

DIAS
v.
DIRECTOR GENERAL OF CUSTOMS

COURT OF APPEAL
J. A. N. DE SILVA, J. (P/CA)
C.A. 971/2000
JANUARY 25, 2001
MARCH 30, 2001
MAY 11, 2001

Customs Ordinance S.8(1), 9(1), 125, 129, 130, 135, 163 - Seizure - Bonafide - reasonable suspicion - Inquiries - Rules of Natural Justice.

The Motor vehicle which was 'Assembled' by the petitioner locally and pending Registration was seized by the Customs Officers. It was contended that such seizure was illegal and made without jurisdiction, as the parts from which the Jeep had been manufactured had been imported lawfully, and that the order of seizure purported to have been made under S.135 is totally without jurisdiction in as much as such a seizure can be effected only if objectively there is material to suggest that it is liable to forfeiture.

Held :

- (i) It is clear that, the notice of seizure issued is not a final determination.
- (ii) The scheme of the Customs Ordinance recognises and gives an opportunity to the person whose goods are seized to vindicate himself at a subsequent inquiry. Court would interfere only if the statutory procedure laid down is insufficient to achieve justice.' There is nothing wanting in that procedure set out in the Customs Ordinance.
- (iii) In the instant case the Customs Officers had reliable information warranting further probing.

APPLICATION for a Writ of Certiorari.

Cases referred to :

1. *Attorney-General v. Wimaladharma* - 78 NLR 327 at 333
2. *Wiseman v. Borneman* - 1971 AC 298
3. *Peerlberg v. Varty* - 1972 2 All ER 6
4. *R v. Raymond* - 1981 2 All ER 246
5. *Furnell v. Whangurai High School Board* - 1973 AC 660

Faiz Musthapha P.C., with *Mahanama de Silva* for Petitioner.

Sanjeewa Samaranayake S.C. for Respondents.

Cur. adv. vult.

May 11, 2001.

J. A. N. DE SILVA, J. P/CA

The petitioner has sought a mandate in the nature of a writ of Certiorari to quash the seizure of a motor vehicle (Toyota Land Cruiser) which according to the petitioner was assembled locally and pending registration.

The relevant facts as mentioned in the petition are as follows. The petitioner claims to be a motor vehicle repair technician with a wide experience of nearly thirty years. He is the main partner of Dias Motor Engineers and sales which is a duly registered business. The petitioner's firm has been in the business of assembling tractor - trailers for sale in the local market and the trailers sold by the petitioner had been duly registered by the Registrar of Motor Vehicles. In or about the year 1999 the petitioner became interested in the assembly of motor vehicles locally. He states that his inquiries revealed that this was being done by local businessmen and that it was more profitable to manufacture a motor vehicle out of parts which are freely available in the local market.

The petitioner's son too runs a business of his own under the name of Dias Motor Enterprises and is engaged in the importation and sale of used auto parts, used tractor and used tractor parts. The petitioner states that he purchased a nose - cut engine of a Toyota Land Cruiser Jeep for a sum of Rs. 125,000/= from the son in January 2000. In March 2000 the petitioner purchased a windscreen, tyres and other accessories to assemble a Jeep from several local dealers. Thereafter on 02. 04. 2000 the petitioner purchased a diesel engine bearing No. 2K2881629 and a back half cut of a Toyota Land Cruiser from Sachitra Enterprises of Malkaduwwa, along with other miscellaneous parts for a sum of Rs. 533,106/= In

June 2000 he completed the "manufacture" of the said Toyota Land Cruiser Jeep at his workshop at Kurunegala.

The said Jeep had not been registered and on 28th of June 2000, 2nd - 5th respondents (Customs Officers) visited the petitioner's workshop and seized the same issuing P9, the notice of seizure. Customs Officers have also taken into custody a number plate bearing registration No 65 - 0927 which they alleged that the petitioner had used for this Jeep.

On behalf of the petitioner Mr. Faiz Musthapha Presidents Counsel contended that the seizure was illegal and made without jurisdiction as the parts from which the Jeep had been manufactured had been imported lawfully into Sri Lanka.

The learned Counsel further submitted that the order of seizure purported to have been made under Section 135 of the Customs Ordinance is totally without jurisdiction in as much as such a seizure can be effected only if objectively there is material to suggest that it is "liable to forfeiture under the Customs Ordinance". He drew the attention of Court to a passage in the Judgement of Justice Tennekoon in *Attorney General v. Wimaladharmapriya*⁽¹⁾ at 333 dealing with Section 125 which is on similar terms.

"It does not mean that any goods may be seized by officers of customs according to whim and fancy it only means that an officer of customs bona fide acting as such may seize any goods which he has reason to suspect are forfeited or liable to forfeiture. . . . To use the words adopted by the legislature itself. . . . though in another context the officer of customs seizing goods under Section 125 must have "probable cause" for such seizure."

It was the submission of Mr. Musthapha that in the instant case there is no such material and therefore the seizure is totally without jurisdiction.

It is therefore relevant to consider the scope of the power of seizure under the Customs Ordinance.

The Customs Ordinance contains many provisions dealing with situations in which goods are forfeited. To mention a few Sections 27, 30, 33, 34, 38, 43, 47, 50, 55, 59, 75, 80, 107, 118, 121 and 125. From the above Sections it is clear that there are many grounds on which customs officers may seizure goods as forfeited.

At this stage it is relevant once again to refer to the Judgment of Justice Tennekoon in *Attorney General v. Wimaladharama (supra)* where he says ". . . the words in Section 125 which give power to seize goods declared under the Customs Ordinance to be forfeited must be read as meaning that the customs officer may seize goods only if he has reasonable ground for suspecting that the goods are uncustomed or goods imported contrary to any prohibition or restriction and are for that reason forfeit."

From the above observations it is clear that a customs officer making seizure must act bona fide and on the basis of a reasonable suspicion. This denotes the commencement of a customs investigation. Further steps may also be taken under Section 9(1) of the Ordinance to issue statutory notices for production of relevant documents. Inquiries may also be made under Section 8(1) for this purpose any person could be examined on oath. These inquiries under Section 8(1) are generally a sequel to the investigation in which relevant evidence may be gathered to provide the foundation for an inquiry, charges are framed and the statutory election made under Section 129 or 130 at the conclusion of this process. In terms of Section 163 the Director General of Customs may mitigate the forfeiture or penalty and the decision is subject to review by the Minister.

The question that has to be decided is that whether the seizure effected by 2nd - 5th respondents (Customs Officers) should be considered as a final decision. As set out earlier from the scheme of the act it is clear that (P9) is not a final determination. The petitioner in the petition takes up the following positions.

- (a) That the rules of natural justice required the petitioner to be heard before the said seizure was made.
- (b) That the seizure was therefore liable to be quashed by a writ of certiorari.

It should be noticed that *bona fides* of Customs Officers have not been impugned by the petitioner apart from the vague averment at paragraph 29 of the petition which had been denied by the respondents.

In the absence of an allegation of abuse of discretion the only other question that has to be decided is whether the petitioner should be given a hearing before the seizure is effected.

The learned State Counsel who appeared for the respondents submitted that there is no requirement under the Customs Ordinance to afford a hearing to a person before the seizure. It was his submission that the power of seizure conferred on customs officers could be characterized as a purely executive act analogous to and bearing a close resemblance to the power of arrest conferred on police officers. A seizure may be lawful and justified even though it is subsequently found either by the Director General of Customs or by the District Court that a forfeiture cannot be supported on evidence. In support of this contention the learned State Counsel relied on the decisions of the following cases. *Wiseman v. Borneman*⁽²⁾, *Peerlberg v. Varty*⁽³⁾, *R v. Raymond*⁽⁴⁾ and *Furnell v. Whangurui High School Board*⁽⁵⁾.

In *Wiseman v. Borneman*(*Supra*) the tribunals' function was to decide whether on the basis of the documents submitted to it by the taxpayer and by the Inland Revenue, there was a *prima facie* case for the Revenue to recover unpaid tax. Lord Reid in that case made the following observation.

"Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a *prima facie* case, but no one supposes that justice requires

that he should first seek the comments of the accused or the defendant on the material before him. So there is nothing inherently unjust in reaching such a decision in the absence of the other party."

The scheme of the Customs Ordinance recognizes and gives an opportunity to the person whose goods are seized to vindicate himself at a subsequent inquiry. It should be kept in mind that the Court would interfere only if the statutory procedure laid down is insufficient to achieve justice. I hold that there is nothing wanting in the procedure set out in the Customs Ordinance.

In the instant case the Customs Officers commenced their investigation pursuant to information that this Jeep was running under a false number plate (vide paragraph 7(a) of the 2nd respondent affidavit). The veracity of this information is confirmed by paragraph 20 and 25 of the petition wherein admissions are made by the petitioner, that the Jeep was used on the road and secondly that he was in possession of a number plate of another vehicle. Subsequently investigations revealed that the registration number 65 - 0927 belonged to one Kapuduwe Nandasiri Thero who had made a statement to the customs that he never sent his vehicle to the petitioner for repair (vide 2R5). Accordingly the customs officers have reliable information which warranted further probing.

I hold that the petitioner failed to establish any illegality on the part of the respondents. If the petitioner is now in possession of all the documents to establish that duty has been paid for all parts used for the Jeep he may produce them at the inquiry. This application is dismissed with costs.

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