

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

In the matter of an appeal under and in terms of
Article 128 of the Constitution of the Democratic
Socialist Republic of Sri Lanka

SC Appeal No: 119/2024

SC/Spl LA No: 32/2020

Court of Appeal No. 810/99 (F)

DC Colombo No: 3371/SPL

Angelo Sebastian Pereira,
P.O. Box 4306, Dubai,
United Arab Emirates.

PLAINTIFF

Vs.

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

DEFENDANT

And between

Angelo Sebastian Pereira,
P.O. Box 4306, Dubai,
United Arab Emirates.

PLAINTIFF – APPELLANT

Vs.

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

DEFENDANT – RESPONDENT

And now between

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

DEFENDANT – RESPONDENT – APPELLANT

Vs.

Angelo Sebastian Pereira,
P.O. Box 4306, Dubai, United Arab Emirates.

PLAINTIFF – APPELLANT – RESPONDENT

Imma Pereira Sharron,
St Xavier's College, St Andrews,
Thiruvananthapuram, Kerala 695586.

SUBSTITUTED PLAINTIFF – APPELLANT – RESPONDENT

Before: P. Padman Surasena, CJ
Mahinda Samayawardhena, J
Arjuna Obeyesekere, J

Counsel: Hashini Opatha, Senior State Counsel for the Defendant – Respondent – Appellant

A.A.M. Illiyas, PC with Tharindu Ratnayake and S. M. Thanseem for the Substituted Plaintiff – Appellant – Respondent

Argued on: 5th November 2024

Written Submissions: Tendered on behalf of the Defendant – Respondent – Appellant on 8th January 2025

Tendered on behalf of the Substituted Plaintiff – Appellant – Respondent on 10th February 2025 and 7th May 2025

Decided on: 18th September 2026

Obeyesekere, J

- (1) There are two issues that arise for determination in this appeal. The first is whether the Plaintiff – Appellant – Respondent [the Plaintiff] who ‘arrived’ in Sri Lanka on 15th July 1991 as a transit passenger and who had in his possession 50 slabs of gold, weighing 5850 grams, had **imported** the said gold to Sri Lanka contrary to the provisions of the Exchange Control Act, No. 24 of 1953, as amended, the Import and Export Control Act, No. 1 of 1969, as amended and the Customs Ordinance, as amended and if so, whether the forfeiture of the said gold is in accordance with the provisions of the Customs Ordinance. The second issue is whether the Plaintiff was the owner of the said gold, since it is only an owner of goods which have been forfeited under the Customs Ordinance that can maintain an action for the recovery of such goods.

Facts in brief

- (2) The Plaintiff is an Indian national who was 37 years of age at the time of the impugned incident. He claimed that he had been living in Dubai for over 20 years and had been engaged in the import and export business, including the importation of tea from Sri Lanka. He stated that due to the conflict that arose in the Middle East in early 1991, he had decided to sell his assets in Dubai and relocate to his home country of India. The Plaintiff claimed further that having sold his assets, he had made arrangements for a third party to purchase 50 slabs of gold, each weighing 116.5 grams and an aggregate weight of 5850 grams. He had thereafter purchased an air ticket from Dubai to Madras via the Colombo International Airport, Katunayake [Katunayake], which required him to spend almost 15 hours in transit in Sri Lanka, prior to taking his connecting flight to Madras.
- (3) The Plaintiff admits that he boarded an Air Lanka Flight on 15th July 1991 from Dubai carrying the aforementioned gold in a commercial quantity equivalent to over 700 gold sovereigns. Although scheduled to arrive in Katunayake at 0600 hours on the same day, it is admitted that the flight was delayed and landed in Katunayake close to 1030 hours. All passengers on board the said flight were required to disembark

from the airplane and passengers on transit were required to visit the Transit Lounge situated within the Airport premises. It is an admitted fact that transit passengers are not required to (a) obtain immigration clearance, (b) declare the goods they are carrying, or (c) pay import duty on the said goods.

- (4) The Plaintiff, who was carrying a black brief case with him, was stopped at the entrance to the Transit Lounge by an Assistant Superintendent of Customs who had directed the Plaintiff to accompany him to the Office of Sri Lanka Customs situated within the Airport. At the office, the Plaintiff had been asked whether he was carrying any gold, to which the Plaintiff had answered in the affirmative. The Customs Officer had thereafter directed the Plaintiff to open the brief case and had found that the space inside the bag had been separated by a *formica* sheet fixed horizontally across the bag with a leather covering on top, thus creating a false bottom. The gold that the Plaintiff was carrying had been concealed between this *formica* sheet and the actual bottom of the brief case.
- (5) The Customs Officer had informed the Plaintiff that in terms of the Exchange Control Act, the importation of gold to Sri Lanka required a permit from the Central Bank and since the Plaintiff did not possess a permit, he has violated the provisions of the Exchange Control Act and thereby attracted the provisions of the Customs Ordinance. A statement of the Plaintiff had thereafter been recorded by the Officer-in-Charge of the Customs Office, Katunayake. Although the Plaintiff later claimed that he was the owner of the gold, in his statement recorded by the said Officer-in-Charge, the Plaintiff had stated that he was carrying the gold for a third party in exchange for a fee. Pursuant to the statement of the Plaintiff being recorded, the gold had been declared forfeited and three times the value of the gold had been imposed as a fine. The Plaintiff had thereafter made an appeal to the Director General of Customs and the said fine had been mitigated to a sum of Rs. 100,000. The Plaintiff admits that he paid the said fine on 7th August 1991.

Sections 154 and 155 of the Customs Ordinance

- (6) In terms of Section 154 of the Customs Ordinance:

“All ships, boats, goods and other things which shall have been or shall hereinafter be seized as forfeited under this Ordinance, shall be deemed and taken to be condemned, and may be dealt with in the manner directed by law, ...unless the person from whom such ships, boats, goods and other things 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 ...that he intends to enter a claim to the ship, boat, goods, or other things seized as aforesaid and further give cash security to prosecute such claim before the court having jurisdiction to entertain the same and otherwise to satisfy the judgement...If proceedings for the recovery of the ship, boat, goods or other things so claimed be not instituted in the proper Court within thirty days from the date of notice and security as aforesaid... the ship, boat, goods or other things seized shall be deemed to be forfeited and shall be dealt with accordingly by the Collector or other proper officer of customs.”

- (7) It is admitted by the parties that the requisite notice under Section 154 was tendered, the Director General of Customs nominated security and action was instituted in the District Court within the stipulated time period.

- (8) Section 155 of the Customs Ordinance provides that:

“No claim to anything seized under this Ordinance shall be admitted by such court, unless such claim be entered in the name of the owner, with his residence and occupation, nor unless oath to the property in such thing be made by the owner, or by his attorney or agent, by whom such claim shall be entered, to the best of his knowledge and belief, nor unless the claimant shall at the time of filing his libel or plaint to establish his claim satisfy the court that he has given notice and security as in section 154 enacted.”

- (9) Since Section 155 requires that a claim to anything seized under the Customs Ordinance shall be entered in the name of the owner, for the first time and in order to maintain a claim, the notice served in terms of Section 154 claimed that the gold belonged to the Plaintiff.

Action in the District Court of Colombo

- (10) Action was instituted in the District Court of Colombo on 13th September 1991, with the Plaintiff claiming the following relief:
- (a) A declaration that the forfeiture of the 50 slabs of gold is wrongful, unlawful and contrary to law;
 - (b) A declaration that the Plaintiff is the owner of the said gold;
 - (c) An order for the delivery of the said gold to the Plaintiff;
 - (d) An order that the sum of Rs. 100,000 be returned to the Plaintiff;
 - (e) Damages in a sum of Rs. 2 million.
- (11) The gravamen of the Plaintiff's case was that he was only a transit passenger, that he had not 'arrived' in Sri Lanka and thus he has not imported the said gold to Sri Lanka, and accordingly, the declaration of forfeiture of the gold was unlawful.
- (12) The Defendant – Respondent – Appellant [the Defendant], being the Hon. Attorney General, filed answer on 30th March 1992. Whilst denying the position of the Plaintiff including the fact that the Plaintiff was the owner of the gold, the Defendant stated that the Plaintiff had imported the said gold to Sri Lanka in violation of the provisions of the Exchange Control Act, the Import and Export Control Act and the Customs Ordinance, and that the declaration of forfeiture of the said gold by Sri Lanka Customs is in terms of the law.

Principle issues of the parties

- (13) Admissions and issues were agreed upon on 15th September 1992.
- (14) Of the issues raised by the Plaintiff, the issue that is relevant to this appeal is Issue No. 13, which reads as follows:

*“Has the Plaintiff by having in his possession 50 slabs of gold, imported or **brought** into the country the said gold within the meaning of Section 21(1) of the Exchange Control Act and Sections 12, 43, 107 and 125 of the Customs Ordinance? ”*

(15) The following issues raised by the Defendant are relevant to this appeal:

[A] Issue No. 10(b): *“Did the Plaintiff by bringing into the Country the said gold contravene Sections 12, 43, 107A(1) and 125 of the Customs Ordinance and Sections 21(1) and 21(2) of the Exchange Control Act?”*

[B] Issue No. 11: *“If the answer to the above issue is answered in the affirmative, is the forfeiture of 50 slabs of gold in terms of the Exchange Control Act read with the provisions of the Customs Ordinance lawful?”*

[C] Issue No. 16: *“Is the Plaintiff the owner of the gold?”*

(16) The District Court was therefore called upon to determine if the Plaintiff was the owner of the gold and whether he had imported the said gold to Sri Lanka.

Evidence of the Plaintiff

(17) Having rejected an application by the Defendant to determine certain issues as issues of law, the trial before the District Court commenced with the Plaintiff giving evidence on his behalf. The Plaintiff reiterated the factual matters that I have already referred to and took up the position that (a) the gold belonged to him, (b) he was only in transit at Katunayake, (c) he was carrying the gold to Madras, and (d) the gold was not meant to be brought inside Sri Lanka.

(18) The Plaintiff was cross examined extensively with regard to the ownership of the gold. I have considered the evidence of the Plaintiff relating to ownership in paragraphs 29-34 of this judgment since ownership of the gold is one of the two principle issues to be determined in this appeal.

(19) The following matters transpired during the cross examination of the Plaintiff:

(a) The Plaintiff had visited Sri Lanka on four previous occasions;

(b) The Plaintiff was aware that transit passengers whose onward connection was more than six hours from the time of arrival at Katunayake was provided with accommodation in a nearby hotel situated outside the airport;

- (c) The Plaintiff had in fact availed himself of such facility on his previous visits;
- (d) The gold was concealed in a false bottom of the briefcase since the Plaintiff was concerned for the safety of the gold;
- (e) The Plaintiff had no intention of declaring the gold to Sri Lanka Customs since he was only in transit;
- (f) The Plaintiff was taking the gold to India to be sold in India. The Plaintiff stated that he had already been introduced to a person by the name of Balasubramanium who had agreed to meet him inside the airport once he arrived in India and purchase the gold from him. While the Plaintiff did not disclose any further details with regard to the transaction with Balasubramanium such as the price that had been agreed, the Plaintiff admitted that he had not met Balasubramanium previously;
- (g) The Plaintiff admitted that:
 - (i) A permit issued by the Reserve Bank of India was required to carry gold to India;
 - (ii) He did not possess such a permit;
 - (iii) Balasubramanium is said to have arranged a permit and had informed him over the telephone that he has a permit;
 - (iv) He did not ask that a copy of the said permit be faxed to him in advance;
 - (v) He has not seen a copy of a permit;
 - (vi) He does not know if a permit had in fact been arranged by Balasubramanium and he has no proof whether a permit had been arranged;
- (h) The Plaintiff stated further that Balasubramanium will not be called as a witness. With what Balasubramanium is said to have told the Plaintiff being hearsay, at its best, the importation of gold to India by the Plaintiff was a violation of the laws of India;

- (i) The Plaintiff stated further that even though he embarked on the journey from Dubai without having proof that a permit was available, since he was a non-resident Indian, he could carry gold without a permit. The latter statement later turned out to be false, when the Defendant produced a letter issued by the Directorate of Revenue Intelligence, India, which I have reproduced at paragraph 22.
- (20) It was suggested to the Plaintiff that since his connecting flight was only at 2100 hrs that evening, he was to be provided with hotel accommodation outside the airport by Air Lanka, and that the intention of the Plaintiff was to carry the gold into the Country by-passing Customs. In other words, the position of the Defendant was that the gold was meant for Sri Lanka and that the claim of the Plaintiff that he was only in transit was an attempt to circumvent the legal provisions applicable to the importation of gold into Sri Lanka.
- (21) I must perhaps state that the suggestion that the gold was meant for Sri Lanka and not India, as claimed by the Plaintiff, has merit for the reason that a reasonable person carrying such a large quantity of gold and that too being his entire life's savings, would be concerned for the safety of the gold and hence, would normally take a direct flight to India, as opposed to going via Sri Lanka and spending over 15 hours in transit.
- (22) The said suggestion becomes even more significant when considered in the context of the following letter dated 13th May 1994 [D2] issued by the Directorate of Revenue Intelligence, New Delhi, India:

*"At the relevant time i.e. 15th July 1991, **the import of gold bullion into India was prohibited** except with the special or general permission of the Reserve Bank of India. The prohibition was for any quantity of gold bullion. Only the Reserve Bank of India was authorised to issue any general or special permission in this regard.*

It may be worthwhile to mention that Mr. Pereira could have been charged for smuggling of gold if he had landed at Madras with 50 gold biscuits concealed in a false bottom of his luggage. He would have been arrested and prosecuted in a Court of Law under Customs Act, 1962. The contraband gold would have been

confiscated and penalty imposed on him in Departmental Adjudication proceedings under the Customs Act, 1962. The maximum punishment in a Court of Law is seven years imprisonment and fine whereas in Departmental proceedings the maximum penalty imposable is five times of the value of the goods confiscated."

- (23) Thus, unlike in Sri Lanka where the gold was only seized as forfeited and a penalty imposed, had the Plaintiff taken the gold to India, he would have faced upto seven years of imprisonment. That is not a risk that a reasonable man who was aware of the legal position in India would take. To my mind, the above letter, together with the other factual circumstances that I have already referred to, demonstrates that the gold was not meant for India but for Sri Lanka.
- (24) The District Court rejected the evidence of the Plaintiff on the basis that it was weak. I am in agreement with the said finding since to my mind too, the answers given by the Plaintiff during cross examination demonstrate that the Plaintiff was not a credible witness. I say so for the following reasons:
- (a) The Plaintiff claimed he had worked 20 years in Dubai but did not provide any proof of employment nor proof of income;
 - (b) The Plaintiff claimed that he purchased over 700 gold sovereigns at a cost of Riyals 240,000 but did not provide any proof of how he paid for such a vast quantity of gold except producing a receipt in Arabic, which receipt was not produced at the time he was questioned by Sri Lanka Customs nor referred to in the list of documents filed by the Plaintiff, nor produced during his evidence-in-chief but was produced for the first time during cross examination;
 - (c) The Plaintiff claimed that he used his entire life savings and purchased gold to be sold to a person who he had never met previously;
 - (d) The Plaintiff did not disclose any details with regard to the alleged transaction with Balasubramanium;
 - (e) The Plaintiff stated that he knew that a permit was required to carry gold to India but did not ask the person to whom the gold was to be sold to fax him a

copy of the permit, thus risking the confiscation of the gold, and thereby his entire life savings, and the imposition of a term of imprisonment.

- (25) The Defendant led the evidence of (a) the Assistant Superintendent of Customs who had met the Plaintiff at the entrance to the Transit Lounge and found the gold concealed in the false bottom of the brief case carried by the Plaintiff, and (b) the Officer-in-Charge of the Customs Office at Katunayake who recorded the statement of the Plaintiff. Their evidence was straightforward in view of the admission by the Plaintiff that (i) he brought the gold with him from Dubai, (ii) he was in possession of the said gold, and (iii) he had not obtained a permit from the Central Bank to import the gold to Sri Lanka.

Judgment of the District Court and the Court of Appeal

- (26) By its judgment pronounced on 10th September 1999, the District Court held that while sufficient evidence had not been led with regard to ownership of the gold, when the evidence is carefully analysed, *“it is very clear that the Plaintiff has brought gold into Sri Lanka without a valid permit by contravening the provisions of the Exchange Control Act.”* The District Court accordingly dismissed the action with costs.
- (27) Aggrieved by the judgment of the District Court, the Plaintiff invoked the appellate jurisdiction of the Court of Appeal. By its judgment dated 20th December 2019, the Court of Appeal held with the Plaintiff on the question of ownership and that the possession of the gold by the Plaintiff does not amount to importation. In arriving at the latter conclusion, the Court of Appeal refused to follow the judgment of the Court of Appeal in **Attorney General v Kumarasinghe** [(1995) 2 Sri LR 1] where the facts were identical and where the Court of Appeal had held that gold in the possession of a transit passenger amounts to importation, by distinguishing the said findings on the basis that Kumarasinghe was a Sri Lankan passport holder as opposed to the Plaintiff who was an Indian national holding an Indian passport. The Court of Appeal accordingly allowed the appeal and granted the Plaintiff the relief claimed except the claim for damages.

Questions of Law

(28) The Defendant thereafter sought and obtained special leave to appeal of this Court on 5th November 2024 on the following three questions of law:

- [I] Did the Court of Appeal err in law by holding that the Plaintiff was the owner of the gold forfeited by Sri Lanka Customs?
- [II] Did the Court of Appeal err in law by failing to decide that the Plaintiff had imported gold into Sri Lanka in terms of Section 21 of the Exchange Control Act?
- [III] Is the judgment of the Court of Appeal contrary to the provisions of the Exchange Control Act and the Customs Ordinance?

Is the Plaintiff the owner of the gold

(29) At the inquiry that followed the detection, the Plaintiff made a statement [D1] which was recorded by the Officer-in-Charge of the Customs Office at Katunayake. In that statement, the Plaintiff had stated as follows:

“I am a tea exporter from Sri Lanka to Dubai, most of my export orders used to buy from M/s Austra Lanka Exporters and Modern Tea Packers Private Limited situated at No. 875, Bloemendhal Road, Colombo 15. The purpose carrying gold from Dubai via Sri Lanka to Madras. This bag containing gold was given by one Mr. Mohammed in Dubai to be given to a person who will come and identify me in Madras Airport and I was supposed to give this bag to him. ... The benefit I am having after carrying this bag containing gold to Madras the owner Mr. Mohammed arranged to pay me Rs. 50,000 Indian currency outside the Madras Airport.”

(30) It is in the light of the above statement that the Defendant raised an issue with regard to the ownership of the gold, since ownership of the gold went to the root of the claim before the District Court.

(31) I must at the outset refer to the judgment of this Court in Attorney General v Sathasivam [69 NLR 110]. In that case, the plaintiff claimed that he is the owner of 1012 wrist watches taken from the possession of one Andiapillai and claimed that the watches be returned to him. In the action that followed under Section 154 of the Customs Ordinance, the principal issue was whether the plaintiff is the owner of these wrist watches and on whom lay the burden of proof with regard to ownership. With regard to the burden of proof, the Court stated as follows:

“As I have said earlier in this judgment, section 44 of the Customs Ordinance read with the Table of Prohibitions and Restrictions Outwards declares goods which are attempted to be exported contrary to that section to be forfeit to the Crown. But when the question arises upon proceedings instituted pursuant to section 154 of the Ordinance, it does not call for an answer until such time as the plaintiff shall have established his ownership of the goods concerned. This the plaintiff failed altogether in doing, and his action should have been dismissed.”

(32) I have already stated that even though the Plaintiff claimed in his evidence-in-chief that he purchased the gold in Dubai, he did not disclose any further details in this regard. The following questions were asked from the Plaintiff during cross examination with regard to the manner in which he received the gold in Dubai:

Q – After this gold was seized from you, the Customs had an inquiry?

A- Yes

Q – At that inquiry you made a statement and they recorded your statement. And you have signed that statement?

A – Yes

Q – In that Customs Inquiry did you say that this bag containing gold was given by one Mr. Mohammed in Dubai?

A – **I said the gold was given to me by Mr. Mohammed in Dubai.** I did not say about the bag.

Q – You did not speak about the bag in the statement?

A – I cannot remember what I said

Q – This is what you have said in your statement – *“This bag containing gold was given by one Mr. Mohammed in Dubai.”* Do you agree that you said that the gold was given by Mr. Mohammed?

A – **I may have said**, I cannot recall

Q – It is further stated – *“Please give it to the person who will come and identify you in the Madras Airport and please give this bag to him.”*

A – **I have said that**

Q – After that did you say that *‘I have previously travelled to Sri Lanka about four times on export business’*?

A – Yes

Q – The benefit to you for carrying this gold to Madras is the owner Mr. Mohammed has arranged to pay me Rs. 50,000 Indian currency outside the Madras Airport?

A – **Whatever is stated there**

[The statement is marked as ‘D1’. The Plaintiff reads the statement]

Q – At the end you have stated that this ticket that you were using was given by Mr. Mohammed?

A – **Yes**

Q – Who is this Mr. Mohammed?

A – **The Customs Officer told me to say that it was not my gold.**

Q – What you say is there is no such Mr. Mohammed?

A – No

Q – The whole statement you fabricated?

A – Not the whole statement. That somebody has given me gold. I am taking it for him.

Q – Your taking gold for somebody is what you fabricated?

A – Yes

Q – Did you consider that it was incorrect for you to make a false statement?

A – **The Customs Officer told me, that is the reason I said so.**

Q – The Customs Officer told you, therefore you made a false statement?

A – Yes

Q – Are you telling us that the only reason for you to make a false statement was because somebody told you to do so?

A – **Yes. I have to pay Rs. 9.5m if I say it is my gold** and I had no way to get so much of money to get out.

Q – You have stated that Mr. Mohammed promised to give you Rs. 50,000 in Indian currency once you took this gold to Madras?

A - Yes

Q - Is that correct?

A - **I have stated**

(33) Thus, the Plaintiff admitted that he made the statement that the gold was given to him by Mohammed but stated that he said so, at the behest of the Customs Officer who recorded his statement who had told him that if he says it is his gold, a fine of three times the value of the gold will be imposed but if he says that he was only carrying it for someone else he could get away with a fine. Thus, the position of the Plaintiff was that although he was the owner of the gold, he did not say so in order to enable the Customs Officer to refrain from imposing a fine of three times the value of the gold.

(34) It is in the light of the above evidence that the District Court held that “*not enough evidence (had been) revealed*” to establish that the Plaintiff was the owner of the gold [ප්‍රමාණවත් සාක්ෂි ඉදිරිපත් වී නැත].

(35) In its judgment, the Court of Appeal conceded the following:

(a) The Plaintiff admitted not only to making the statement, but also that “*the bag containing the gold was given by one Mohammed in Dubai*”;

(b) “*There is no other assertion in the statement that he was the owner of the goods*”;

(c) “*One can even go to the extent of saying there was an omission to assert ownership in the prior statement made on 15th July 1991*”.

(36) The Court of Appeal however took the view that the Plaintiff has proved that he is the owner of the gold. The basis for this conclusion was threefold.

- (37) The first was that *“less than a month later, on 10th August 1991, in both his Section 154 notice to the Director General of Customs and Section 461 notice to the Attorney General, the Plaintiff had categorically asserted ownership to the forfeited goods in addition to averring the same in his plaint. He again articulated his claim to ownership in his evidence-in-chief.”*
- (38) Quite apart from the fact that they were mere assertions which had not been supported by evidence, I have already stated that in terms of Section 155 of the Customs Ordinance, a claim to any goods seized under the Customs Ordinance shall be entered in the name of the owner. In other words, it is only an owner of the goods who shall have the *locus standi* to maintain an action to claim the goods that have been forfeited. The learned Senior State Counsel submitted that having admitted in his statement to Sri Lanka Customs that he was only a courier working for a fee, the Plaintiff could not have maintained an action for the gold, unless he changed his position and claimed ownership. This change in position is accordingly reflected in the notice served in terms of Section 154, the notice served in terms of Section 461 of the Civil Procedure Code and the plaint.
- (39) Having carefully considered the totality of the circumstances that I have referred to, I am in agreement with the submission of the learned Senior State Counsel that the assertion of the Plaintiff that he is the owner of the gold was an afterthought and a complete fabrication, and that the Court of Appeal erred when it acted upon the uncorroborated and belated assertion of the Plaintiff.
- (40) The second and perhaps the main ground that influenced the Court of Appeal to conclude that the Plaintiff has established that he was the owner of the gold was that the Defendant failed to lead the evidence of the Customs Officer who recorded the statement of the Plaintiff in order to rebut the claim of the Plaintiff that he fabricated his statement at the behest of the said Customs Officer.
- (41) Having conceded that there is an inconsistency between the statement made to the Customs Officer soon after the detection and what was stated in the aforementioned notices and thereafter in Court, the Court of Appeal proceeded to consider if the explanation for the inconsistency has been explained by the Plaintiff

and if so, whether such explanation was satisfactory. Having done so, the Court of Appeal stated as follows:

“In the course of the cross examination itself the Plaintiff proceeded to explain as to why he did not claim ownership of the gold in his statement marked D1. ... The Plaintiff laid the blame for inconsistency fairly and squarely on the customs officers. Though a suggestion was made that he fabricated the statement, he attributed it to the Interrogating Officer. ...

*Thus there was evidence of inducement and pressure that was proffered by the plaintiff. In my view these are items of evidence that are emphatic explanations but they **were not contradicted at all by the defendant** in rebuttal. **The only witness** who gave evidence for the defendant Mr. Anura Gunatilaka was not called upon to address the explanation. This witness for the defendant was emphatic that he was nowhere there when the statement of the plaintiff was recorded. If Mr. Anura Gunatilake was not competent to rebut allegations of undue pressure **the recorder of the statement could have been summoned to give evidence** in order to impeach the explanation offered by the plaintiff as to why he did not claim ownership of the gold in his statement. **Therefore it is quite clear that the statement marked as D1 does not establish that what was recorded in the statement as to ownership of the gold represents the correct position.** The assertion that because of the pressure exerted the plaintiff did not utter the truth as to his ownership has to be accepted because there was a duty to speak on the part of the defendants witnesses in view of this allegation but they chose to remain silent. When there is a duty to speak silence must be interpreted to mean an admission.”*

- (42) The learned Senior State Counsel submitted that the evidence of the Customs Officer who recorded the statement of the Plaintiff was in fact led and that he was cross examined at length by the Plaintiff’s Counsel. She therefore submitted that the Court of Appeal clearly erred when it concluded that the Defendant only led the evidence of the Officer who met the Plaintiff at the entrance to the Transit Lounge but failed to lead the evidence of the Officer who recorded the statement of the Plaintiff. The learned President’s Counsel for the Plaintiff too conceded this fact, both in his oral submissions and in his post hearing written submissions.

- (43) I must state that in view of the position of the Plaintiff that even though he admitted in his statement that he was only a courier, he did so at the behest of the Customs Officer who recorded his statement, the least that should have been done was for that position to be suggested to the said Officer when he was cross examined. What is damning to the case of the Plaintiff is that even though the Customs Officer who met the Plaintiff at the entrance to the transit lounge and the Customs Officer who recorded the statement of the Plaintiff gave evidence before the District Court and were cross examined, none of the Customs Officers were questioned on this issue nor were any suggestion made to them that they induced the Plaintiff to make a false statement.
- (44) Even though the Plaintiff claimed that the Customs Officer promised him leniency in exchange for not claiming that he is the owner of the gold, the penalty imposed on the Plaintiff by the Customs Officer who recorded his statement and thereafter conducted the inquiry was three times the value of the gold, which is the maximum penalty that could have been imposed in terms of the law. Thus, no leniency as claimed by the Plaintiff in exchange for stating that he was only a courier was afforded to the Plaintiff. The mitigation of the fine to Rs. 100,000 was made by the Director General of Customs only on 7th August 1991 pursuant to an appeal made by the Plaintiff to the Director General. Thus, the reason attributed by the Plaintiff for him not claiming to be the owner of the gold when he made the statement is clearly a fabrication.
- (45) Be that as it may, except for stating that he bought the gold in Dubai, the Plaintiff did not state in his evidence the place in Dubai from where he purchased the gold or how he paid for the gold. One must bear in mind that the Plaintiff had in his possession over 700 gold sovereigns which according to the Plaintiff, cost him 240,000 Riyals. However, the Plaintiff did not provide any proof of how he paid for such a vast quantity of gold except producing a receipt in Arabic [P9], which receipt was not worth the paper on which it was written since it surfaced for the first time only during the cross examination of the Plaintiff, prompting the Defendant to suggest to the Plaintiff that P9 was a fabrication. Thus, it is clear that the production of the receipt too was clearly an afterthought.

(46) The third ground relied upon by the Court of Appeal in arriving at its conclusion that the Plaintiff was the owner of the gold was Section 110 of the Evidence Ordinance which provides that, *“When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.”*

(47) Having referred to Section 110, the Court of Appeal stated as follows:

“Section 110 is based on the premise that possession of movable or immovable property is presumptive proof of ownership, because men generally own the property which they possess. When, therefore, a person is in possession of anything the presumption of ownership being in his favour, the burden of showing that the person is not the owner of that of which he has possession is on the person who affirms it.

There is no such rebuttal in this case to defeat the ownership created by Section 110 and I proceed to hold that the plaintiff has established his ownership to the property.”

(48) The learned Senior State Counsel submitted that Section 110 has no application to the facts of this case and that the Court of Appeal misdirected itself when it relied upon Section 110. In order to appreciate the submission of the learned Senior State Counsel, it is important to first understand the scope of Section 110, which has been clearly set out in **The Law of Evidence** by E.R.S.R. Coomaraswamy [Volume II, Book 1, pages 438-439] in the following manner:

“The clear implication of this Section is that possession is prima facie or presumptive proof of ownership and the person in possession is presumed to be the owner. The words ‘owner of anything’ show that section 110 applies to both immovable and movable property.

The possessor of a thing or property is presumed to be the owner of it, and may put all other claimants to proof of their title. .. Where, therefore, the plaintiffs and their predecessors in title have been proved and admitted to be in possession of a

land, the burden of proving that they were not the owners lies upon the defendants.

The presumption of ownership from possession applies only if two conditions are satisfied:

- (a) That the possession is not prima facie wrongful, such as possession obtained by force;*
- (b) That the title of the other contesting party is not proved, so that only the possession of the possessor is before the court. When the initial title of another person is established, the section no longer applies and the possessor must prove that that title has somehow or other been terminated...*

Where the plaintiff fails to prove ouster, the defendant's possession must be assumed to be lawful and the defendant is entitled to rely on the presumption created by Section 110."

- (49) The above position has been reiterated in the recent publication, Applicability of the Evidence Ordinance in Civil Actions [2022; pages 677-678], where its author, Dr U L Majeed, referring to Section 110, has stated as follows:

"This section provides for a presumption of ownership from possession. Possession is a good title against all except the rightful owner, and entitles the possessor to maintain ejectment against all, other than such owner, who dispossesses him. The presumption of ownership works only if two conditions are satisfied, namely (a) the possession is not prima facie wrongful, and (b) the title of the other contesting party is not proved.

For the application of the presumption under Section 110 of the Evidence Ordinance, it must be proved that the possession is lawful. The only effect of this section is that if a person is in possession, his title is presumed until the title of some other person is established. This section no longer applies when the possessor proves that the title of the other person has somehow or other been

terminated, either by transfer or succession or by adverse possession. Thus, the burden of ousting title by adverse possession lies upon the person asserting it.

The presumption of title from possession under Section 110 is available only when such possession is long and continuous. Spasmodic and interrupted possession by persons is not sufficient. The law presumes that possession follows title and does not favour forcible entry into possession by a trespasser."

- (50) It is clear from the facts of this case that the two conditions identified by Coomaraswamy for Section 110 to apply have not been satisfied in this case, in that (a) the possession of the gold without a permit is unlawful, and (b) the State is not claiming title to the gold and hence there being no contesting party. I am therefore in agreement with the learned Senior State Counsel that the Court of Appeal erred when it applied the provisions of Section 110 of the Evidence Ordinance to this case.
- (51) In the above circumstances, I am of the view that the Plaintiff has failed to establish that he is the owner of the said gold and that the Plaintiff therefore did not have the *locus standi* to have and maintain a claim for the said gold. I therefore answer the first question of law in the affirmative

Has the Plaintiff imported gold into Sri Lanka

- (52) This brings me to the second question of law. It may appear at first glance that the necessity to address the second and third questions of law does not arise in view of the conclusion that I have reached that the Plaintiff did not have the *locus standi* to have and maintain an action before the District Court. However, in view of the conclusion reached by the Court of Appeal on these two questions of law, it is important that I address the issue of whether a passenger who arrives in the Country, either by plane or ship, bringing into the Country gold in commercial quantities can be said to have imported such gold into Sri Lanka even though such passenger was only transiting through Sri Lanka.
- (53) I have already stated that the Plaintiff arrived on an Air Lanka flight from Dubai and held a valid air ticket to travel to Madras. Having disembarked from his flight, he walked upto the entrance to the Transit Lounge at Katunayake bringing with him

into the Country his brief case with the gold concealed in a false bottom of the bag. The bringing of the gold to Sri Lanka must be viewed in the context of the admission that (a) the Plaintiff's connecting flight to Madras was 15 hours after the scheduled arrival time of his flight from Dubai, (b) as a result of the delay in the arrival of the said flight from Dubai, the Plaintiff was required to spend 11 hours in transit, (c) Air Lanka offered hotel accommodation situated outside the Airport to passengers who had a transit period of over 6 hours in Katunayake, and (d) the Plaintiff had availed himself of such facility on a previous visit of his to Sri Lanka.

- (54) It is in this background that the learned President's Counsel for the Plaintiff submitted that the Plaintiff was only a transit passenger, that transit passengers are not required to clear Immigration nor make a declaration to Sri Lanka Customs, and thus, the Plaintiff cannot be considered as a passenger who has arrived in Sri Lanka nor can the Plaintiff be considered as having imported gold into Sri Lanka. I must state that the learned President's Counsel is correct in his submission that a transit passenger is neither required to clear immigration nor submit a customs declaration or pay customs duties on the goods that he is carrying. One must however bear in mind that a passenger in transit or otherwise (a) cannot bring into the Country goods which are prohibited, (b) cannot bring restricted goods into the Country unless the necessary approvals have been obtained beforehand, (c) cannot carry any goods in commercial quantities, as what the Plaintiff did in this case, and (d) can only carry goods required for their personal consumption.
- (55) The learned President's Counsel for the Plaintiff submitted further that unless the gold is brought into the Country for use, enjoyment, consumption, sale or distribution within Sri Lanka, such gold cannot be considered as having been imported into Sri Lanka. This submission was supported by the judgment of the High Court of Madras in **K.R. Ahmed Shah v Additional Collector of Customs** [1981(8)ELT153(MAD)] where it was held that, *"Unless, therefore, the goods are brought into the country for the purpose of use, enjoyment, consumption, sale or distribution so that they are incorporated in and mixed up with the mass of the property in the country they cannot be said to have been imported or brought into the country."*

- (56) In addressing the issue of whether the gold has been imported, the Court of Appeal, first re-produced the following passage from the judgment of the Supreme Court of India in **The Central India Spinning and Weaving and Manufacturing Company Limited v The Municipal Committee, Wardha** [(1958) AIR 341] where it was stated that:

“Import is derived from the Latin word ‘importare’ which means ‘to bring in’ and export from the Latin word ‘exportare’ which means to carry out but these words are not to be interpreted only according to their literal derivations. Lexico-logically they do not have any reference to goods in ‘transit’ a word derived from ‘transire’ bearing a meaning similar to transport, i.e. to go across. The dictionary meaning of the words import and export is not restricted to their derivative meaning but bear other connotations also.”

- (57) The Court of Appeal thereafter proceeded to consider the said judgment and the judgments of the Supreme Court of India in **Garden Silk Mills Limited v Union of India** [AIR 2000 SC 33] and **Udayani Ship Breakers Limited v Commissioner of Customs and Central Excise** [(2006) 2 SC 336]. Of these judgments, what is relevant to this case is the judgment in **The Central India Spinning and Weaving and Manufacturing Company Limited v The Municipal Committee (Wardha)** [supra] where the Court held that the Terminal Tax imposed by the Municipality is not leviable on goods which are neither unloaded or reloaded at Wardha but are merely carried across through the Municipal area. The Court of Appeal thereafter concluded that, *“All these cases quite convincingly establish that import connotes the passing of goods beyond passport control and this never takes place when a transit passenger carries goods to another country as a transit passenger.”*

- (58) The learned Senior State Counsel drew our attention to the judgment of the English Court of Appeal in **R v Smith (Donald)** [(1973) 1 QB 924] where packets containing cannabis addressed to a person in Bermuda were posted by the defendant who was in Kenya at that time. The said packets were put on board an aircraft in Kenya which was bound for Heathrow Airport in the United Kingdom. At Heathrow, the packets were unloaded and without leaving the customs area were put on board a second aircraft bound for Bermuda. The cannabis was discovered when the packets arrived

in Bermuda. Thus, all that happened was that the parcel was unloaded from one aircraft at Heathrow, remained throughout its stay in the United Kingdom within the customs security area and was never subject to customs clearance, and was then loaded on to another aircraft for onward transmission to Bermuda.

(59) The defendant in that case was charged with being knowingly concerned in the fraudulent evasion of the prohibition against the importation of cannabis imposed by the Dangerous Drugs Act 1965. The defendant submitted that the packets of cannabis had neither been imported into nor exported from the United Kingdom since all that had occurred at Heathrow had been a trans-shipment within the customs area from one aircraft to another for the purposes of onward transmission to Bermuda, and that since he had not intended to import the packets into or export them from the United Kingdom he could not be guilty of being knowingly concerned in the offences alleged against him.

(60) Having referred to Section 79(2)(b) of the Customs and Excise Act, 1952 of the United Kingdom, in terms of which,

“The time of importation of any goods shall be deemed to be –

(a) where the goods are brought by sea, the time when the ship carrying them comes within the limits of a port;

(b) where the goods are brought by air, the time when the aircraft carrying them lands in the United Kingdom or the time when the goods are unloaded in the United Kingdom, whichever is the earlier;

(c) where the goods are brought by land, the time when the goods are brought across the boundary into Northern Ireland:”

the Court of Appeals held in **Smith** [supra] that:

“It seems quite clear that the Act contemplates that goods can be imported before they are either landed from a ship or unloaded from an aircraft. If, as we think, section 79 is not concerned only with budgetary matters, it is plain that goods entering the country by air are imported before they are unloaded, as are goods

brought by sea before they are landed. In a fasciculus of sections dealing with the improper importation of goods, whether by evading the payment of duty on customed goods or the prohibition upon the importing of prohibited goods, it would be strange indeed for Parliament to have excluded from the various categories of "goods imported" a category of "goods unloaded" without such an intention being precisely indicated. ... It is sufficient to say that in this case we have no doubt that the cannabis in question was imported when the aircraft bringing it landed at Heathrow, and was exported when it was placed on board the B.O.A.C. aircraft and that it is quite irrelevant to the question of importation that it remained between unloading and re-loading in a customs area."

- (61) While the aforementioned judgments have taken contrasting views on the question of whether goods in transit have been imported into the country, there are two matters that clearly emerge from these judgments. The first is that the goods referred to in the Indian cases were neither prohibited or restricted goods unlike in the case before us and only dealt with the question of whether import/terminal taxes can be imposed, whereas in *R v Smith*, the Court was dealing with prohibited goods. The second matter is that the Indian cases were not guided by any statutory provisions whereas in *R v Smith*, the Court was dealing with specific provisions of the Customs and Excise Act.
- (62) This brings me to the important question of whether the Plaintiff has imported gold to Sri Lanka in terms of the legal regime that prevailed in Sri Lanka in 1991. I may perhaps mention that the Exchange Control Act which was applicable at that time, has since been repealed and replaced by the Foreign Exchange Act, No. 12 of 2017.
- (63) It is admitted by the parties that the Exchange Control Act does not contain a definition of the word, 'import' but that Section 22 of the Imports and Exports (Control) Act defines 'import' as follows:

*"with its grammatical variations and cognate expressions, when used in relation to any goods, means the importing or **bringing into** Sri Lanka, or causing to be imported or brought into Sri Lanka, whether by sea or by air of such goods."*

Thus, bringing into Sri Lanka any goods is considered as an 'import' for the purposes of the Imports and Exports (Control) Act.

- (64) As the law stood in 1991, gold was a restricted item. This is clearly set out in Section 21(1) of the Exchange Control Act, which reads as follows:

*“(1) No person shall, except with the permission of the bank, **import** into Sri Lanka-*

- (a) any notes of a class which are or have at any time been legal tender in Sri Lanka; or*
- (b) any such other notes as may be prescribed being notes issued by a bank or notes of a class which are or have at any time been legal tender in any territory; or*
- (c) **any gold.***

- (65) Thus, in terms of the Exchange Control Act, gold is not a commodity that can be freely imported into Sri Lanka but is a restricted item. Section 21(1) must be read together with Schedule 'B' of the Customs Ordinance which contains the table of items the entry of which is either prohibited or restricted and includes '*articles the importation of which is restricted by any enactment.*' Thus, if any person is desirous of importing gold into Sri Lanka, he or she must obtain the permission of the Central Bank by way of a permit prior to bringing the gold into Sri Lanka. This position has been reiterated in Section 12(1) of the Customs Ordinance, in terms of which "*The goods enumerated in the table of prohibitions and restrictions in Schedule B shall not be imported or brought into or exported or taken out of Sri Lanka save in accordance with the conditions expressed in the said Schedule*", the condition being that the importation must be in accordance with the provisions of the enactment that imposes the restriction or prohibition.

- (66) The question is, does the word, 'import' in Section 21(1) of the Exchange Control Act include 'bringing' into Sri Lanka of any gold by a passenger, whether such passenger be on transit or otherwise.

(67) That,

- (a) the word '*import*' in the Exchange Control Act is used synonymously with the word, '*bringing*';
- (b) the Exchange Control Act does not draw a distinction in respect of gold brought by passengers who clear Immigration and enter a country and those passengers who do not do so but remain in transit until they board their connecting flight;
- (c) the definition of '*import*' in the Imports and Exports (Control) Act is a reflection of the provisions of the Exchange Control Act,

are clearly borne out by Section 21(2) of the Exchange Control Act, which reads as follows:

"The bringing or sending into any port or other place in Sri Lanka of any gold intended to be taken out of Sri Lanka without being removed from the vessel or aircraft in which that gold is being carried shall, for the purpose of this section, be deemed to be the importation of that gold."

(68) Thus, in terms of Section 21(2), a passenger, irrespective of whether he is a Sri Lankan or a foreign national, and irrespective of whether he has cleared immigration, who has in his possession any gold, even though such passenger is only in transit, even though such gold is not removed from the aircraft that the passenger arrived in Sri Lanka, and even though such gold was intended to be taken out of Sri Lanka, is deemed to have imported the said gold to Sri Lanka. To my mind, the law is very clear in this regard.

(69) The position cannot be any different with regard to a passenger, such as the Plaintiff, who not only brings gold into an airport in Sri Lanka but disembarks from the aircraft bringing that gold into the Country, concealed under a false bottom of his personal brief case. Thus, the intention of the legislature which I must give effect to is that any person who brings gold into the Country is deemed to have imported such gold into Sri Lanka, even if such person intended to take the said gold out of Sri Lanka and even if such person has not cleared immigration.

(70) The resultant position is set out in Section 43, which provides that:

*"If any goods enumerated in the table of prohibitions and restrictions in Schedule B shall be imported or **brought** into Sri Lanka contrary to the prohibitions and restrictions contained in such table in respect thereof, **such goods shall be forfeited**, and shall be destroyed or disposed of as the Principal Collector of Customs may direct."*

(71) In Palasamy Nadar v Lanktree [51 NLR 520], having considered the use of the words, 'shall be forfeited', Gratiaen, J stated as follows:

"If goods are declared to be "forfeited" as opposed to liable to forfeiture" on the happening of a given event their owner is automatically and by operation of law divested of his property in the goods as soon as the event occurs. No adjudication declaring the forfeiture to have taken place is required to implement the automatic incident of forfeiture. This seems to be the effect of the decisions of the English Courts in The Anandale [(1877) 38 L. T. 139] and De Keyser v. Harris [(1936) 1 K. B. 224].

A forfeiture of goods by operation of law would, of course, be of purely academic interest until the owner is in fact deprived of his property by some official intervention. Section 123 of the Ordinance [presently Section 125] provides the machinery for this purpose. It empowers any officer of the Customs to seize any goods which are "declared to be forfeited" by the Ordinance. When that is done, the goods "shall be deemed and taken to be condemned" and may be dealt with in the manner directed by law unless the person from whom they have been seized or their owner "shall, within one month from the date of seizure give notice in writing to the Collector that he intends to enter a claim to the goods and shall further give security to prosecute such claim before the Court having jurisdiction to entertain the same."

(72) In **A.H Kothari v K.P.W. Fernando** [74 NLR 463], Chief Justice H.N.G. Fernando stated as follows:

"Schedule B to the Customs Ordinance contains a "Table of Prohibitions and Restrictions Inwards", which includes articles the importation of which is prohibited by regulations such as those of 1963. Section 43 of the Ordinance provides that "if any goods enumerated in the table of prohibitions and restrictions in Schedule B shall be imported into Ceylon, such goods shall be forfeited".

In the case of Palasamy Nadar v. Lanktree [(1949) 51 N. L. R. 520.] Gratiaen J. referred to the different phrase's used in the Ordinance "shall be forfeited", and "liable to be forfeited". He pointed out that in a case in which it is declared that goods shall be forfeited on the happening of a given event, "the owner is automatically and by operation of law divested of his property so soon as the event occurs". If then any goods are in fact unlawfully imported in contravention of Section 43, they are forfeited by operation of law and become the property of the State at the moment of importation, even if the Customs may be unaware of the unlawful importation. But naturally, possession remains in the importer unless and until he is physically deprived of the goods by a seizure.

The provision for seizure is Section 125, which enacts that "all goods which by this Ordinance are declared to be forfeited shall and may be seized by any officer of Customs". It is clear from this section that the power is to seize what has already been forfeited by operation of law. It is not that goods are seized and then forfeited, but rather that goods are seized because they have become forfeited by law."

(73) In these circumstances and in view of the admission that the Plaintiff did not have a permit from the Central Bank of Sri Lanka, I am of the view that the Plaintiff has imported into Sri Lanka the said 50 slabs of gold in contravention of the provisions of the Exchange Control Act and that the said gold shall be forfeited.

Attorney General v Kumarasinghe

(74) I must state that this is not the first time that the above deeming provision in the Exchange Control Act has been considered by our Courts.

(75) **Attorney General v Kumarasinghe** [supra] is a case where the accused, a Sri Lankan national, had returned to the Country from Singapore on 13th July 1989 on an Air Lanka flight and had been at the transit lounge at the Katunayake International Airport awaiting to take his connecting flight to Male. Upon the said flight being announced Kumarasinghe had left the transit lounge and was on his way to board the plane to Male when he had been stopped by Officers of Sri Lanka Customs. Having examined his brief case, the Officers had found 40 pieces of gold. On being questioned Kumarasinghe who did not have a permit to possess the said quantity of gold stated that he was carrying the gold to Male. He was indicted by the Attorney-General with having imported into Sri Lanka 40 pieces of gold without a permit issued by the Central Bank of Sri Lanka in contravention of Section 21(1) read with Section 21(2) of the Exchange Control Act, and thereby having committed an offence punishable under Section 51(1) read with Section 51(4)(b) of the said Act. I must state that Section 51(1) applies only to a person in or resident in Sri Lanka.

(76) Pursuant to Kumarasinghe being acquitted by the High Court, the Attorney General sought to revise the said judgment before the Court of Appeal. Having considered the aforementioned provisions of the Exchange Control Act, D.P.S. Gunasekera, J stated as follows:

*“The question for determination in this case is as to whether the accused-respondent had imported gold into Sri Lanka, when he was found in possession of 40 pieces of gold in the **transit lounge**, awaiting a flight to Male at the Katunayake International Airport. **The ordinary meaning of 'import' is to bring from abroad.** The term 'importation' is not defined in the Exchange Control Act. However an examination of Section 21 reveals that an extended meaning is given to the word 'importation' in Section 21(2). Thus the legislature appears to have intended to deal with a situation where a transit passenger leaves a consignment of gold in*

an aircraft without offloading it from the aircraft and he is without a permit from the Central Bank to be dealt with for the importation of that gold."

*"The matter for determination in the instant case is whether the accused-respondent who had removed the gold from the aircraft and brought it to the transit lounge can be said to have imported the gold. In determining this question it is useful to consider what importation means. Since the word importation has not been defined in the Exchange Control Act recourse could be had to its definition which is provided in the Imports and Exports Control Act. Section 22 of the Imports and Exports Control Act 1 of 1969 states that "Import" with its grammatical variations and cognate expressions when used in relation to any goods means the importing or **bringing into Sri Lanka**, or causing to be brought into Sri Lanka whether by sea or by air of such goods. **Going by this definition we are of the view that the moment the accused-respondent landed on Sri Lankan soil with the brief case containing gold that the act of importation was complete.** And that if he failed to produce the requisite permit for possession of that gold that he has contravened the provisions of Section 21(1)."*

"In our view it would be absurd to say that where the gold is left in the aircraft without it being removed it is importation and to hold that it is not importation when gold is physically brought out of the aircraft into the transit lounge of the airport as has happened in this case." [emphasis added]

- (77) The legal position in respect of a transit passenger who has in his possession gold without a permit from the Central Bank could not have been stated any clearer than this. Although the District Court relied on the judgment of the Court of Appeal in Kumarasinghe [supra], the Court of Appeal sought to distinguish the facts of this case from Kumarasinghe [supra] on the following basis:

"In the course of its judgment the Court of Appeal did not lay much stress on the question whether Section 21(1) would apply to a transit passenger who was holding a foreign passport and there was no doubt that this question did not arise before their Lordships. There was no conclusion reached on the applicability of the aforesaid provisions Sections 21(1) and (2) to a transit passenger because upon

an indictment for an offence punishable under Section 51(1) and 51(4) of the Exchange Control Act, the accused person has to be a person in Sri Lanka or resident in Sri Lanka. It is axiomatic that Kumarasinghe holding a Sri Lankan passport was resident in Sri Lanka although on the question he did not cross the passport control and was only a transit passenger.”

- (78) I agree that the Plaintiff could not have been charged under Section 51(1), since the Plaintiff was not a resident of Sri Lanka, unlike Kumarasinghe. But the Plaintiff was not charged under Section 51(1) and hence, the issue before the Court of Appeal in this case was not the legality of a prosecution under Section 51(1) but the legality of a declaration by Sri Lanka Customs that the gold has been seized as forfeited since Sections 12 and 43 of the Customs Ordinance have been violated. I am in agreement with the learned Senior State Counsel that Section 21(2) of the Exchange Control Act has not drawn a distinction between a foreign passport holder and a Sri Lankan passport holder, and therefore to introduce such a distinction when the legal context does not warrant so, would be to do violence to the legislative intent behind Section 21(2).

Customs Ordinance and transit passengers

- (79) The learned President’s Counsel for the Plaintiff submitted further that officers of Sri Lanka Customs have no jurisdiction in respect of a passenger until such passenger clears immigration since it is only after the formal stamping of the passport indicating entry into Sri Lanka that a passenger can be considered to have arrived in Sri Lanka and thus, becomes subject to the jurisdiction of Sri Lanka Customs. In other words, the position of the Plaintiff was that Sri Lanka Customs does not have jurisdiction in respect of transit passengers since they have not arrived in Sri Lanka.
- (80) In support of his submission, the learned President’s Counsel for the Plaintiff referred to two Circulars issued by the Director General of Customs.
- (81) The first is a Circular issued on 1st July 1991 [D3], whereby the Director General of Customs had informed all Officers that pursuant to a decision by the Government, certain restrictions imposed on Sri Lankans returning from employment abroad with regard to importation of gold has been relaxed but that any gold brought in by

foreign passport holders, whether declared or not, is liable to forfeiture under the provisions of the Customs Ordinance read with the Exchange Control Act unless such importation is covered by a permit issued by the Controller of Exchange. D3 was applicable at the time the Plaintiff imported the gold.

- (82) The second Circular is dated 17th July 1991 [P7] and had been issued two days after the impugned incident. By such Circular, the Director General of Customs had informed all Officers that, *“On a directive by the Government it has been decided that transit passengers and their baggage should not be subjected to customs check with immediate effect. Customs Officers are hereby informed that they should restrict their movements and presence in the transit areas at the airport so as not to cause any embarrassment or inconvenience to transit passengers. **They should however exercise vigilance and surveillance over any attempt to smuggle into the country any gold by such passengers.**”*
- (83) The learned President’s Counsel for the Plaintiff also drew our attention to an Order made by the Minister of Finance under Section 44 of the Exchange Control Act, published in Extraordinary Gazette No. 790/8 dated 27th October 1993 [P11], by which, *“Exemption from the provisions of section 21 of the Exchange Control Act is hereby granted in respect of any gold or prescribed currency brought into any port in Sri Lanka by any passenger traveling in transit through the port, provided such gold or prescribed currency is kept or retained in the vessel or aircraft in which such passenger is traveling or on the person or in the personal possession of the passenger in any area reserved or demarcated for use by transit passengers in such port.”* To my mind, P11 reinforces the position of the Defendant with regard to the application of Section 21(2) of the Exchange Control Act.
- (84) While P7 and D3 are only internal administrative circulars issued for the convenience of passengers, they have no bearing on the statutory powers that have been vested with Sri Lanka Customs. In my view, a passenger aboard an aircraft arrives in Sri Lanka no sooner the aircraft he or she is travelling in lands at the airport, and hence what matters for the purposes of the Customs Ordinance is the physical arrival of a passenger.

(85) This is reflected in Section 107A(1) of the Customs Ordinance, in terms of which, *“Any passenger **arriving** in Sri Lanka may be searched and his baggage landed, examined and delivered by such officers and in accordance with such regulations as the Minister may prescribe by Notification published in the Gazette; and if any prohibited, **restricted** or uncustomed **goods are found concealed in the baggage of any passenger arriving in Sri Lanka** or upon his person or in any place in which they have been put by his direction or with his connivance **either before or after landing**, the same shall be forfeited, together with the contents of the packages and the packages containing the same.”*

(86) The consequential step that Sri Lanka Customs can take with regard to a passenger who brings a restricted good has been set out in Section 129 of the Customs Ordinance, which section reads as follows:

“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 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 intent 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 Collector of Customs”

(87) I am therefore of the view that to say that a transit passenger who brings a restricted or prohibited good is outside the jurisdiction of Sri Lanka Customs is contrary to the provisions of the Exchange Control Act and the Customs Ordinance.

(88) In the above circumstances, I must state that I am not persuaded by the submission of the learned President's Counsel for the Plaintiff that the Plaintiff was not within the jurisdiction of Sri Lanka Customs since he was only a transit passenger. I must for the avoidance of any doubt state that the Customs Ordinance applies in respect of passengers as well as the goods they carry the moment the aircraft they are travelling in arrives in Sri Lanka, and that clearing immigration is not the trigger for the application of the Customs Ordinance.

(89) Taking into consideration all of the above matters, I answer the second and third questions of law in the affirmative.

Conclusion

(90) In the above circumstances, the judgment of the Court of Appeal is set aside, the judgment of the District Court is affirmed and this appeal is allowed, with costs fixed at Rs. One Million.

JUDGE OF THE SUPREME COURT

P. Padman Surasena, CJ

I agree

CHIEF JUSTICE

Mahinda Samayawardhena, J

I agree

JUDGE OF THE SUPREME COURT