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

In the matter of an application for mandates in the nature of Writs of Certiorari, Mandamus and Prohibition under and in terms of Article 140 of the Constitution of the Democratic Socialist republic of Sri Lanka.

C.A (Writ) Application
No.84/2020

Sonal Brothers (Pvt) Limited

No.5, Kotalawala Place,

Colombo 04.

PETITIONER

-Vs-

1. G. Vijitha Ravipriya

   Director General of Customs,

   Sri Lanka Customs,

   No.40, Main Street,

   Colombo 11.

2. M.R. Ranaraja

   Director,

   Risk Management Unit (RMU),

   No.40, Main Street,

   Colombo 11.

3. M.S.J. De Silva

   Deputy Director Customs,

   Deputy Director,

   Risk Management Unit (RMU),

No.40, Main Street,

Colombo 11.

4. **S.M.M.K. Siriwardena**

   Superintendent of Customs,

   No.40, Main Street,

   Colombo 11.

5. **J.N. Mirihagalla**

   Superintendent of Customs,

   No.40, Main Street,

   Colombo 11.

6. **N.A. Dushmantha**

   Assistant Superintendent of Customs,

   No.40, Main Street,

   Colombo 11.

7. **U.G.I.N. Bandara**

   Assistant Superintendent of Customs,

   No.40, Main Street,

   Colombo 11.

8. **M.W.U. Jayasanka**

   Assistant Superintendent of Customs,

   No.40, Main Street,

   Colombo 11.

9. **L.K.H.D.K. Aarewatta**

   Deputy Director Customs,

   No.40, Main Street,

   Colombo 11.

10. **Nimal Karunathilaka**

    Director General,

    Department of Commerce,

4th Floor 'Rakshana Mandiraya',
No.21, Vauxshall Street,
Colombo 02.
RESPONDENTS

BEFORE	:	A.H.M.D. Nawaz., J (P/CA) *and* Sobhitha Rajakaruna., J
COUNSEL	:	M.U.M. Ali Sabry, PC with N. Nafath for the Petitioner. Vikum de Abrew, SDSG with Nayomi Kahawita SC for the Respondents.
Argued on	:	10.06.2020
Decided on	:	19.06.2020

A.H.M.D. Nawaz., J (P/CA)

In this application the Petitioner seeks a *writ of certiorari* to quash the decision of the 1st to 10th Respondents, to detain the consignment of the goods imported into Sri Lanka under the 'Pakistan-Sri Lanka Free Trade Agreement (PSFTA) scheme. A writ of mandamus is also sought on the aforesaid Respondents, compelling them to grant the Petitioner a duty waiver under the said scheme and allow the Petitioner to clear the said consignment under the 'PSFTA'.

A writ of prohibition preventing the 1st to 10th Respondents and other members of the Sri Lanka Customs allied to the said Respondents is also sought. When the matter was taken up for support, the learned President's Counsel who appeared for the Petitioner summarized the crux of the factual matrix thus:

The Petitioner imported a consignment of 500 M/T of Super Kernel Basmathi Rice under the 'PSTFA', and despite the submission of stipulated documents requested by the Department of Commerce, the said consignment was examined and detained, and subsequently an inquiry has been initiated on the ground that the said Super Kernel Basmathi Rice was not Basmathi rice. The stance of the Petitioner is that all the documents that he submitted establish the fact that the imported rice constitutes Basmathi rice, but the Respondents refuse to recognize it as such, since they rely on a report from the Rice Research and Development Institute (RRDI) which compares the samples with PUSA Basmathi rice from India.

Thus the learned President's Counsel for the Petitioner, Ali Sabry PC contended that the Respondents have taken into account an irrelevant consideration and not taken into account relevant considerations such as the fact that there is sufficient evidence to establish that the rice imported is of the Basmathi strain. In order to demonstrate an arguable case at this threshold stage, the learned Counsel argued that there is a *prima facie* case that warrants the issue of notice and that there is no case which compels the detention of the imported rice-see ***Jinadasa v Weerasinghe*** (1929) 31 NLR 33 and the Indian case of ***T.N. Indrani Devi v the Municipal Board, Imphal*** AIR 1958 Manipur 27 for possibility of success as a threshold to establish a *prima facie* case.

The learned President's alluded to section 47 of the Customs Ordinance which reads as follows:

> *The person entering any goods inwards, whether for payment of duty or to be warehoused, or for payment of duty upon the taking out of warehouse, or whether such goods to be free of duty, shall deliver to the Collector a bill of entry of such goods, on a form of such size and colour as may be specified in that behalf by the Collector by Notification published in the Gazette, and be fairly written in words at length, expressing the name of the ship, and of the master of the ship in which the goods were imported, and of the place from which they were brought, and the description and situation of the warehouse, if they are to be warehoused, and the name of the person in whose*

name the goods are to be entered, and the quantity, value and description of the goods, and the number, dimensions, and the denomination or description of the respective packages containing the goods, and such other particulars as the Collector by that or a subsequent Notification may require him to furnish, and in the margin of such bill shall delineate the respective marks and numbers of such packages. The particulars furnished in the bill of entry shall be supported by such particulars as the Collector may, by Notification published in the Gazette, require if such person fails to deliver a bill of entry prepared, and supported by such documents as aforesaid, he shall be liable to a penalty not exceeding one thousand rupees. Such person shall pay any duties and dues which may be payable upon the goods mentioned in such entry; and such person shall also deliver at the same time two or more duplicates of such bill, in which bill all sums and numbers shall be expressed in figures, and the particulars to be contained in such bill shall be legibly written and arranged in such form and manner, and the number of such duplicates shall be such, as the Collector shall require, and such bill of entry when signed by the Collector, or person authorized by him, and transmitted to the proper officer, shall be the warrant to him for the examination and delivery of such goods; but if such goods shall not agree with the particulars in the bill of entry ***the same shall be forfeited*** *and such forfeiture shall include all other goods which shall be entered or packed with them as well as the packages in which they are contained.*

The learned President's Counsel drew the attention of this Court to the SC decision of *TOYOTA LANKA (PVT) LTD., AND ANOTHER V JAYATHILAKA AND OTHERS*- 2009 (1) Sri LR 276 at page 287- wherein Sarath N Silva CJ (with Gamini Ameratunga J and Siripavan J agreeing) contrasted the situation of concealment and evasion to pay dues vis-a-vis misdescription and underpayment of dues. The Supreme Court has pointed out that it is the former and not the latter that results in a mandatory consequence of forfeiture and in the latter situation the proper course would be to require the person to pay the "duties and dues which may be payable" being the statutory obligation of the importer in terms of Section 47 or in the event of a short levy to recover the amount due in terms of Section 18 (2) and (3) or 18A of the Customs Ordinance. Where the person has been charged in excess, he has a statutory right to seek a refund in terms of Section 18 (1) of the Customs Ordinance.

The learned President's Counsel argued that even if the position of the Respondents were to be accepted, in terms of the aforesaid judgment the consignment in issue is not liable to be forfeited. If at all, it is the obligation to pay duty that is triggered if the rice imported by the Petitioner does not pass muster. That was the nub of the argument for the Petitioner.

Further submission was made that upon a perusal of the proceedings before the Customs Inquiry, it would become clear that the reports produced at the said inquiry establish that the subject-matter of importation is nothing but Super Kernel Basmathi rice.

As opposed to this argument, Mr. Vikum de Abrew, the learned Senior Deputy Solicitor General (SDSG) submitted that in order to eliminate any abuse occurring in regard to the concessionary scheme introduced under PSFTA the Respondents were empowered to ascertain the variety of rice having regard to the reports requested from RRDI. It is the submission of the learned SDSG that the reports received from RRDI establish that the variety of rice imported by the Petitioner was not Basmathi.

Thus the Reports from Pakistan vis a via reports from Sri Lanka contend for superiority in the quest to establish the variety of rice. The evidentiary value of either test figures prominently in the case and I take the view that this cannot be assessed unless affidavit evidence is tendered to this Court and evaluated at a final hearing.

I hold the view that the Petitioner has made out a *prima facie* case for issuance of notice. In fact discretionary bars such as laches are taken up but I take the view that this is to be considered at the final hearing as the argument of the Petitioner at the threshold stage is that the Respondents have stepped out of jurisdiction in assuming based on the reports from RRDI that the rice does not belong to Basmathi variety-see what Sharvananda J (as His Lordship then was) discussing the question of laches states thus in ***Biso Menika Vs. Cyril de Alwis*** (1982) 1 S.L.R. 368 at page 379,:-

> *When the Court has examined the record and is satisfied the Order complained of is manifestly erroneous or without jurisdiction the Court would be loathe to allow the mischief of the Order to continue and reject the application simply on the ground of delay, unless there are very extraordinary reasons to justify such rejection.*

So this Court has to arrive at its conclusions on laches in this particular instance only after having considered the facts and circumstances at a final hearing.

Having considered the issuance of notice the question arises whether this Court can grant the interim relief that the Petitioner has sought.

The document marked **'1R7'** attached to the limited statement of objections of the 1st to 9th Respondents contains a minute made by the Director General of Customs to relocate the cargo to the importer's go down subject to a bank guarantee.

In other words, though the learned counsel appearing for the Respondents stated that the said consignment in question has been automatically forfeited to the state it would not appear to be so in light of the minute of the Director General of Customs to release the cargo subject to a bank guarantee. The minute shows an implicit acceptance that the property in the rice has yet not passed to the state and it is still in the Petitioner.

On the very representation that the imported goods could be released upon a bank guarantee the question arises what type of bank guarantee could be furnished by the importer.

Considering the tests applicable to the grant of an interim relief and the arguments placed before us as to the perishable nature of the goods and the accumulation of continuing demurrage against the Petitioner I decide to order the lodgment of a corporate guarantee. I have considered the arguments raised in the written submissions of the Respondents that there is no substantive relief prayed for as to a corporate guarantee and therefore an interim relief cannot be granted but reject that submission for a bank guarantee embodies within it both an on-demand bank guarantee and a conditional bank guarantee. By the very reference to a bank guarantee in the minute of the Director-General, Customs it is clear that there is no rejection of a corporate guarantee that could be furnished from a bank. In the circumstances I direct that the imported rice is released to the Petitioner upon a corporate guarantee to the value of Rs.30, 516, 630 being given in respect of the duty payable. Whilst this Court makes this order we wish to make it clear that this order should not be construed as a final decision as to what category in Section 47 as distinguished by the Toyota Lanka case the facts of this case fall within.

If after release of the goods it is found that the Petitioner has sold the goods the Petitioner has to furnish a bank guarantee to the value of the rice sold.

Subject to these conditions we decide to issue notice of this application on the Respondents.

PRESIDENT OF THE COURT OF APPEAL

Sobhitha Rajakaruna, J.

I agree

JUDGE OF THE COURT OF APPEAL