KALA TRADERS (PVT.) LTD. AND ANOTHER
VS
DIRECTOR GENERAL OF CUSTOMS AND OTHERS

COURT OF APPEAL
WIJEYARATNE, J AND
SRIPAVAN, J,
CA 2034/2004,
FEBRUARY 8, 9, 10, 2005,
APRIL 26, 27, 2005 AND
JUNE 15, 2005.

Customs Ordinance, sections 47 and 125- Sri Lanka Standards Institution Act, No. 6 of 1984-Importation of sugar- Classification of sugar into white and brown-Void - Basis of levy of customs duties - Who determines ? –Are the customs bound by standards set by Sri Lanka Standards Institution (SLSI) ? - Misinterpretation and suppression of material facts.

The petitioner is a sugar importer who imported a consignment of sugar described as plantation white sugar. The petitioner having made the customs declaration (cus-dec) for 4,000MT of sugar had discharged 324MT on the basis of the cus-dec. The petitioner contends that when it has taken delivery of 324MT, the 1st respondent demanded the petitioner not to discharge the sugar cargo, as the cargo was not entitled to the duty free concessions as the 1st respondent has taken a decision to classify white sugar as being sugar that contains a maximum colour of 200 ICUMA units and any sugar above 200 ICUMSA units would be classified as brown sugar. The petitioner contended that, the SLSI (4th respondent) had set a standard that plantation white sugar should contain a minimum polarization value of 99.2 degrees and its colour should be maximum of 500 ICUMA units and sugar less than 500 ICUMA units be classified as white sugar. The petitioner contended that the sugar imported had a colour of 400 ICUMSA units containing a minimum polarization value of 99.4 degree. The petitioner also contended that the decision of the 1st respondent to classify white sugar as sugar containing colour of 200 ICUMA units and sugar about the number of ICUMA units being described as brown sugar is totally arbitrary, illegal and ultra vires.

The respondent's contention was that, the basis of levy of customs duties is under the Customs Ordinance and its determination according to tariff guide according to which sugar is not distinguished as brown sugar and white but evaluated on the basis of polarization value. The respondents also contended that there was suppression and misrepresentation of facts, and the basis of cus-dec disclosed frauds.

HELD:

(1) The classification of goods so far as the customs declaration and or inquiry is concerned is not by the 4th respondent (SLSI) whose classification has no binding effect on the Sri Lanka Customs. The SLSI Act has no provision directing the Customs to adopt its standards for such purpose.

Per Wijayaratne, J

"The petitioners voluntarily submitted samples to the Government Analyst with sugar containing the colour 654 ICUMSA units disproving the very argument of the petitioner relying on the SLSI standards was well within the knowledge of the petitioner and the fact that they suppressed the result of the analyst from court alone is sufficient to dismiss the application.

Per Wijayaratne, J.

"The submission that no duty is leviable on any sugar whether white or brown has no relevance to the matter in issue, at the inquiry before the customs, because the application of section 47 can be on goods that are free of duty and the scope of the inquiry was to include goods that are free of any duty but still falling within the ambit of section 47".

(2) The consignment of goods that was imported needs classification/ categorization by the Customs Department and the determination whether any duty is leviable on the same. This has to be determined by the Customs Department through the inquiry under sections 8 and 47.

APPLICATION for a writ of certiorari / mandamus.

Cases referred to :

1. *Kandy Omnibus Co. Ltd. Vs. Roberts* (1954) 56 NLR 293
2. *Alphonso Appuhamy Vs. Hettiarachchi* (1973) 77 NLR 131
3. *Moosajee Ltd. Vs. Eksath Engineers Saha Samanaya Kamkaru Samithiya* - (1976-79) 1 Sri LR 285.
4. *Hulangamuwa Vs. Siriwardene* - (1986) 1 Sri LR 275
5. *Faleel Vs. Moonesinghe* - (1994) 2 Sri LR 501
6. *Laub Vs. Attorney General* - (1995) 2 Sri LR 88
7. *Malaffur and another Vs. M. B. Deragoda* -(1981) 2 Sri LR 483
8. *Wijesekera & Co. Vs. Principal Collector of Customs* - (1951) - 53 NLR 329.

M. A. Sumanthiran with Ms. Arulananthan for Petitioner.

Farzana Jameel, Senior State Counsel, *with Janak de Silva*, State Counsel for respondent.

Cur. adv. vult.

June 29, 2005,
WIJEYARATNE, J.,

The 1st Petitioner is the sugar importer who imported a consignment of 10,000 metric tons described as Plantation white sugar from Papua New Guinea on board the vessel "Ever Bright" which berthed in Colombo Harbour on 04.10.2004. The Petitioners having made custom's declaration (CUS-DEC) for 4,000 metric tons of sugar had discharged 324 metric tons on the basis of such CUS-DEC.

The Petitioners take up the position that on 05.10.2004 when it has taken delivery of said 324 metric tons, the Sri Lanka Customs under the 1st Respondent directed the Officer of the 1st Petitioner to cease to discharge the sugar cargo. The Petitioner was informed the cargo was not entitled to the duty free concession as the 1st Respondent has taken a decision to classify white sugar as being sugar that contains a maximum colour of 200 ICUMSA units and any sugar above 200 ICUMSA units would be classified as Brown Sugar. These Petitioner's contention that the Sri Lanka Standards Institution the 4th respondent has set standard for said plantation white sugar be contained a minimum polarization value of 99.2 degrees and its colour should be a maximum of 500 ICUMSA units, and sugar containing less than 500 ICUMSA units be classified as white sugar.

The Petitioners also alleged that a policy decision was taken by the Government of Sri Lanka to discontinue or cease an imposition VAT and import duty on white sugar as well as brown sugar.

However, a duty of Rs. 4.50 per kilogram was imposed upon imports of brown sugar and this decision was announced to the sugar importers including the 1st Petitioner at a meeting held at the Treasury on or about 01.01.2004. The Petitioners contend that the sugar imported had a colour of 400 ICUMSA units containing a minimum polarization value of 99.4 degrees which brings consignments within the classifications of plantation white sugar in terms of the standards set by the 4th Respondent.

The Petitioners alleged that the decision of the 1st Respondent to classify white sugar as sugar containing the maximum colour of 200 ICUMSA units and sugar above the said number of ICUMSA units being described as Brown sugar is totally arbitrary, illegal and ultra vires.

The Petitioners also alleged that an alteration of the SLSI (4th Respondent's) the classification of white sugar by the 1st Respondent and refusal to release the balance consignment 9676 metric tons of white sugar, the Petitioner described as plantation of white sugar, on such purported basis of dutiability on the part of the 1st and 2nd Respondents are arbitrary, unreasonable, illegal, null and void and of no force or avail in law. On such basis the Petitioners sought the grant of several mandates of writs of certiorari, mandamus and interim relief as contained in prayers 'a' to 'q' of the Petition.

Given notice the 1st to 3rd Respondents filed their objections to the application and the Respondents urged that the basis of levy of customs duties is under the provisions of Customs Ordinance and its determination according to Tariff Guide marked 2R15. According to which sugar is not distinguished as brown sugar and white but evaluated on the basis of polarization value. They also urged that the customs did not go by the standards set by the 4th Respondent to determine the classification of the goods and the levy of duty according to the standards set by the 4th Respondent.

It was their contention that even if it is to be accepted for the purpose of argument that any sugar beyond the unit value of 500 ICUMSA is to be considered brown sugar they further took up the position that the purported certificate issued by the 4th Respondent's employee is disclaimed by the 4th Respondent institution and the report of the Government Analyst on samples submitted by very Petitioners indicates that it has a colour of 654 ICUMSA units which fact the Petitioners did not disclose. The Respondents also urged that the 1st and 2nd Respondents are entitled to investigate and inquire into the matter of classification of consignment of goods *vis-a-vis* CUS-DEC submitted by the Petitioner. They sought a dismissal of the Petition on the basis of suppression of material facts and misrepresentation of facts and further on the basis of CUS-DEC which, they submitted, disclosed frauds.

When the matter was taken up for argument learned counsel for the Petitioners took pains to describe the process of classification and the use of Sri Lanka Standards Institution standards for the identification of goods. His argument was that the Customs Department is bound to follow the standards set by the SLSI, the 4th Respondent. He even referred to the objects and scope of the 4th Respondent.

However, what the learned counsel failed to establish is that the Customs Department is obliged to follow the standards set by the 4th Respondent in the categorization of goods by the Customs Department and the 1st and 2nd Respondents in the imposition of import or export duties or to relate the duty free structure to such goods. The SLSI Act, No. 6 of 1984 certainly has no provision directing the Customs to adopt its standards for such purpose.

It is my view that this position was very clear in the minds of the Petitioners who themselves have submitted samples drawn from the consignment of sugar to the Government Analyst for classification and identification of colour in terms of ICUMSA units. The Petitioners concede having submitted samples for analyst and it is for no other purpose than to classify the goods as they described the consignments as plantation white sugar. This is a clear admission, the proper authority is the Government Analysts and the classification of goods so far as the Customs declaration and or inquiry is concerned is not by the 4th Respondent SLSI whose classification has no binding effect on the Sri Lanka Customs, under the 1st Respondent.

In my view it is because the Petitioner so mere convention report by the Government Analyst to bring it within their classification of plantation of white sugar and not fall within the categorization of goods by the 1st Respondent. It is significant to note that upon voluntary submission by the Petitioner the samples of the consignments of sugar imported, the Government Analyst has reported it to contain 654 ICUMSA units bringing the same within the classification or category of brown sugar.

Even according to the standards set by the 4th Respondent, the respondents have submitted, that the report of the Government Analyst 2R3, certified that the sugar imported fell within the description of Brown sugar. It is to be noted that the Petitioner having the benefit of the reports of the analysis done by the Government Analyst neither submitted it to the 1st and 2nd Respondents nor to this Court, in support of their claim that the consignment of sugar imported is white sugar and not brown sugar, knowing very well that the result of the analysis did not support their contention. It is this position that the Respondents referred to as suppression of material facts. Learned counsel for the Petitioner in the

course of his arugument proposed to submitted that though the Petitioners concede that fact of having submitted samples for analysis by the Government Analyst, they did not receive the report from the Government Analyst and that is why the same is not referred to in their application to this Court.

However in the course of the argument learned counsel for the Respondent through the production and submission of relevant registers maintained by the Department of the Government Analyst established that very employee who had subsequently made statement to the customs has collected the report. In the course of their investigation it was further disclosed that it was this very employee of the 1st respondent who made fraudulent attempt to defraud the revenue by importing the consignments of sugar as plantation white sugar has collected this report. Accordingly it is made quite clear that as at the time of presenting this application to this Court seeking several mandates of writs as sought therein the Petitioners were fully aware or at least ought to have been aware that the report of the Government Analyst made on the voluntarily submissions of samples by the Petitioner did not support their contention that the consignments of sugar being the plantation white sugar and not brown sugar, as the Petitioners are now trying to make out. It was also established by the very statement on behalf of the Petitioner that they did not receive the report when in fact their employees have collected the report, an attempt on the part of the Petitioner to suppress this material facts is willful and with ulterior motive of not disclosing the true postition to this Court.

In the course of the argument the Respondent's counsel referred to result of on going investigation which reveals that the Petitioners had a design to avail the benefit of duty free imports by describing the articles differently from its true positions, when compared with the documents declarations and connected documents submitted to the bank for the purpose of obtaining letters of credit facilities. All these descriptions given there vary from the true categorization of the consignments and these are relevant to the determination as to whether any duties are payable, are matters for the Customs' Department.

It is not for this Court to determine any of such material facts. The Petitioners concede their having submitted the Customs declaration and inquiry being commenced by the 1st and 2nd Respondents under section 8 of the Customs Ordinance.

In the event of the Customs Department under the 1st Respondent and investigation carried out by the 2nd Respondent revealing that the consignment of goods described therein did not answer the description given there, then the matter falls within the ambit of section 47 of the Customs Ordinance.

The argument of the counsel that there is no duty payable on sugar according to the Revenue Protection Orders or the Customs Ordinance published in the Gazette is not a relevant fact for the reason that the application of the provision of section 47 of the Customs Ordinance did not depend on the liability of goods for the levy of customs duty or otherwise.

Section 47 reads : "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 the warehouse, or **whether such goods be free of duty** shall deliver to the Director General a bill of entry of such goods ....."

Accordingly the submissions made by the learned counsel for the Petitioner that no duty is leviable on any sugar whether white or brown has no relevance to the matter in issue, at the inquiry before the Customs, because the application of section 47 can be on goods that are free of duty and the scope of the inquiry may include the goods that are free of any duty but still falling within the ambit of section 47.

The arguments on the part of the Petitioner specially the submissions made by the counsel for the Petitioner on the effect of Revenue Protection Ordinance, the application of the legal provisions and effect of the same on the Gazette notification XI to X4 therefore has no relevance for the matter in issue here because even if no duty was leviable in view of any of this notification, or any such notification not having the effect of law still the 1st and 2nd Respondents are empowered under the Customs Ordinance to proceed with their investigation to examine the classification of goods and determine whether they agree with the description given in the declaration admittedly made by the Petitioner. I am not in a position to disagree with the learned counsel for the Respondent that this argument was an attempt to vary the basis of the application made to the Court. However the undisputed position is that the consignments of goods that was imported by the Petitioner needs classification/categorization by the Customs Department through the 1st and 2nd Respondents and

determination whether any duty is leviable on the same. This has to be determined by the 1st and 2nd Respondents through the inquiry under the provisions of the Customs Ordinance more particular sections 8 and 47 thereof. Pending such inquiry provision of section 125 authorizes and empowers the 1st and 2nd Respondents to seize such goods. The Petitioner has sought the Customs inquiry to proceed and through the argument of this case with the consent of the Petitioner, the custom inquiry has commenced and is proceeding. In such situation, there is no reason for this Court to interfere with such inquiry merely on the basis of categorization/classifications of goods according to the Petitioner which through the acts of the Petitioner itself proved to be different from the classifications they sought to give the goods.

Besides there is a presence of misrepresentation and suppression of facts. In the case of *Kandy Omnibus Co. Ltd Vs Roberts* [1], it was observed that the Petitioner "must be frank with the Court and must not suppress material facts or practice anything like deception."

Again in the case of *Alphonso Appuhamy Vs Hettiarachchi* [2] Pathirana, J observed that "there is always the need for a full and fair disclosure of all material facts to be placed before the Court when an application for a writ or injunction is made of other words, so rigorous is the necessity for a full and fair disclosure of all material facts that the Court will not go into the merits of the application, but will dismiss it without examination."

In the case of *Moosajees Ltd Vs Eksath Engineru Saha Samanya Kamakru Samithiya* [3] *Hulamgamuwa Vs Siriwardena*[4] *and Faleel Vs Moonesinghe* [5]. Following the decisions referred to above, refused the application for writs on the failure of the Petitioner to disclose the material facts in his pleadings.

In the case of *Laub Vs Attorney-General* [6].Court even found that the application could be dismissed *in limine* as the Petitioner had suppressed material facts and had not acted with uberrimei fides.

In the instant case the Petitioners voluntarily submitted samples to the Government Analyst with sugar containing the colour of 654 ICUMSA units disproving the very argument of the Petitioner relying on the SLSI standards was well within the knowledge of the Petitioners and the fact that they suppressed the result of the analysts from this Court alone is sufficient to dismiss this application. Beside such position of suppression of material

facts, the legal position is also clear that the 1st and 2nd Respondents are entitled to investigate and inquire into the matter of identification/ categorization/classification of the consignments of goods imported, in relation to the description given in the CUS-DEC and consider whether the goods agreed to description given in the CUS-DEC. To interfere with this duty by way of a mandate issued in this Court would not be a review of an administrative decision but would amount to preventing the Customs Ordinance being given effect to, by the intervention of this Court.

Learned counsel for the Petitioner submitted that in the case of *Mulaffer and another* Vs *M. B. Dissanayake* [7], this Court having held that "when goods are correctly categorized and correct particulars are given in the bill of entry, insistence that goods are correctly classifiable under a different heading which attracts heavier duty is a refusal to perform a public duty and mandamus will lie."

The said judgment followed the decision in *Wijesekera & Co.* Vs *The Principal Collector of Customs* [7], where it was held that 'to insist upon the bill of entry being incorrectly filled up in such a manner that, upon the face of the document, the exporter would be liable to pay a heavier export duty than was justly due, would amount to a refusal to perform a public duty. In that event mandamus would clearly lie."

In both these cases, the most material fact was that goods were correctly categorized and correct particulars were given in the bill of entry, in other words true particulars as to the quantity, value, etc has been given in the declaration.

In the instant case, it is not the position that the Petitioners having given the true particulars or correct categorization of the goods but a case of Petitioners attempting to describe the goods under the category which attracted no duty and as a result of their own act and deed in obtaining Government Analyst Report, established that their description of goods in the Bill of entry did not agree with the consignments of goods. Therefore the above decisions have no application to the facts and material in this case.

Accordingly the application of the Petitioners is dismissed with costs fixed at Rs. 10,000/-.

SRIPAVAN, J. - I agree.

Application dismissed.