority was limited because it arose under

certain sections of the Ordinance and only when those sections were applicable. It was said by Lord Atkinson in *Russo-Chinese Bank v. Li Yau Sam* [1910] A. C. 174 at p. 184 :—

“ If the agent be held out as having only a limited authority to do on behalf of his principal acts of a particular class, then the principal is not bound by an act done outside that authority even though it be an act of that particular class, because, the authority being thus represented to be limited, the party prejudiced has notice, and should ascertain whether or not the act is authorised.”

With that view their Lordships respectfully agree. In that case the authority did not arise under a statute but in their Lordships' view this fact makes no difference. If there is a difference at all it would lie in the circumstance that in a statute the limits of the authority conferred are fixed rigidly and no recourse to evidence is necessary to ascertain them. The Ordinance could no doubt have made the representation by the Principal Collector binding on the Crown, but it has not done so and to read into it any such provision would be unduly to extend its meaning.

It may be said that it causes hardship to a purchaser at a sale under the Customs Ordinance if the burden of ascertaining whether or not the Principal Collector has authority to enter into the sale is placed upon him. This undoubtedly is true. But where as in the case of the Customs Ordinance the Ordinance does not dispense with that necessity, to hold otherwise would be to hold that public officers had dispensing powers because they then could by unauthorised acts nullify or extend the provisions of the Ordinance. Of the two evils this would be the greater one. This is illustrated in the case under consideration. The subject derives benefits, sometimes direct, sometimes indirect, from property vested in the Crown, and its proper protection is necessary in the interests of the subject even though it may cause hardship to an individual.

The goods which are the subject matter of this action have been treated so far without reference to the sale to Maharajan & Co. on the 23rd January, 1947. The date on which the property passed from the Crown to Maharajan & Co. cannot be gathered with confidence from the evidence, and there is no evidence that Maharajan & Co. did not pay or offer to pay warehouse rent. But even if property passed on the 23rd January, 1947, (it could not have passed earlier) and no warehouse rent was paid by Maharajan & Co., still the Principal Collector had no right to sell the goods on the 4th March, 1947, because the period between those two dates falls short of the three months prescribed by s. 108 as the period after which alone goods may be sold for the non-payment of warehouse rent. The sale to Maharajan & Co. does not therefore alter the fact that the Principal Collector had no authority to sell the goods.

Their Lordships wish to observe in passing that no argument was addressed to them on the contention raised in the Case for the appellant that “ although the Principal Collector is a servant of the Crown, acts done in performing a statutory duty are done by him not as servant of the Crown but as the officer designated by the statute ”. In view of the conclusion they have arrived at they do not, for the purposes of a decision on this case, find it necessary to examine it.

The judgment of the Supreme Court proceeded largely on the basis of an admission said to have been made by the Solicitor General to the effect that section 17 of the Customs Ordinance applies to the Crown. Before the Board there was some discussion as to the extent of the Solicitor General's admission. Assuming, however, that the Supreme Court rightly understood the admission their Lordships cannot be bound on a question of law by an admission which in their opinion would involve an erroneous construction of the Ordinance. Their Lordships will therefore humbly advise Her Majesty that the appeal be allowed, the decree of the Supreme Court be set aside and the decree of the District Court restored. Each party must bear its own costs both on this Appeal and in the Supreme Court of Ceylon.

Appeal allowed.

