

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter an Application for Special Leave to Appeal under Article 128 of the Constitution of 1978 against a Judgment of the Court of Appeal dated 02.07.2003 in C.A. (Writ) Application No. 1169/2001.

S.C. Appeal No. 19/2004

S.C. (Spl.) L.A. No. 178/2003

C.A. Application No. 1169/2001 (Writ)

Customs Case No. POM 1050/2000

1. Car Plan Ltd.,
No. 297, Union Place,
Colombo 2.
2. Mahendra Tambiah,
Managing Director,
Car Plan Ltd., No. 297, Union Place, Colombo 2.
3. Rodney Mason,
Director, Car Plan Ltd., No. 297,
Union Place, Colombo 2.

Petitioners-Petitioners

Vs.

1. K.L.G.T. Perera,
Deputy Director of Customs,
Customs House, Bristol Street,
Colombo 1.

2. W.D.L. Perera,
Director General of Customs,
Customs House,
Bristol Street, Colombo 1.
3. The Attorney General,
Attorney General's Department, Hulftsdorp,
Colombo 12.

Respondents-Respondents

BEFORE : **TILAKAWARDANE.J**
RATNAYAKE.J &
EKANAYAKE.J

COUNSEL : Shibly Aziz, P.C., with Nigel Hatch, P.C., and Aneeta
Perera instructed by Julius & Creasy for the Petitioner-Petitioner.
Deputy Solicitor General U Y Wijetilleke with Rajitha Perera, S.C.,
for the Respondent-Respondents

ARGUED ON : 06.09.2010

DECIDED ON : 10.11.2010

TILAKAWARDANE.J

Special Leave to Appeal was granted on 26.02.2004 on the questions of law set out in paragraph 28 (a) to (g) of the Petition dated 08.08.2003. The matter was argued and the arguments were concluded. The Judgment was reserved on 21.02.2005 by the Hon. Chief Justice. However, the Judgment could not be delivered due to the retirement of Honorable Chief Justice. This matter was re-listed to be heard 06.09.2010.

At this hearing all parties to the Application agreed that the only issue to be determined by this Court was whether the 1st Petitioner Company had made a false declaration to the Sri Lanka Customs by failing to declare and include the conversion cost of US \$ 1500 on every vehicle imported in this consignment. It was not disputed that if such false declaration had been made this would attract a forfeiture of the vehicles in terms of Sections 52 and 119 of the Customs Ordinance as amended.

The broad facts pertaining to this case are also not disputed. The Petitioner Company being an incorporated company involved *inter alia* in the business of importation and sale of motor vehicles was appointed as the sole distributor and/or the agent of KIA Motor Company of Korea in 1996. Several consignees referred to in paragraph 7 of the aforesaid Petition dated 08.08.2003, placed an order for the importation of 15 Nos. KIA Grand Sportage 1998 cc RFTCI Inter Cooler Turbo Diesel Right Hand Drive Model K08Z- B52 Jeeps. It is not contested that the aforesaid KIA Jeeps of the aforesaid model was only manufactured in the Left Hand Drive model and CIF price of the Left Hand Drive model was admittedly US \$10,920.

In paragraph 6 of the Petition dated 08.08.2003 the Petitioner admits that the importation on behalf of all the consignees were for Right Hand Drive Jeeps of the said model, and that the specific requirement under the law for driving in Sri Lanka required that the jeeps were in the Right Hand Drive model, and a conversion of the Left Hand Drive necessarily had to take place.

In terms of the contents of the document P5, KIA Motor Corporation of Kuala Lumpur sent a letter dated 09.03.2000 under the authority of its General Manager H.T. Lee to all distributors in the Asia and Pacific Region introducing them to a sub contractor Korea Co. Limited which had successfully converted the Sportage Diesel Left Hand Drive model to the Right Hand Drive model of the Jeep. In this letter the ordering procedure was set out. The Left Hand Drive model had to be ordered from the KIA Motors Corporation and then the jeep would be delivered to the factory of Korea Co Limited where the conversion work would be undertaken, but the shipment would be done by the KIA Motor Corporation.

The total responsibility of the conversion was solely upon the Korea Company Ltd. So that, they would bear full liability and accountability of all local technical problems due to the

conversion and be responsible only under the warranty of the said Korea Company Ltd. The KIA Corporation of Kuala Lumpur would bear no liability with regard to problems that rose on the conversion. It is clear that the author of this letter himself had come up with this suggestion.

This letter also referred to the fact that the KIA Motor Corporation would receive the payment for the Left Hand Drive model and conversion cost of US \$ 1500 should be sent to the account of the Korea Company Ltd. directly and the details to facilitate a bank transfer were also supplied in the said letter.

The importance of the distinction with regard to the mode of payment was clarified further by letter dated 29th March 2000 which was produced at the customs inquiry marked P20 and in this case as P17X1. The obvious, unambiguous conclusion was that though there were two modes of payment the CIF value of the fully fitted vehicle arriving in Sri Lanka was the sum value of the two amounts totaling to US \$ 12,420.

At the customs inquiry much evidence was led with regard to the fact that these vehicles had been bought from permit holders who were permitted to obtain concessions due permit for the importation of the motor vehicles by virtue of the Treasury Circular No.866 dated 22.02.1999 as amended by treasury circular No: 866(1) dated 23.06.1999. As this is not directly relevant to the question of the CIS value of the KIA Grand Sportage Jeeps that had been admittedly imported, this Court would not deal with that evidence which was referred to in the inquiry notes and P8A to P8I or the documents annexed to the Petition, other than the evidence relating to the importation of the said 15 jeeps and its CIF value.

The salient part of the evidence with regard to the fact that is in issue in this case, is the evidence that deals with the CIF value of each of the vehicles that were imported. All the witnesses', whose permits had been used, gave explicit evidence that in terms of said KIA great Sportage jeeps the value given to them was US \$ 12,490. Categorically at page 175 of the inquiry notes it was specifically clarified that this was the precise price of the Right Hand Drive model of the said vehicle which was being imported.

The evidence in this case reflects that the Petitioner had issued two pro forma invoices for each vehicle. Undoubtedly when one peruses document P5 sent by the KIA Motor Corporation, Kuala Lumpur the reason for this is *ex facie* evident. It stated that the payment for the conversion for the Left Hand Drive model to the Right Hand Drive model was to be directly sent to the Korea Company Ltd., and was in a sum of Rs. US \$ 1500. Therefore two pro forma invoices for each vehicle were for the value of US \$ 10920 and US \$ 1500, and had been remitted, the former against letters of credit and the latter by a telegraphic transfer. Both had been sent through the same Bank, except for the vehicle imported by Dr. Janapriya.

Significantly, by document P17 the fact of two modes of payments and the need of conversion of Left Hand Drive to Right Hand Drive have been set out by the Managing Director of the Petitioner Company by document which was marked as P17X1 annexed to the Petition.

The important document in this context is document P17X3 dated 19.05.2000. In this letter, whilst including the Right Hand Drive component, the total CIF Right Hand Drive value has been set out as US \$ 12,420 and the annotation at the bottom of this document is relevant and noteworthy. In that document, the author of the letter, Mr. Mahin Thambiah who was the Managing Director of the Petitioner Company has said "Please sole (this probably should read as Seoul) office that when negotiating final document it must be at US \$ 10,920 otherwise we will have problems with the Sri Lanka Customs". The document thereby disclosed by its contents, the complicity and intention of the Petitioner Company to undervalue the vehicles, even at the inception of this transaction.

Another factor that is also evident from the evidence, that the position of the Appellant had been recorded at the inquiry was that there was a considerable delay in the delivery of these vehicles and those importers had to face losses due to the expiration of their permits and the letters of credit. The fact of the delay is evident in the inquiry notes and document annexed to the Petition P5B. The position of the Appellant was that It was only in this context that subsequently the KIA Motor Corporation had agreed to waive off the conversion cost of US \$ 1500 for certain vehicles including some of the 15 vehicles in question. No evidence whatsoever was led

or documents produced that this waiver was ever actually given to the consignee, on these vehicles that had been imported.

It is relevant to note what was imported was not a Left Hand Drive diesel jeep, but KIA Sportage Right Hand Drive diesel jeep. Clearly the total cost of the vehicle included the conversion to the Right Hand Drive, as this was the specification of the vehicle that had been imported into the country. The fact that conversion cost was waived off, even if proof was available that they did so, would not be relevant with regard to the declared CIF value. Value at the time was relevant, as time was of essence, and at the time the value was US\$ 12,420. This was specially relevant as any waiver that may have been granted was not as a matter relating to the value of a jeep, but as a mitigation for the delay in the delivery of the vehicle, which had allegedly caused loss to the person who had originally ordered the vehicles, and who had complained about the delay. The fact that there had been some negotiations to return this money or a waiver of US \$ 1500 by the Korean Company was merely adverted to, but there was no evidence whatsoever led at the inquiry to prove that those amounts had been deducted and remitted back. It was a mere assertion by the Appellant, which was never proved by way of evidence or through documents. In fact Dr. Janapriya said that he never received any refund of US \$ 1500. Dr. Janapriya in his evidence too corroborated the position of the Attorney General. In this context, Dr. Janapriya gave evidence at the inquiry and through a letter dated 03.10.2000 said that he had paid the full CIF price of the vehicle, as demanded by the Petitioner Company of US \$ 12,420 and he did not get any refund of any part of the money.

In this context, it is relevant to refer to the case of Culasubadhra vs. University of Colombo and others in 1985 1 SLR 244 at 257 Seneviratne.J stated thus:-

“It is not the function of this Court to determine whether the finding is justified or not. A finding of fact by a Tribunal such as this can be set aside by way of a writ only if it is found that there was no evidence at all to base such a finding or if the Tribunal has not properly directed itself in evaluating the evidence and drawing necessary inferences and could not have come to that conclusion if it properly directed itself”.

On the evidence that was led at the inquiry and the evidence that had been placed before this Court that CIA value of that jeep was US \$ 12920 and therefore, this Court finds that the Petitioner has made an incorrect and false statement with regard to the CIF value of the Right Hand Drive KIA Sportage jeep. Accordingly, the vehicles are liable to forfeited in terms of Sections 52 read with 119 of the Customs Ordinance, as amended.

This would, however, not preclude the 2nd Respondent from acting in terms of Section 163 to mitigate the forfeiture or penalty where it may be considered to be unduly severe.

In any event, the Writ of Mandamus directing the 2nd and/or 3rd Respondents to release the vehicles to the Petitioner cannot be done. The Director General had no power to release the vehicles under section 163 of the Customs Ordinance, as amended which only permits mitigation of forfeiture. The power to Order the restoration of seized goods has been given to the Minister to be exercised in terms of section 164 and 165 of the Customs Ordinance (Vide *Bangamuwa Vs S.M.J Senaratne. Director General of Customs and another.* SLR 2000 Vol. 1 page 106).

Under all the facts aforesaid this Court sees no reason to interfere with the Judgment of the Court of Appeal dated 02.07.2003. The said Judgment is affirmed. The Appeal is dismissed. No costs.

JUDGE OF THE SUPREME COURT

RATNAYAKE.J

I agree.

JUDGE OF THE SUPREME COURT

EKANAYAKE.J

I agree.

JUDGE OF THE SUPREME COURT