1966 *Present :* **T. S. Fernando, J., and Sri Skanda Rajah, J.**

THE ATTORNEY-GENERAL, Appellant, *and*
T. SATHASIVAM, Respondent

S. C. 623 of 1964—D. C. Jaffna, 2279/M.

Customs Ordinance (Cap. 235)—Seizure of goods as forfeited—Action instituted by person claiming to be owner of the goods—Burden of proof—Sections 44, 129, 130, 154, 162.

1,012 wristlet watches, which were found in the possession of one A, were declared by the Collector of Customs as forfeit under the Customs Ordinance. Subsequently the plaintiff claimed to be the owner of the watches and instituted the present action in compliance with the requirements of section 154 of the Customs Ordinance.

Held, that, inasmuch as the action was instituted pursuant to section 154 of the Customs Ordinance, the burden of proof was on the plaintiff to establish that he was the owner of the wristlet watches.

APPEAL from a judgment of the District Court, Jaffna.

L. B. T. Premaratne, Crown Counsel, with *H. L. de Silva*, Crown Counsel, for the defendant-appellant.

B. C. F. Jayaratne, with *S. Sharvananda*, for the plaintiff-respondent.

Cur. adv. vult.

July 12, 1966. T. S. FERNANDO, J.—

In the early afternoon of the 21st July 1962, two constables of the Jaffna Police Station seized a man (referred to hereinafter as Andiapillai) who had arrived by the train reaching Jaffna from Colombo. Carrying a cardboard box on his head, Andiapillai walked out of the 3rd class exit of the railway station towards a car parked in the railway yard. Before he could put the box in the car the constables arrested him. The car drove away. Andiapillai and the box were taken into the railway booking office. He remained mute when questioned as to his name, the contents of the box and to whom it belonged. He was therefore taken to the Police station. There Andiapillai was given by him as his name and he also furnished an address in Jaffna. He refrained, however, from giving the name of the owner of the box or from saying what it contained. The police opened the box and inside it under a protecting gunny covering was a sealed biscuit tin. Inside this tin elaborately wrapped were found no less than 1,012 wristlet watches, most of which were of popular Swiss manufacture.

The Police, suspecting the watches to have been stolen, began some investigations on that basis. Andiapillai was suspected of being an illicit immigrant and sent to a detention camp. Before 48 hours could elapse the Police ceased to suspect these to be stolen property and inclined to the belief that they were the subject of an attempt at illicit exportation. They therefore on the 23rd July 1962 took Andiapillai, the box and its contents to the Collector of Customs at Jaffna. This officer made certain inquiries and declared the watches forfeit under the Customs Ordinance (Cap. 235). Even at the stage of the Collector's inquiries Andiapillai did not claim the goods, nor indeed did anyone else come forward to claim them. The Collector imposed a forfeiture of a sum of Rs. 30,000, presumably acting in terms of section 130 read with section 163 of the Customs Ordinance.

Andiapillai was enlarged on bail on the 30th July 1962, and proceedings were instituted shortly thereafter against him in the Magistrate's Court of Jaffna. On the 31st July 1962, the plaintiff-respondent (referred to hereinafter as the plaintiff) wrote letter P1 to the Collector to say that he is the owner of all the wristlet watches taken from the possession of Andiapillai and claimed their return to him (the plaintiff). The Collector replied by P2 of the 9th August 1962 requesting the plaintiff to call at his office on the 13th August in connection with the claim made. The plaintiff then wrote letter P3 on the 12th August stating that he had been advised by his lawyers not to call at the Collector's office as the matter was pending in the Magistrate's Court. By the same letter the plaintiff called upon the Collector to " fix the necessary security under the provisions of the Customs Ordinance to make my claim in the District Court of Jaffna ". This was, no doubt, a reference to the security specified in section 154 of the Customs Ordinance.

Section 154 of the Customs Ordinance enacts that " all ships, boats, goods, and other things which shall have been or shall hereafter 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 in respect to ships, boats, goods, and other things seized and condemned for breach of such Ordinance, 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 ..... give notice in writing etc. .....and shall further give security to prosecute such claim....."

Section 162 of the same Ordinance enacts that " all ships and boats, and all goods whatsoever, which shall have been seized and condemned for a breach of this Ordinance, shall be disposed of as soon as conveniently may be after the condemnation thereof, in such manner as the Collector or other proper officer of customs shall direct."

The plaintiff, not having been the person from whom the goods were seized, but claiming to be the owner thereof, gave security as contemplated in section 154 and instituted the present action against the Attorney-General as representing the Crown, and prayed for the following reliefs :—

(*a*) a declaration that he is entitled to the 1,012 wristlet watches ;

(*b*) an order on the Collector to restore to him the said watches ;

(*c*) an order on the defendant to pay a sum of Rs. 105,000 in the event of the watches having perished or deteriorated or been disposed of ; and

(*d*) a refund of the security deposited.

At the trial the principal issue related to the question whether the plaintiff is the owner of these wristlet watches. The plaintiff who began his evidence by stating that he is a trader whose business is that of buying and selling wristlet watches went on to say that he is also a trader in dry fish and vegetables. He claimed he bought these watches about the year 1957 from a number of shops in Colombo. He stated that these watches had been taken to Jaffna after their purchase and were brought back to Colombo for the first time only on the 18th July 1962 in the hope of selling them there. As the prices at Colombo were not favourable, he decided to send them back to Jaffna through Andiapillai who, he said, was a broker and was travelling by train to Jaffna on the 21st July, although he himself was due to go to Jaffna next day by lorry with vegetables. He had decided to send the watches to Jaffna by train as he feared damage to them in transit if they were taken by lorry. Andiapillai did not ask him what the box contained nor did he tell him that it contained valuables.

The plaintiff reached Jaffna on the afternoon of the 22nd July and learnt that the parcel had not reached the place where it had been arranged that it would be deposited. He learnt also that Andiapillai was in custody, but did not go in search of him or to the Police station or to the Customs office.

The plaintiff admitted also that he had at no time imported wristlet watches and that he had no registered place of business either at Jaffna or in Colombo. He had no account books recording his purchases of these watches from time to time. He had at no time been assessed to pay income tax. According to him, he used to keep these watches at his residence at Valvettiturai.

It was part of the contention for the Crown that these watches became forfeit in terms of section 44 of the Customs Ordinance by reason of an attempt to export or take them out of Ceylon. The learned trial judge has held that there is no proof of such an attempt. In the view we take of the principal issue in the case, it is hardly necessary to say anything in regard to the finding in the court below as to the attempt to export. In

reaching that finding, however, the learned judge has altogether failed to appreciate the force of the evidence relating to the manner in which these watches were found packed at the time they were seized. In the words of the learned judge himself, the parcel was carefully packed. The watches were first wrapped individually in tissue paper and then in cellophane paper. Thereafter the packet was taped with insulating tape. Four such packets were then packed together into one packet. Four such larger packets were then packed together into a still larger packet which would then consist of 16 watches. Sixteen such larger packets each containing 16 watches were again wrapped into one bundle in cellophane paper. All 1,012 watches were put into larger packets after the fashion above described. The product was next wrapped in plastic paper and thereafter in brown cartridge paper. The package was then put into an empty biscuit tin which was thereafter sealed with lead. The sealed tin was then put into a gunny and wrapped and finally placed in a cardboard-box displaying the sign " Horlick's Malted Milk ". The Crown contended, I think with much justification, that a strong probability arose upon the evidence that this elaborate, almost water-proof packing was necessary not to prevent damage in transit from Colombo to Jaffna, but as a precaution against damage to the watches by contact with water in the event of transport across the sea between Ceylon and India.

At the trial, the plaintiff, although he stated he had purchased these watches at Colombo and that he had with him the cash memos given by the sellers in respect of them, did not produce a single such memo in evidence. His counsel did attempt to produce one such memo without calling the seller or someone on the latter's behalf to prove the genuineness of the document. On objection being properly taken on behalf of the defendant to this method of production the plaintiff's counsel withdrew the document. The learned trial judge, in spite of the non-production of these memos which the plaintiff represented he had with him, failed to draw a presumption which he might properly have drawn against the plaintiff by virtue of section 112 of the Evidence Ordinance; on the contrary, he referred to these memos as documents listed by the plaintiff in his list of documents and proceeded to treat such listing as a circumstance in favour of the plaintiff's claim that these watches belonged to him. In the result the learned judge came to make a clearly erroneous inference. The failure to produce documents establishing his purchase detracted greatly from the truthfulness of the plaintiff's claim. The other points relied on by the trial judge were that (1) the evidence of the plaintiff was uncontradicted and (2) the plaintiff knew the manner of the packing, the make and the number of the watches in Andiapillai's possession. In regard to the first of these two points, irrespective of the truth or falsity of the claim made by the plaintiff, I find it difficult to see how the Crown could reasonably have been expected to be ready to contradict the bare assertion of the plaintiff that he had purchased these watches; in regard to the second, the learned judge has lost sight of the

fact that the plaintiff came forward with any claim only after Andiapillai had been released on bail, at a time when he could have obtained from Andiapillai all the information he gave.

The important question at the trial was that of the onus of proof. The onus of establishing that he was the owner of these 1,012 wristlet watches was indisputably on the plaintiff. When he refrained from producing the best evidence of that ownership which he claimed to have with him, that should surely have told heavily against him. The trial judge has misdirected himself on the question of where the onus lay by referring to the case of *The Attorney-General v. Lebbe Thamby* [1]. It would be most unfortunate if courts come to apply that decision to all Customs cases irrespective of the nature of the goods concerned. There the Court was dealing with a case arising out of an alleged unlawful importation of gold bars which the Court there recognised as being goods which could have been imported as well as made locally.

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. It is necessary to emphasize that all goods which shall have been seized as forfeit under the Customs Ordinance are by section 154 " deemed and taken to be condemned " unless the claim is successfully prosecuted by the person from whom the goods were seized or by the owner or person authorised by the owner.

It would have been unnecessary to say more in this judgment had it not been for the reference by the learned trial judge to the case of *Tennekoon v. The Principal Collector of Customs* [2] upon which he has relied in holding that there has been a failure by the Collector to comply with a rule of natural justice. Here again, with all respect, that authority has been applied without reference to the nature of the proceeding before the District Court here concerned. In *Tennekoon's case* what was being resisted was not a forfeiture of goods but an attempt to recover a forfeiture or penalty imposed under section 129 of the Customs Ordinance. In spite of the phraseology frequently popular with officers of the Customs that they have " declared the goods forfeit ", the forfeiture of goods is something that attaches the moment the act prohibited by law has been

[1] *(1958) 61 N. L. R. 254.* [2] *(1959) 61 N. L. R. 232.*

committed. In the other case referred to by the learned trial judge, viz., *Omer v. Caspersz* [1], I was myself dealing with a point arising out of section 129 of the Customs Ordinance. These two cases therefore were of no relevance to the issues in the District Court.

For the reasons set out above, we allowed the appeal of the defendant, set aside the judgment and decree of the District Court and directed the dismissal of the plaintiff's action with costs in both courts.

SRI SKANDA RAJAH, J.—I agree.

Appeal allowed.