

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application under Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

1. JPC Trade Company Ltd
East Lower Block
World Trade Centre,
Colombo 01

2. R. Lahiru Rakshitha,
Country Manager,
JPC Trade Company Ltd
East Lower Block
World Trade Centre,
Colombo 01

Petitioners

SC FR Application 290/2014

Vs,

1. Mr. Jagath P. Wijeweera,
Director General of Customs,
Sri Lanka Customs,
No. 40, Main Street,
Colombo 11.

- 1(a).Mr. Chulananda Perera,
Director General of Customs,
Sri Lanka Customs,
No. 40, Main Street,
Colombo 11.

- 1(b).Mrs. P.S.M. Charles,
Director General of Customs,
Sri Lanka Customs,
No. 40, Main Street,
Colombo 11.

2. Mr. M. Paskaran,
Director of Customs (Social Protection Directorate)
Sri Lanka Customs,
No. 40, Main Street,
Colombo 11.

2(a). Mr. Athula Lankadewa,
Director of Customs (Social Protection Directorate)
Sri Lanka Customs,
No. 40, Main Street,
Colombo 11.

3. Mr. P. Gallage,
Superintendent of Customs,
Sri Lanka Customs,
No. 40, Main Street,
Colombo 11.

4. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondents

Before: **Justice Buwaneka P. Aluwihare PC**
 Justice Prasanna Jayawardena PC
 Justice Vijith K. Malalgoda PC

Counsel: Rasika Dissanayake for the Petitioners
 Sumathi Dharmawardena Senior Deputy Solicitor General for the 4th Respondent

Argued on: 17.07.2018

Judgment on: 28.09.2018

Justice Vijith K. Malalgoda PC

The two Petitioners namely J.P.C. Trade Company Ltd. and R. Lahiru Rakshitha had come before this court alleging the violation of the Fundamental Rights guaranteed under Article 12 (1), 13 (1) and 13 (4) of the Constitution.

As submitted by the Petitioners, the 1st Petitioner is a duly incorporated company in Japan and it is registered with the Registrar General of Companies in Sri Lanka as an overseas company under the provisions of the Companies Act No 07 of 2007, and the 2nd Petitioner who is a citizen of Sri Lanka, is employed as the country manager of the 1st Petitioner company. The 1st Petitioner is an exporter of Motor Vehicles from Japan to Sri Lanka and was not allowed or permitted by the Laws of Sri Lanka to import Motor Vehicles into the Country.

The Petitioners have alleged the involvement of some custom officers in conducting an investigation against the 1st and the 2nd Petitioners with regard to 63 vehicles the 1st Petitioner had exported under the provisions of the Customs Ordinance and other Laws of the country.

In this regard a team of custom officers had visited the 1st Petitioner's office and inspected the documents pertaining to the said 63 vehicles and later the Petitioners were made to understand that an inquiry was commenced for alleged violation of sections 129 and 163 of the Customs Ordinance for importation of undervalued vehicles into Sri Lanka.

The Petitioners have challenged the authority of the 1st to the 3rd Respondents or any employee of the Department of Customs to conduct such inquiry against the Petitioners under section 129 of the Customs Ordinance, since the 1st Petitioner was not involved in importing any goods into the country. In this regard the Petitioners have brought to the notice of this court the provisions of section 129 of the Customs Ordinance which reads as follows;

Section 129;

“Every person who shall be concerned in importing or bringing into Sri Lanka any prohibited goods, or any goods the importation of which is restricted, contrary to such prohibition or restriction, and whether the same be unshipped or not, and every person who shall unship or assist, or be otherwise concerned in the unshipping of any goods which are prohibited, or of any goods which are restricted and imported contrary to such restriction, or of any goods liable to duty the duties for which have not been paid or secured, or who shall knowingly harbour, keep, or conceal, or shall knowingly permit, or suffer, or cause, or procure to be harboured, kept, or concealed, any such goods, or any goods which have been illegally removed without payment of duty from any warehouse or place of security in which they may have been deposited, or into whose hands and possession any such goods shall knowingly come, or who shall assist or be concerned in the illegal removal of any goods from any warehouse or place of security in which they shall have been deposited as aforesaid, or who shall be in any way knowingly concerned in conveying, removing, depositing, concealing, or in any manner dealing with any goods liable to duties of customs with intend to defraud the revenue of such duties or any part thereof, or who shall be in any way knowingly concerned in any fraudulent evasion or attempt at evasion of such duties or any part thereof, shall in each and every of the foregoing cases forfeit either treble the value of the goods, or be liable to a penalty of one hundred thousand rupees, at the election of the Director General.”

The Petitioners complaint before this court refers to 16 vehicles said to have imported by the Peoples Leasing Company a subsidiary company of the People’s Bank and had further submitted that, the 1st Petitioner being the exporter had no reason to undervalue the said

vehicles exported, as it gain no benefit whatsoever. Therefore it is the importer that should be liable as per section 129 of the Customs Ordinance since the importer has a duty to declare the value of the imported goods and also to pay taxes as required under such ordinance or any other law.

As submitted by the Petitioners, at the conclusion of the Customs Inquiry where the 2nd Petitioner faced charges for abetment for importation, the 2nd Petitioner was imposed a forfeiture, which was conveyed to him by P-20 which reads as follows,

Order,

“I impose a mitigated forfeiture of Rupees six million (LKR 6,000,000/-) on Mr. R. Lahiru Rakshitha, Country Manager representing M/S JPC Trade Company Ltd. East Lower Block, World Trade Centre, Colombo in terms of sections 129 and 163 of the Customs Ordinance”

However the Petitioners have submitted that the offender, the People’s Leasing Company the importer of the said 16 vehicles have been exonerated with an ulterior motive of punishing the Petitioners irrespective of the fact that if at all only the said People’s Leasing Company was liable to pay any such custom duties or penalties to Sri Lanka Customs.

The Respondents have filed comprehensive objections before this court including the statements recorded from, Lahiru Rakshitha Ranthatige (the 2nd Petitioner) and from one Akbar Mohamed Ilham during the Customs Inquiry held against several persons, marked 1R1 and 1R2 respectively.

The 1st Respondent, Director General of Sri Lanka Customs in his affidavit filed before this court had taken up the position that;

- a) During the course of audit control, the Port Control Branch of the Customs suspected that there had been a loss of revenue due to undervaluation of vehicles imported into Sri Lanka
- b) In this regard, investigations were carried out with regard to several imports into Sri Lanka by Japanese exporters including the following suppliers,
 - i. M/S J.P.C. Trade Company Ltd. (the 1st Petitioner)
 - ii. My Direct Cars (Pvt) Ltd
 - iii. Asho Cars Japan (Pvt) Ltd.
- c) The said investigations revealed that declaration on the vehicles imported reflected the transaction price as much lower than the actual price
- d) It was further revealed that most of the pro forma invoices with regard to the said vehicle imports were issued by the local office of the said companies for establishing the letters of credit
- e) The remaining component of the transaction price had been paid under the description of “Local Handling Charges”, “Warranty Fee” and “Advanced Payments”
- f) By using this method the vehicle importers with the help of the exporter had defrauded the customs and the tax base had been considerably and unlawfully reduced, resulting in the under payment of the applicable customs duties and other levies for the vehicles so imported
- g) One A.A.M Ilham making a statement to Sri Lanka Customs had admitted that he allowed the 1st Petitioner company to make use of his Bank Account at Sampath

Bank, Pettah branch to collect the balance component of the transaction price (real value of the vehicle) from the prospective buyers, and the money so collected was subsequently deposited to the Japanese Account of the 1st Petitioner with the help of another friend of Ilham who lives in Japan. According to Ilham, he was paid a commission by the 1st Petitioner for transferring these monies to Japan

- h) According to the statement of Ilham, it is the 2nd Petitioner who contacted him, when such transactions took place and on the instructions received from the 2nd Petitioner, monies were deposited in the Japanese Account with the help of his friend who lives in Japan.

Even though the Petitioners were silent on their involvement in defrauding Sri Lanka Customs by using the above method, the second Petitioner whilst making a statement to Sri Lanka Customs during the said investigation (1R1) had admitted undervaluing vehicles exported by his company and sending the balance money to Japan through their local agent Ilham. According to 2nd Petitioner, when Ilham deposited the money in 1st Petitioner's Japan account, a picture of the deposit slip is sent to him in order to prove the transaction. Several such photographs were collected during the investigation carried out by the custom officials and those photographs were produced before this court marking them under 1R5.

In addition to the photographs referred to above, several e-mails exchanged between the prospective buyers and the 1st Petitioner Company either through the 2nd Petitioner or some other sales co-ordinators of the 1st Petitioner, giving bank details of Ilham as, **A.A.M. Ilham, Sampath Bank, Account No. 004250027791, Main street branch, Mobile No. 0777 3888717** for the purpose of depositing the balance money, were also produced under 1R5 by the Respondents before this court.

When going through the material placed on behalf of the Respondents it is clear that the above conduct of the Petitioners have resulted in a loss to Sri Lanka Customs when the importers used the *per-forma* invoices issued by the Petitioners to the undervalued price in order to open letters of credit. It is further observed that the Petitioners whilst issuing a *per-forma* invoice to an undervalued price for the importer to avoid a major part of the tax component, had collected the full value of the vehicle using another illegal method of transferring the money outside the country.

With all these illegal and defrauding activities, being carried out, the Petitioners have come before this court complaining that the Petitioners were treated differently by the 1st to 4th Respondents and thereby the Petitioners are entitled for a declaration that the Respondents have violated their fundamental right for equal protection guaranteed under Article 12 (1) of the Constitution.

The Petitioners have further prayed to quash and/or annul the decision of forfeiture by the 3rd Respondent contained in his letter dated 18.02.2014 marked P-20.

The Petitioners complaint of discrimination has taken place as against the People's Leasing Company a subsidiary of the People's Bank. The Petitioners complaint refers to 16 vehicles said to have imported by the said People's Leasing Company on *per-forma* invoices issued by the 1st Petitioner at an undervalued price. Petitioners have collected the balance amount i.e. the difference between the actual price and the undervalued price through the account of one Ilham, directly from the person who got down the vehicle through People's Leasing Company.

The material already discussed clearly shows that, the Petitioners have aided and abetted the importers of the vehicles referred to in this application to import such vehicles at an

undervalued price. If not for the Petitioners *per-forma* invoices at an undervalued price, the said importer would not be able to open the letters of credit to get down those vehicles for the price referred to in the *per-forma* invoice.

When a Petitioner allege that his Fundamental Rights has been infringed by any party, the powers of this court to grant such relief is discussed in Article 126 (4) of the Constitution, which reads as follows;

126 (4) “The Supreme Court shall have power to grant such relief or make such directions as it may deem just and equitable in the circumstances in respect of any petition or reference referred to in paragraphs (2) and (3) of this Article or refer the matter back to Court of Appeal if in its opinion there is no infringement of a fundamental right or language right.”

Is it just and equitable for this court to make an order to quash and/or annul the decision of forfeiture by the 3rd Respondent in the circumstances referred to by me in this judgment?

In the case of ***C.W. Mackie and Company V. Hugh Molagoda Commissioner General of Inland Revenue and others 1986 1 Sri LR pages 300 at 308, 309*** the Supreme Court had considered a similar situation with regard to the payment of turnover tax by the Petitioner and observed that;

“It is not disputed that the sum of Rs. 2,109,001. 43 claimed by the Petitioner does not represent any turnover tax paid in excess of the amount with which he was properly chargeable. The said sum was what was lawfully due from it as turnover tax for the period in question and was lawfully paid by the Petitioner in the discharge of its legal liability. If the Petitioner’s prayer is that the Commissioner General of Inland Revenue

should be directed by this court to make a refund of this Rs. 2,109,001. 43 paid by the Petitioner as turnover tax on rubber up to 31. 12. 1982, we have to look for justification outside the Act to make the refund. Counsel for Petitioner invoked the jurisdiction of this court under Article 126 (4) of the Constitution to make such directions as it may deem just and equitable in respect of the petition preferred under Article 126 (2) to warrant the refund set off against future taxes.

The power of this court to issue such directions stems from proof of the infringement of a fundamental right. It is only on such an infringement that this court will have the power to grant such relief or make such directions as it may deem just and equitable in the circumstances. This preliminary fact has to be established by the Petitioner to warrant the invocation of this equitable jurisdiction. In the instant case, the Petitioner pleads breach of its right to equality as the basis of its application. Article 12 (1) of the Constitution provides "all persons are equal before the law and are entitled to the equal protection of the law." The essence of the right of equality guaranteed by Article 12 (1) and the evil which the article seeks to guard against is the avoidance of designed and intentional hostile treatment or discrimination on the part of those entrusted with administering the law. In order to sustain the plea of discrimination based upon Article 12 (1) a party will have to satisfy the court about two things, namely **1.** That he has been treated differently from others, and **2.** That he has been differently treated from persons similarly circumstanced without any reasonable basis.

But the equal treatment guaranteed by Article 12 is equal treatment in the performance of a lawful act. Via Article 12, one cannot seek the execution of any illegal or invalid act. Fundamental to this postulate of equal treatment is that it should be referable to the

exercise of a valid right, founded in law in contradistinction to an illegal right which is invalid in law. I respectfully agree with what the court said in *Venkata Subbiah Setty V. Bangalore Municipality* (1)”

“Article 14 (corresponding to our Article 12) cannot be understood as requiring the authorities to act illegally in one case, because they have acted illegally in other cases.

In *Ram Prasad Vs. Union of India* (2) the latter court quoted with approval the above statement of the law in *Venkata Subbiah Setty V. Bangalore Municipality* (supra) and added-

That the guaranteed under Article 14 cannot be understood as requiring the authorities to act illegally in one case because, they have acted illegally in other cases. No one can contend that wrong must be extended to him as well in order to satisfy the provisions of Article 14.”

From the facts I have already discussed in this judgment, it is clear that the Petitioners were involved in submitting undervalued *pro-forma* invoices for the purpose of importing vehicles in to the country and abetted the importer to defraud the customs. The 2nd Petitioner in his statement to Sri Lanka Customs had admitted this position. In the said circumstances the Petitioners are not entitled to allege, the violation of Article 12-1 of the Constitution.

When the Petitioners came before this court alleging the violation of their fundamental rights guaranteed under Article 12 (1) of the Constitution, they were silent on their conduct in submitting undervalued *pro-forma* invoices and in paragraph 15 of the petition filed before this court had taken up the position that,

“The Petitioners state that thereafter the 2nd Respondent took, a statement on 16th September in which the 2nd Petitioner stated that the 1st Petitioner being the exporter had no reason to undervalue the vehicles exported as it gains no benefit what so ever.....”

However in his statement made to Sri Lanka Customs (1R1) the 2nd Petitioner had taken up the following position with regard to the undervaluing of vehicles,

“I accept that most of the vehicles we handled to ship from Japan to Sri Lanka is undervalued. I undertake to give this undervaluation figure of vehicles which I can find out.”

When considering the position the Petitioners have taken, when coming before this court and the material revealed thereafter, it appears that the Petitioners have deliberately suppressed their involvement in submitting *pro-forma* invoices to undervalued amounts. By suppressing the said fact from this court, the Petitioners have presented a completely distorted version before this court.

In this regard I am mindful of the decision in ***Alponso Appuhamy Vs. Hettiarachchi 1973 NLR 131*** where *Pathirana J* had observed as follows;

“The necessity of a full and fair disclosure of all the material facts to be placed before the court when an application for a writ or injunction is made and the process of the court is invoked is laid down in the case of *The King V. The General Commissioners for the purpose of the Income Tax Acts for the District of Kensington-Ex-parte Princess Edmond de Poignac* - (1917) Kings Bench Division 486. Although this case deals with a writ of *Prohibition* the principles enunciated are applicable to all cases of writs or

injunctions. In this case a Divisional Court without dealing with the merits of the case discharged the rule on the ground that the applicant had suppressed or misrepresented the facts material to her application. The Court of Appeal affirmed the decision of the Divisional Court that there had been a suppression of material facts by the applicant in her affidavit and therefore it was justified in refusing a writ of *Prohibition* without going into the merits of the case. In other words, so rigorous is the necessity for a full and truthful disclosure of all material facts that the court would not go into the merits of the application, but will dismiss it without further examination.”

Even though the said case referred to Writ Application filed before court, I am of the view that the said principle extends to Fundamental Rights applications as well, when the Petitioners alleged that their fundamental rights guaranteed under the Constitution had been violated by the conduct of the Respondents. A Petitioner who comes before the Supreme Court alleging the violation of his fundamental right is bound to a fair disclosure of all material facts.

In the said circumstance I further observe that the Petitioners have suppressed material facts from this court, when they allege violation of Article 12 (1) of the Constitution.

The Petitioners have further alleged the violation of Articles 13 (1) and 13 (4) of the Constitution but I see no merit in the said allegations, since the Respondents before this court are bound to act under the provisions of the Customs Ordinance and the other relevant legal provisions in order to implement the lawful findings reached by an inquiry proceeded under the provisions of the Customs Ordinance.

In the said circumstances I hold that the Petitioners have failed to establish, that their fundamental rights guaranteed under Articles 12 (1), 13 (1) and 13 (4) of the Constitution have

been infringed by the Respondents. I therefore dismiss this application with costs fixed at Rs. 1,000,000/-.

Judge of the Supreme Court

Justice Buwaneka P. Aluwihare PC

I agree,

Judge of the Supreme Court

Justice Prasanna Jayawardena PC

I agree,

Judge of the Supreme Court