

**IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA**

C. Czarnikow Sugar Ltd.,
Paternoster House,
No.65. St. Paul's Churchyard,
London, EC4M 8AB.
Petitioner

CASE NO: CA/WRIT/144/2018

Vs.

1. P.S.M. Charles,
Director General of Customs,
Sri Lanka Customs,
No.40, Main Street,
Colombo 11.
- 1A. K.A. Vimalenthirajah,
Director General of Customs
(acting),
Sri Lanka Customs,
No.40, Main Street,
Colombo 11.
- 1B. Maj. Gen. (Retd.) G. Vijitha
Ravipriya,
Director General of Customs,
Sri Lanka Customs,
No.40, Main Street,
Colombo 11.

2. D.M.N. Dissanayake,
Director General of Customs
and Inquiring Officer,
Sri Lanka Customs,
No.40, Main Street,
Colombo 11.

Respondents

Before: Mahinda Samayawardhena, J.
Arjuna Obeyesekere, J.

Counsel: Sanjeewa Jayawardena, P.C., with Charitha
Rupasinghe for the Petitioner.
Chaya Sri Nammuni, S.S.C., for the
Respondents.

Decided on: 16.10.2020

Mahinda Samayawardhena, J.

Notwithstanding the Petitioner seeks several reliefs in the lengthy petition, at the stage of the argument the Petitioner confined its relief to paragraph (e) of the prayer to the petition, which reads as follows:

Issue a mandate in the nature of a writ of mandamus, directing the 1st and/or the 2nd Respondent to commence a duly constituted and formal customs inquiry:-

(i) After first issuing the Petitioner a formal show cause/charge sheet and

- (ii) After permitting the Petitioner to tender a written explanation in the first instance in response to such show cause/charge sheet, and*
- (iii) To duly permit the Petitioner to lead both oral and documentary evidence and of witnesses in support of its position and in order to vindicate itself in respect of the specific charges against; and*
- (iv) To only and only then determine the guilt or innocence of the Petitioner in respect of each specific charge if any that may be preferred against the Petitioner.*

Kala Traders Private Limited (a company incorporated in Sri Lanka) imported 4,000 MT of white sugar from the Petitioner (a company incorporated in England). The vessel MV Ever Bright arrived in the Port of Colombo on 30.09.2004 and berthed for discharge on 04.10.2004. Sri Lanka Customs sealed the consignment of sugar to conduct an inquiry on the basis that the shipping documents had been falsified by misdescription of the goods (brown sugar described as white sugar) in order to pay lesser custom duties.

Upon a case being filed by the consignee, Kala Traders, this Court in CA/WRIT/2034/2004 directed the entire consignment of sugar to be released to Kala Traders upon a Bank Guarantee valued at Rs. 45 million.

From what I have stated so far and will state in the course of this Judgment, Kala Traders is a necessary party to this application although the Petitioner does not appear to think so.

An inquiry under section 8 of the Customs Ordinance was initiated by the Director General of Customs to look into the aforesaid matter.

During the course of the inquiry, the Director General of Customs sent P16 dated 21.12.2006 to the Petitioner, requiring the Petitioner to be present at the inquiry between 4th-26th January 2007, stating "*There is an investigation being carried out by this Department in order to ascertain whether you are knowingly concerned in violating any provisions of the Customs Ordinance in the importation of above mentioned consignments of sugar.*"

This was replied by the Petitioner by P17 dated 23.01.2007. In this detailed reply, the Petitioner informed the Director General of Customs to "*Desist from summoning us for any investigation or inquiry in respect of the shipment effected on 04.10.2004 on MV Ever Bright*" *inter alia* on the basis that "*We were only the shippers of the said consignment to Messers Kala Traders (Pvt) Ltd as far as we are concerned the said consignment had been delivered as far back as September 2004.*" The Petitioner took up the firm position that "*it would be illegal and against the provisions of the Customs Ordinance to summon us at this stage of the inquiry.*"

It is most significant to note that nowhere in this five-page letter P17 did the Petitioner take up the position that at the time of the

seizure, the Petitioner was the owner of the said consignment or even part of it.

Thereafter, the Director General of Customs sent P18 dated 14.02.2007, again explaining why the presence of the Petitioner would be helpful for the investigation. The Petitioner was further informed in P18 "*if you are unable to present yourself as requested, we will accommodate a date to suit your convenience.*" The Petitioner remained unmoved. The customs inquiry proceeded.

In the meantime, the Petitioner filed a case against Kala Traders in the Commercial High Court, bearing case No. 263/2007/MR. The Petitioner does not tender a copy of the plaint in the said case, which would have been of great assistance to this Court to understand the real grievance of the Petitioner in relation to this transaction. In the said Commercial High Court case, the Petitioner seems to have sought a declaration that the Petitioner is the owner of 6000 MT of the 10,000 MT consignment of sugar and to recover from Kala Traders the value of the said quantity of sugar. It also appears by paragraph 73 of the petition that the Petitioner secured Judgment in its favour, but at the time of filing this application "*the said case is still pending for the recovery of the said dues.*"

However, in a sudden turn of events, after filing the said Commercial High Court case and more than one year after correspondence by P17 and P18, an Attorney-at-Law on behalf of the Petitioner sent P19 dated 11.03.2008 and P21 dated 02.04.2008 to the Director General of Customs, asking that the

Petitioner be made a party to the inquiry to stake a claim to the goods seized, based on the facts stated therein. Thereafter, the Director General of Customs sent P23 dated 12.05.2007, requiring the said Attorney-at-Law to be present at the Customs Department on 21.05.2008 “*to ascertain the truth of the matters mentioned therein to consider your request duly.*” The Attorney-at-Law flatly rejected this request by P24 dated 02.06.2008, stating “*you have no right to summon me for any inquiry and I will not comply with your request.*” The matter ended on that note.

Upon conclusion of a long-drawn out inquiry, the Inquiring Officer sent a common show cause notice P3 dated 10.08.2017 to nine persons, including Kala Traders and the Petitioner’s local indenting agent, Mondial Impex (Pvt) Ltd. Kala Traders was asked *inter alia* to show cause why the said consignment of 10,000 MT of sugar shall not be forfeited in terms of section 12 read with section 43, and sections 27, 47 and 50 of the Customs Ordinance.

Thereafter, the Order dated 04.09.2017 marked P27 was pronounced, by which *inter alia* the entire consignment of 10,000 MT of sugar was forfeited under section 12 read with section 43, and sections 27, 47 and 50 of the Customs Ordinance.

The Petitioner filed this application on 02.04.2018, mainly seeking to quash P27 in respect of 6,000 MT of the 10,000 MT consignment of sugar, on the basis that payment for the said portion of sugar was on Document Against Payments (DAP)

terms (according to the Agreement entered into between the Petitioner and Kala Traders marked P6).

This makes abundantly clear my earlier observation, i.e. that Kala Traders is a necessary party to this application. For me, hearing this application without Kala Traders is akin to playing Hamlet without the Prince of Denmark! Failure to make necessary parties petitioners or respondents, as the case may be, warrants dismissal of the application *in limine*.

If Kala Traders failed to make due payments in violation of the Agreement or if the ownership of the goods is in dispute, the same shall be resolved in a different forum, perhaps by the said Commercial High Court case, and not by insisting that the Customs Department recommence the already concluded, long drawn out inquiry.

It is in the alternative to the said main relief (quashing P27) that the Petitioner asks this Court to direct the Director General of Customs to hold a formal inquiry upon a formal charge sheet/show cause notice issued on the Petitioner.

The contention of the Petitioner is that the section 8 inquiry under the Customs Ordinance is a fact-finding inquiry, which is a precursor to a formal inquiry, and any punishment meted out after a section 8 inquiry is a nullity, as punishment can only be meted out after a formal inquiry.

Let me consider the issue in light of this submission.

The Petitioner refused to participate in the section 8 inquiry. After the section 8 inquiry, no show cause notice was served on

the Petitioner. The Petitioner was not made a suspect/accused in any inquiry. No punishment was meted out on the Petitioner. In the circumstances, how can the Petitioner find fault with the procedure of the inquiry? As seen from P27, several punishments were imposed on Kala Traders who had legal representation at the inquiry. But Kala Traders or any other party against whom punitive Orders were made do not complain of procedural irregularities. It must be made clear that the forfeitures by P27 were imposed not immediately after the section 8 inquiry but upon show cause notices being served on the parties identified at the section 8 inquiry.

It is noteworthy that having refused to participate in the section 8 inquiry, the Petitioner now finds fault with the Director General of Customs for not serving a show cause notice on the Petitioner and not holding a formal inquiry against it!

The Petitioner seeks to compel the Director General of Customs by mandamus to issue a show cause notice on the Petitioner and hold a formal inquiry against the Petitioner, in order for the Petitioner to claim 6000 MT of sugar on the basis that the Petitioner is the owner of the said portion of sugar.

The Petitioner's application is, in my view, misconceived in law. Writ is a discretionary relief. In the aforesaid facts and circumstances of this case, the Petitioner is not in any way entitled to discretionary relief. This Court previously ordered that the whole consignment of sugar be released to Kala Traders upon a Bank Guarantee (although final Judgment in that case was entered against Kala Traders, as seen from the Judgment in

Kala Traders (Pvt) Ltd v. Director General of Customs [2006] 11 Sri LR 295). Kala Traders is not a party to this application. The Petitioner filed a case in the Commercial High Court against Kala Traders to recover payment on 6,000 MT of sugar on the basis that the Petitioner is the owner of that portion of sugar, presumably in terms of the Agreement P6. The Petitioner's redress lies elsewhere, not in the writ Court.

I dismiss the application of the Petitioner with costs.

Judge of the Court of Appeal

Arjuna Obeyesekere, J.

I agree.

Judge of the Court of Appeal