

**BANGAMUWA**  
**V**  
**S. M. J. SENARATNE, DIRECTOR GENERAL OF**  
**CUSTOMS AND ANOTHER**

COURT OF APPEAL  
J. A. N. DE SILVA, J.  
CA APPLICATION NO. 259/99  
26<sup>th</sup> JANUARY, 2000

*Writ of certiorari - Order under section 163 of the Customs Ordinance - Whether the Director-General may release goods seized as forfeit - Minister's powers under sections 164 and 165 of the Ordinance.*

Haskell Lanka (Pvt) Ltd. ("Haskell") had entered into an agreement with the Board of Investment of Sri Lanka ("the BOI"). The said enterprise obtained a permit dated 5.4.1994 from the BOI to import a MitsuSubishi Pajero on a duty free basis, as was permitted by its agreement with the BOI, to be used by the enterprise. Haskell opened a letter of credit on 'nil margin' on guarantee given by one Ismail Osman, who appeared to be a dealer in vehicles. The motor vehicle was imported on a duty free basis on the said permit. It was cleared from the customs and registered on 17.9.1994. But the vehicle was not used at all by Haskell. It was found to be in the possession of Osman. Thereafter it was in the possession of one Wijesuriya who was a vehicle dealer himself and sold to Rohan Rodrigo and Company Ltd, for a sum of Rs. 4.5 million. After inquiry, the 2nd respondent (an Assistant Director of Customs) ordered the forfeiture of the vehicle and imposed penalties on the Managing Director of Hasekell, Osman and Wijesuriya, in terms of section 129 of the Customs Ordinance.

The said vehicle was thus seized as forfeit. But the 1st respondent (Director-General of Customs) by the order dated 22.2.1999 ordered the release of the vehicle to Haskell on total fiscal levies leviable under normal law.

**Held :**

The Director-General had no power to release the vehicle under section 163 of the Customs Ordinance which only permits mitigation of a forfeiture. The power to order the restoration of seized goods has been given to the Minister to be exercised in terms of section 164 and 165 of the Customs Ordinance.

Application for a writ of certiorari in respect of an order made by the Director-General of Customs.

*A.S.M. Perera, PC with Nevil Ananda* for the petitioner.

*Y. Wijayatilake, D.S.G.* for the respondent.

*Cur. adv. vult.*

January 26, 2000

**J. A. N. DE SILVA, J.**

By this application the petitioner prays for a writ of certiorari to quash the order dated 22.02.1999 given by the first Respondent the Director General of Customs to release the vehicle bearing No. 64-7666, Pajero to Haskell Lanka (PVT) Ltd.

According to the facts set out in the petition Haskell Lanka (Pvt) Ltd. entered into an agreement with the Board of Investments of Sri Lanka under which the said enterprise was entitled to numerous concessions including the importation of a vehicle without the payment of duty.

The said enterprise obtained a permit dated 05.04.94. from the Board of Investments to import a Mitsubishi Pajero on a duty free basis and free of import licence control to be used by the enterprise. The following conditions were laid down in the said permit.

- (1) The vehicle imported should not be sold for a period of three years: and after three years the vehicle could be re-exported, sold to the Procurement and Advisory Unit of the Ministry of Finance or in the local market on a payment of customs duty and other duties as maybe determined by the customs.
- (2) The enterprise was expected to obtain an endorsement from the Registrar of Motor Vehicles to include the clause referred to above in the registration book

relating to the said vehicle and the said registration book had to be forwarded to the Investor Services Department of the Board of Investments for scrutiny and return soon after the registration.

Haskell Lanka (Pvt) Ltd. opened a letter of credit on nil margin on guarantee given by one Ismail Osman who appears to be a dealer in vehicles and a director of an organisation called Asian Motor (Pvt) Ltd.

The said motor vehicle was imported to Sri Lanka on a duty free basis on the said permit and was cleared from the customs without payment of duty and was registered on 17.09.94. On the material that was available it became clear that the said vehicle had not been used at all by Haskell Lanka (Pvt) Ltd. Investigations have further revealed that Ismail Osman referred to earlier, who was the Guarantor of the letter of credit (opened for this vehicle) was in possession of the said vehicle after its importation.

Subsequently one Upul Wijesuriya, who is a vehicle dealer himself, was in possession of this vehicle, sold the said vehicle to Rohan Rodrigo and Company (Ltd) for a sum of 4.5 million. There had been no entries in the books of Haskell Lanka (Pvt) Ltd. in relation to the inclusion of this vehicle in the inventory of Haskell Lanka (Pvt) Ltd.

However after the inquiry commenced an entry had been interpolated in the ledger relating to the cost of the Pajero. The accounts assistant at Haskell Lanka (Pvt) Ltd. had admitted that he made this interpolation on 09.10.1997 by which time the Customs Department had already started investigations. It was further revealed that the money to meet the cost of importation had been made available by Ismail Osman and a few others known to him.

Assistant Director of Customs Mr. P. Yoganathan, the second respondent was appointed to inquire into this matter.

The evidence of a large number of individuals was recorded, and the parties who were involved were represented by senior lawyers at the inquiry.

After the conclusion of the inquiry the second respondent ordered the forfeiture of vehicle no. 64-7666 valued at Rs. 5,951,077/- in terms of section 50 (A) (b) of the Customs Ordinances read with section 27 (2)(b) of the Greater Colombo Economic Commission Act. No. 4 of 1978. He also imposed a penalty of Rs.100 000/- each on Mr. Thejawani, Managing Director Haskell Lanka (Pvt) Ltd, Mr. Ismail Osman and Mr. U. Wijesuriya in terms of section 129 of the Customs Ordinances. The inquiry officer severely warned Mr.. Rohan Rodrigo and discharged him.

Subsequently Haskell Lanka (Pvt) Ltd. wrote to the Director General of Customs seeking the release of the said vehicle, and the Director General by the order dated 22.02.1999 ordered the release of the said vehicle to the said company on total fiscal levies leviable as if the vehicle has been cleared under the normal law.

At the hearing of this application, counsel for the petitioner contended that once an item is forfeited in terms of the provisions of the Customs Ordinance, the Director General has no power to release the same acting in terms of section 163 of the Customs Ordinance. The only power the Director General has in terms of section 163 is to mitigate a forfeiture or penalty should he deem such forfeiture or penalty is unduly severe. Section 163 of the Customs Ordinance reads thus:

“In all cases in which under this Ordinance any ships, boats, conveyances, goods or other things have become liable to forfeiture, or have been forfeited, and in all cases in which any person shall have incurred or become liable to any penalty, it shall be lawful for the collector, should he deem such forfeiture or penalty unduly severe, to mitigate the same; but all cases so determined by the collector shall nevertheless be liable to revision by the minister.”

The power of the restoration of seized goods is given to the Minister under the Customs Ordinance who may do so on such terms and conditions as he thinks fit under section 164 and section 165 of the Customs Ordinance. Section 164 reads thus:

“In case any goods, ships or boats shall be seized as forfeited, or detained as undervalued, by virtue of this Ordinance, it shall be lawful for the Minister to order the same to be restored again in such manner and on such terms and conditions as he shall think fit to direct; and if the proprietor of the same shall accept the terms and conditions prescribed by the Minister he shall not have or maintain any action for recompense or damage on account on such seizure or detention and the person making such shall not proceed in any manner for the purpose of obtaining the condemnation thereof.”

Section 165 of the Customs Ordinance reads thus :

“The Minister may, by any order made for that purpose, direct any ship, boat, goods or other commodities whatever, seized under this Ordinance, to be delivered to the proprietor thereof, whether condemnation shall have taken place or not, and may also mitigate or remit any penalty or fine or any part of any penalty or fine incurred under this Ordinance, or may release from confinement any person committed under this Ordinance, on such terms and conditions as to him shall always appear to be proper:

Provided always that no person shall be entitled to the benefit of any order for such delivery, mitigation, remission or release, unless such terms and conditions are fully and effectually complied with.”

I am in total agreement with the submission of the petitioner's counsel. Deputy Solicitor General Mr. Wijayatilake who appeared for the respondents who stated that after a careful examination of the law relating to the above matter the Attorney General has advised the Customs Department that

the Director General has no power to release goods which have been forfeited.

In the circumstances I hold that the order of the Director General to release the vehicle to Haskell Lanka (Pvt) Ltd. is ultra vires the power vested in him.

I direct to issue a writ of certiorari to quash the order dated 22.02.1999. Application is allowed. I make no order with regard to costs.

*Certiorari issued to quash the order dated 22.02.1999*