

GUNATILEKA
v.
WEERASENA

COURT OF APPEAL.
DE SILVA, J.
CA 457/95.
NOVEMBER 11, 1999.
DECEMBER 17, 1999.
JANUARY 10, 2000.

Writ of Certiorari - Quash determination of Director General of Customs holding that 2nd Respondent is an initiating officer - Customs Ordinance, Ss.8, 153.

The question for consideration is whether the determination made by the Director General of Customs (1st Respondent) to the effect that the 2nd Respondent is also an Initiating Officer in terms of the Circular (distribution of rewards) is unreasonable.

It was contended that according to S. 153 and the scheme of the Circular the determination of the Director General of Customs as to who the Initiating Officer is solely an exercise of his discretion, and the said determination was an exercise of absolute discretion which is not justiciable and is in the nature of a subjective exercise which is not easily interfered with by Courts.

Held :

(1) In Modern Administrative Law the concept of absolute discretion is unacceptable. Arbitrary power and unfettered discretion are what courts refuse to countenance.

(2) As the law developed certiorari and prohibition have become general remedies which may be granted in respect of any exercise of discretionary power.

(3) Initiating Officer is a person who commences action resulting in seizure on information or observation personal to him. The 2nd Respondent does not come under this category, more so his application to the Director - General of Customs that he be treated as an Initiating Officer was made nearly one and half years after the detection.

APPLICATION for a Writ of Certiorari.**Cases referred to :**

1. *R vs Secretary of State for Trade & Industry Exp.Lonsho PK* (1989) 1 WLR 525
2. *Faleel vs Susil Moonesinghe and others* [1994] 2 Sri.L.R. 301
3. *U.S. vs Wundarlich* (1951) 342 US 98
4. *Roberts vs Hopwood* (1925) AC 578 at 613
5. *Breen vs Amalgamated Engineering Union* (1971) 2 QB at 190

E.D. Wikremanayake with Ms. Anandi Cooray for Petitioner.

Y.J.W. Wijetilake D.S.G. for 1st Respondent.

S. Sivarasa, P.C., with E.R.S.R. Coomaraswamy for 2nd Respondent.

Cur. adv. vult.

March 01, 2000.

DE SILVA, J.

The petitioner, a customs officer, filed this application seeking *inter alia*, a writ of certiorari to quash the determination/orders dated 02. 02. 1996 and 17. 06. 1995 of the Director General of Customs who held that one C.P.M.K. Fernando another customs officer, the second respondent in this case, along with the petitioner to be initiating officers for a detection for which the petitioner claims to be the only initiating officer.

The original petition filed by the petitioner on the 28th June 1995 had been subsequently amended on the 4th of July 1995. When the application was first considered by this Court by judgment dated 05. 06. 1996 the Court held that at the relevant time circular P1 was not operative and the matter was governed by the document marked "Y" which is another scheme of distribution, and dismissed the application. Thereafter the petitioner sought special leave to the Supreme Court against the said order of this Court. The Supreme Court by its judgment dated 09. 09. 1998 held that -

- (1) The scheme embodied in circular marked "Y" is not applicable to the petitioner,
- (2) The circular "P1" is in fact valid, operative and enforceable and applicable to the petitioner and referred the case back to this Court to consider the merits of the case.

It is to be noted that the learned D.S.G. who appeared for the Director General of Customs conceded in the Supreme Court that the applicable circular was P1.

It is common ground that the award has been made in terms of circular marked P1. This circular contains the guidelines to be followed in the distribution of rewards. The question for consideration by this Court is whether the determination made by the Director General of Customs, the 1st respondent to the effect that the 2nd respondent is also an initiating officer in terms of the said circular is unreasonable.

The petitioner's claim is based on the scheme that he was what is known as the "Initiating Officer". The term initiating officer is defined in paragraph 4 of P1 as follows. "Initiating officer would be a person who commences an action resulting in seizure on information or observation personal to him".

In order to decide who the initiating officer is in this instance the facts and circumstances of this case have to be considered in detail.

The petitioner, the 2nd respondent, Fernando, and several other customs officers were on duty at the Colombo Airport, Katunayake on the 4th June 1993. The petitioner observed a passenger, attached to the Egyptian Embassy, coming to the Green Channel. On being questioned the passenger stated that he had nothing to declare and the petitioner permitted him to proceed through the Green Channel. A few minutes later the petitioner observed that the same person again was

in the customs examination hall and was pushing a trolley with another person. As the petitioner grew suspicious over the return of this passenger the petitioner stopped him and started questioning him. Then two other officers viz O. B. Jayanetti and K. G. Jayawardena joined the petitioner. Having seen this the 2nd respondent, Kithsiri Fernando too came to the spot. When the passenger tried to open a bag Fernando noticed a VCR which needed a duty free clearance certificate.

Thereafter the petitioner having interrogated the passenger requested him to bring back the bags which had already been cleared. The passenger refused to do so. The petitioner then instructed Jayanetti, Jayawardena and one Jayantha Ponnampereuma to bring the bags cleared by the passenger earlier. The petitioner then proceeded towards the customs office with the passenger followed by Kithsiri Fernando. The passenger having noticed that the above mentioned three officers were proceeding towards the lobby to bring back the cleared baggage had run through the Green Channel. Kithsiri Fernando had given chase and intercepted the passenger in the V.I.P. car park and ordered the security at the gate to stop the car which the passenger had signalled to leave. Fernando came back to the office with the passenger and the other customs officers brought back the luggage cleared earlier from the car. Thereafter the team of custom officers opened the bags and found 153 slabs of gold valued at Rs. 10,614,700/= and 59 pieces of gold jewellery valued at Rs. 396,000/=.

On or about 17. 06. 1993 an inquiry in terms of section 8 of the Customs Ordinance was held and the said 153 slabs of gold and 39 pieces of gold jewellery were declared as forfeit in terms of the Customs Ordinance.

The petitioner claimed that it was he who initiated action which resulted in this seizure due to his personal observations.

On or about 18. 06. 1993 one D.M.T.B. Dissanayake a customs officer made an application to the 1st respondent, Director General requesting that he be treated as the initiating officer. After obtaining necessary reports the Director General of Customs determined that the said Dissanayake was not the initiating officer. Two further claims were made by the same Dissanayake which too were disallowed by the Director General of Customs.

It is to be noted that at the inquiry held on 17. 06. 1993 the statement of all the customs officers who participated in this detection were read over to them and asked whether they had anything to add. All the officers including Fernando admitted that their statements had been properly recorded (vide P.21).

On or about 08. 11. 1993 the petitioner made an application to the Director General of Customs to proceed to U. S. A. for studies and he was paid an advance from the reward due to him as the initiating officer. According to section 2.3.1 of the circular advance payment may be made only in exceptional cases and should not be paid as a right or as a routine matter. Section 2.3.2. states that "before making any advance payment, the director in charge of the division should satisfy himself that the claim of the officer is correct and that there will not be any disputes regarding same later". The petitioner proceeded to U. S. A. and returned on 20. 01. 1995.

Meanwhile on 15. 08. 94 Fernando had made an appeal to the Director General of Customs stating that he should be considered as the initiating officer on the basis,

- (a) that at all times material to detention of the D.P.L. car and apprehension of the passenger in V.I.P. car park he acted on his own without any direction from any other person and without any information from a third party.

- (b) that the seizure of the goods was due to his action of the detection of the D.P.L. car at the V.I.P. car park.

On 02. 02. 1995 the Director General of Customs made order accepting Fernando as one of the initiating officers. The petitioner appealed to the Director General of Customs by letter dated 28. 02. 1995. The Director General of Customs turned down his appeal on 17. 06. 1995 and affirmed his previous order dated 02. 02. 1995. The present writ application to this Court is to quash the above decisions.

The learned President's Counsel for the second respondent submitted that according to the object of section 153 of the Customs Ordinance and the scheme of the circular P1 the determination of the Director General of Customs as to who the initiating officer is solely an exercise of discretion of the Director General of Customs. He further submitted that the said determination was an exercise of absolute discretion which is not justiciable and is in the nature of a subjective exercise which is not easily interfered with by Courts. The position taken up by the Counsel for the 2nd respondent was that the Director General of Customs acted after due inquiry and not arbitrarily or capriciously and therefore there is no abuse of power. Mr. Sivarasa PC relied on the following authorities. *R. Vs. Secretary of State for Trade and Industry exp. Lonsho PK.*⁽¹⁾. Wade on Administrative Law 7th Edition (1994) page 399, "Administrative Adjudications" by Bernard Schwartz, American Administrative Law 2nd Edition page 190 and Constitution and Administration Law of Ceylon by Joseph A.L. Cooray (1973) page 324, *Faleel Vs. Susil Moonasinghe and Others*⁽²⁾.

It is observed that in Modern Administrative Law the concept of absolute discretion is unacceptable. "parliament constantly confers upon Public Authorities, powers which on their face might seem absolute and arbitrary. But arbitrary

power and unfettered discretion are what Courts refuse to countenance. They have woven a network of restriction principles which require statutory powers to be exercised reasonably and in good faith for *proper purpose only*" Administrative Law - 7th Edition - Wade at page 379.

Justice Douglas in his dissenting judgment in *U.S. Vs. Wundarlich*⁽³⁾ observed,

"Law has reached its finest moments when it has freed man from unlimited discretion of some ruler, some civil or military official, some bureaucrats. Where discretion is absolute man has always suffered. At times it has been his property that has been invaded; at times his privacy; at times his liberty of movement; at times his freedom of thought; at times his life; absolute discretion is a ruthless master."

These Principles have been explained and elaborated in a series of English decisions over a long period of time. *Lord Wrenbury in Roberts Vs. Hopwood*⁽⁴⁾ at 613 stated that,

"A person who is vested with a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so. He must in the exercise of his discretion do not what he likes but what he ought. In other words he must by the use of reason, ascertain and follow the course which reason directs. He must act reasonably."

Again in Breen Vs. Amalgamated Engineering Union⁽⁵⁾ (at 190) Lord Denning MR held that "Statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which ought not to have been taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith, nevertheless the decision will be set aside."

As the law has developed, certiorari and prohibition have become general remedies which may be granted in respect of any exercise of discretionary power; The question is whether some issue is being determined to some person's prejudice; certiorari applies to any exercise of discretion to a person's prejudice whether such exercise of discretion is due to malice, unreasonableness or both or even on any other ground.

The case of the petitioner was that on or about 4th June 1993 he was solely responsible for the detection of an offence involving smuggling of gold. On completion of the inquiry a large quantity of gold and gold jewellery were declared forfeit and that in terms of section 153 of the Customs Ordinance half the proceeds of the sale of the forfeited goods had to be credited to the customs reward fund and distributed in accordance with the scheme approved by the Minister. Initiating officer is entitled to 60% of the said reward.

The scheme of award set out in P1 has been in use of the Customs Department from 1988 with subsequent amendments and was known to all the employees of the Customs Department. When a detection is made officers of the Department can legitimately expect the head of the Department namely Director General of Customs to follow, apply and adhere to the approved scheme. Paragraph 4 of scheme P1, as set out earlier defines the initiating officer as a "person who commences action resulting in seizure on information or observation personal to him."

The petitioner's position is that it is he alone who grew suspicious of the passenger and stopped and questioned him. If not for his action based on his personal observation and initiation the said passenger would have proceeded unchecked and seizure would not have taken place.

It was contended that if not for the timely action taken by Fernando by running to the V.I.P. lounge and stopping the car the gold would have slipped through. It is true that Fernando

had played an important part in the detection later. The question is whether Fernando could be identified as the initiating officer. In his own statement made on the very day he says he joined the petitioner, Jayawardena and Jayanetti when they were questioning the passenger. When he joined the group he did not know about the passenger to form the opinion that he is the initiating officer in terms of the definition given in the circular.

Further more a few days after the detection there was the inquiry referred to earlier in which Dissanayaka made a claim as the initiating officer. When one considers the facts of the case claimant Dissanayaka could be categorized as a complete outsider. Even at that stage it did not dawn upon Fernando that he too should make a claim. His application is dated 15. 08. 1994 to the Director General of Customs that he be treated as the initiating officer. This is nearly one and half years after the detection.

In these circumstances I hold that the decision of the Director General of Customs that Fernando is also an initiating officer is unreasonable. I quash the orders dated 02. 02. 1996 and 17. 06. 1995. Application is allowed without costs.

Application allowed.