1975 *Present :* **Tennekoon, C. J., Pathirana, J., and Weeraratne, J.**

S. M. SEYADU IBRAHIM, and another, Appellants, *and* THE ATTORNEY-GENERAL, Respondent

S. C. 377/69 (F)—D. C. Kandy 10364

Customs Ordinance—Sections 154 *and* 155—*Failure to make "oath to the property" as required by Section* 155— *Does non-compliance with Section* 155 *deprive court of jurisdiction—Are the provisions of Section* 155 *directory or mandatory.*

The appellants instituted action against the Attorney-General claiming certain wrist watches seized as forefeit under the provisions of the Customs Ordinance. The action was dismissed on the ground that the "oath to the property" as required by Section 155 of the Customs Ordinance was not filed in Court at the time the plaint was filed, although an affidavit affirming to the ownership of the wrist watches was subsequently filed in Court before the date of trial.

Held, that the requirement of making "oath to the property" in terms of Section 155 of the Customs Ordinance is directory and not mandatory as to the time at which or before which such "oath" should be filed in Court. The requirement of an affidavit of ownership is procedural in character and the failure to comply with it does not deprive the Court of jurisdiction.

APPEAL from a judgment of the District Court, Kandy.

C. Ranganathan, with *Nimal Senanayake* and *U. C. B. Ratnayake,* for the plaintiffs-appellants.

K. M. M. B. Kulatunga, Deputy Solicitor-General, with *M. M. Zuhair,* State Counsel, for the defendant-respondent.

Cur. adv. vult.

December 2, 1975. TENNEKOON, C. J.—

This is an appeal from the judgment of the District Judge of Kandy dismissing an action instituted by the appellants in which they claimed certain wrist-watches seized by officers of the Customs; the learned District Judge dismissed the claim of the appellants for failure to comply with certain provisions of Section 155 of the Customs Ordinance. The facts on which the submission that the plaintiffs-appellants could not proceed with the action, because they had failed, in compliance with Section 155 of the Customs Ordinance, to "make oath to the property" at the proper time are as follows:—

Date of seizure of watches—20.1.67.

Date of notice of intention to enter a claim and enquiry as to quantum of security to be deposited—12.2.67.

Date of PCC's letter to plaintiffs requesting deposit of Rs. 750 against costs of action—22.2.67.

Date of deposit of security for costs—7.3.67.

Date of filing plaint in the District Court of Kandy—27.3.67.

No affidavit or document of any kind was filed with the plaint.

The answer of the Attorney-General was filed on 3.8.67, and plaintiffs' replication on 7.8.67. Trial was fixed for 13.9.67. Before that date, however, the plaintiffs on 6.9.67 filed an affidavit affirming to their ownership of the wrist watches that had been seized. There was nothing in this affidavit regarding the giving of notice and security under section 154 of the Customs Ordinance. Trial was ultimately taken up only on 10.5.1969.

Some of the issues together with the answers the learned District Judge gave were—

"12. Have the plaintiffs failed to comply with the provisions of section 155 of the Customs Ordinance in that they have failed to make oath to the said wristlet watches as required by the said section ?—*A* : Yes.

13. If issue 12 is answered in the affirmative, could the claim of the plaintiffs have been admitted by the court ?—*A* : No.

14. Have the plaintiffs provided security to prosecute this claim before this Court and to pay costs within the time specified in section 154 of the Customs Ordinance ?—*A*: Yes, in view of answer to issues 18 & 19.

15. If issue 13 and/or 14 is answered in the negative, can the plaintiffs have and maintain this action ?—*A* : No, in view of answer to issue 13.

18. (*a*) Did the Principal Collector of Customs fail and neglect to nominate the amount of the seizure of the wrist-watches ?—*A* : Yes.

(*b*) Did the Principal Collector of Customs nominate the amount of security at Rs. 750 by letter dated 22.2.67 ?—*A* : Yes.

(*c*) Did the Principal Collector of Customs receive the said sum as security on 7.3.67?—*A*: Yes.

19. If issue 18 (*a*), (*b*) and (*c*) are answered in the affiirmative, can the plaintiff maintain this action ?—A: Yes.

The submissions of Counsel on these issues which were taken up independently of and before the other issues, proceeded on the basis of the following documents which were marked and tendered to Court after issues were framed—

P1. Letter dated 20.1.67 by which the PCC informed the plaintiffs, *interalia*. that the watches seized on 15.1.67 are forfeited.

P2. Letter dated 1.2.67, which stated, *inter-alia*, that the plaintiffs should also forfeit a sum of Rs. 1,000 under section 129 of the Customs Ordinance.

D1. Letter dated 12.2.67 by which plaintiffs gave notice of intention to enter a claim and requesting PCC to state what amount should be deposited against cost of action.

P3. Letter dated 12.2.67 by which PCC nominated a sum of Rs. 750 as the amount to be deposited as security.

P5. PCC's official receipt dated 7.3.67 for the sum of Rs. 750 deposited with him by the plaintiffs.

P4. The affidavit dated 6.9.67 testifying to the ownership by the plaintiffs of the wrist-watches forfeited by the Customs Authorities. (This affidavit not filed in Court with the plaint which was filed on 27.3.67 but filed subsequently on 6.9.67.)

The learned District Judge answered the issues in the manner indicated earlier and in view of his answers to issues 12 and 13 dismissed the plaintiffs' action, but as there was a claim in reconvention by the Attorney-General he ordered the case to be called on a later date to fix a date for the trial of that claim.

Section 154 of the Customs Ordinance reads as follows :—

"All ships, boats, goods, and other things which shall have been or shall hereafter be seized as forfeited under the 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, within one month from the date of seizure of the same, give notice in writing to the Collector or other chief officer of Customs at the nearest port that he intends to enter a claim to the ship, boat, goods, or other things seized as aforesaid, and shall further give security to prosecute such claim before the Court having jurisdiction to entertain the same, and to restore the things seized or their value, and otherwise to satisfy the judgment of the Court and to pay costs. On such notice and security being given in such sum as the Collector or proper officer of Customs at the port where or nearest to which the seizure was made shall consider sufficient, the ship, boat, goods, or other things seized shall, if required, be delivered up to the claimant ; but if proceedings for the recovery of the ship, boat, goods, or other things so claimed be not instituted in the proper Court within thirty days from the date of notice and security as aforesaid, the ship, boat, goods, or other things seized

shall be deemed to be forfeited, and shall be dealt with accordingly by the Collector or other proper officer of Customs."

In the present case, notice of intention to enter a claim and the giving of security were not done on the same day. Notice of intention was given in due time and at the same time inquiry was made as to the amount of security that ought to be deposited ; the Principal Collector, however, informed the plaintiffs of the amount of security to be deposited only after one month had elapsed from the date of seizure. An objection taken by the Attorney-General that the security was not deposited within one month of the seizure was rightly over-ruled by the learned District Judge, because the Principal Collector had informed the plaintiffs of the amount of the security only after one month had elapsed from the date of seizure. Security was deposited on 7th of March, 1967. Section 154 requires action for recovery of the goods to be instituted within thirty days from the date of notice and security ; but where the giving of notice and the giving of security are validly effected on two different dates, the thirty days within which action has to be instituted must necessarily run from the latter of those two dates. Thus the plaintiffs in this case had to institute action on or before the 6th of April 1967. The present action was instituted on the 27th of March, ten days before the expiry of thirty days from 7th March, 1967. This was within time and indeed the Attorney-General took no objection on that score.

Section 155 of the Customs Ordinance may, without altering its sense or any of its words, be conveniently set out as follows

No claim to anything seized under this Ordinance shall be admitted by such Court—

(*a*) unless such claim be entered in the name of the owner, with his residence and occupation, (hereinafter referred to as clause (*a*)) ; nor

(*b*) unless oath to the property in such thing be made by the owner, or by his attorney or agent by whom such claim shall be entered, to the best of his knowledge and belief, (hereinafter referred to as clause (*b*)) ; nor

(c) unless the claimant shall at the time of filing his libel or plaint to establish his claim, satisfy the Court that he has given notice and security as in section 154 enacted, (hereinafter referred to as clause (c)).

Apart from complying with the provisions contained in these two sections, a person seeking to have his claim to goods seized under the Customs Ordinance adjudicated upon by a Court would also have to comply with section 461 of the Civil Procedure Code. Thus one sees that the Customs Ordinance, an Ordinance enacted in 1869 erected several barriers in the path of a claimant desiring a judicial hearing of his claim.

The question whether clause (a) is satisfied can be resolved on a mere reading of the plaint. Clauses (*b*) and (*c*) require in the one case an affidavit, and in the other either an affidavti or the production of such documents, as would satisfy the Court that the notice and security provided for in section 154 have been given. Under clause (c) the plaintiff is required to 'satisfy' the Court ; a mere unsworn averment in the plaint is insufficient to 'satisfy' a Court. Any statement in the plaint that notice and security have been given must be supported either by an affidavit or by the production of the documents necessary for the Court to form an opinion as to whether notice and security have been given.

It will be noticed that the provisions of section 154 are substantival in character and that some of the provisions of section 155 can be categorised as substantival in nature and others as merely procedural. Clause (*a*) is substantival in nature for it virtually says that the right to institute action for recovery of goods seized vests only in the owner.

The requirement in clause (*b*) is procedural for clause (*a*) having already said that the action can only be instituted in the name of the owner, clause (*b*) goes on to say only that the ownership alleged in the plaint must be supported by an affidavit of ownership made by the owner or by his Attorney or Agent.

The condition in clause (*c*) is also procedural. The parallel substantival requirement is contained in section 154 which enacts that notice and security must be given within a certain time, and action also instituted within a certain time.

It is to be noted that clause (*c*) contains the words "at the time of filing his libel or plaint"; these words do not occur in clause (*b*); nor can these words be grammatically read as qualifying the requirement of an oath in clause (*b*).

Section 154 uses the expression: "If proceedings for the recovery of the goods be not *instituted* in the proper Court", and Section 155 starts off with the words "no claim to anything

seized under this Ordinance shall be *admitted* by such Court ". There is obviously a difference between a party ' instituting ' an action and the Court ' admitting ' a claim.

The failure to comply with the provisions of section 154 would result in a claimant being deprived of the right to institute and maintain an action for recovery of goods seized as forfeit. The effect of clause (*a*) is also similar in content in that no person other than the owner can institute such an action.

Clauses (*b*) and (*c*) are ancillary to these provisions and are a procedural barrier erected by utilising a Court's power to reject a plaint if there is no prima facie and exparte material to satisfy the Court that the substantive provisions are satisfied. Even if the oath to property is made before summons is issued and material to satisfy the Court that noitce and security have been duly given, is tendered to Court together with the plaint, the defendant is not deprived of the right of raising issues and defeating the action on the ground that the plaintiff is not the owner or that the plaintiff has failed to give notice and security in terms of section 154.

If, on the other hand, the plaintiff fails to comply with the requirements imposed by clauses (*b*) and (*c*) what would be the position ? The answer to that question would depend on the further question : What purpose are clauses (*b*) and (*c*) intended to serve ? The section starts with the words " No claim..... shall be admitted by such Court ". In the context in which this provision appears I am convinced that the thrust of the section is not jurisdictional in the sense that non compliance with clauses (*b*) and (*c*) would deprive the Court of jurisdiction, but only to make it obligatory on the claimant as a matter of procedure to comply with those clauses. In this view of the matter the implication of the provision is not that the Court shall reject the plaint or libel if clauses (*a*), (*b*) and (*c*) are not satisfied, but that it *may* reject the plaint or libel. It is in this sense no different from Section 46 (2) of the Civil Procedure Code ; for even if the Court inadvertently or wrongly admits a plaint or libel, the defendant has still available to him the substantive defence of contending that the action is not by the owner or that the requirements of notice and security as provided in section 154 have not in fact been complied with. The purpose of clauses (*b*) and (*c*) then is only to see that a person who cannot truthfully allege that he is the owner of the goods seized or who cannot show prima facie that he has in fact given notice and security from troubling the Attorney-General with having to come to Court to defend an action in which goods

seized by the Customs authorities are claimed. For these reasons I think that the substance of clauses (*b*) and (*c*) in so far as they place an obligation on the plaintiff are directory and not mandatory as to the time at which or before which they must be complied with.

As was said by Lord Penzance in *Howard v. Bodington*[1] :—

> "I believe, as far as any rule is concerned, you cannot safely go further than in each case you must look to the subject-matter, consider the importance of the provisions and the relation of the provision to the general object intended to be secured by the Act and upon a review of the case in that aspect decide whether the enactment is what-is-called imperative or only directory."

If then the plaintiff fails to comply with the requirements of clauses (*b*) and (*c*) of section 155, the Court may reject the plaint ; or, the Court may make order for production of an affidavit of ownership and for other material to satisfy it that notice and security have been given.

On the other hand, if the Court by inadvertence does not give its mind to those provisions and admits the plaint and orders summons on the defendant, I think that the Court can still make order for compliance with those provisions at any stage if it still considers it necessary that the plaintiff should be required to do so. If there is already an affidavit of ownership and other material to satisfy him that notice and security have been given such order need not be made but the action can be proceeded with.

The learned District Judge has relied on the two cases of *Read v. Samsudin* (1895) 1 N.L.R. 292 and *Avva Ummah v. Casinader* (1922) 24 N.L.R. 199. Both cases are authority for the proposition that,

> "If the plaint is defective in some material points, and that appears on the face of the plaint, but by some oversight the Court has omitted to notice the defect, then the defendant, on discovering the defect, may properly call the attention of the Court to the point, and then it will be the duty of the Court to act as it ought to have done in the first instance, either to reject the plaint or to return it to the plaintiff for amendment. If the plaint is a good one on the face of it, but the defendant has reason to urge why the plaintiff is not entitled to sue him, that objection must be taken by the answer."

[1] (1877) 2 P.D. 203 at 211.

Both these cases, however, were decided in actions under the Civil Procedure Code: The Customs Ordinance, with which we are concerned was enacted in 1869 many years before the Civil Procedure Code. The technical barriers which the latter Ordinance has set up before a Court can admit a claim to property seized under that Ordinance must be understood and applied somewhat liberally having regard to the parallel substantive provisions which are in themselves sufficient to protect the State as defendant. Moreover, the failure of the Court to immediately observe the non-compliance with clauses (*b*) and (*c*) and to take appropriate action, has deprived the plaintiff of the opportunity of presenting a fresh plaint accompanied by the papers necessary to comply with clauses (*b*) and (*c*) of section 155, within the 10 days that were still available to him. No doubt a plaintiff must advise himself about the law and an estoppel cannot be set up against the Court ; but I make mention of this matter only to point out that a liberal interpretation of procedural requirements is fully warranted in the context of provisions in which the time limitations are so tightly drawn and do not affect the substantial jurisdiction of the Court or the defences which may be advanced by the defendant on the ground of failure to comply with the substance of section 154, or with clause (*a*). of section 155.

The case of *Avva Ummah v. Casinadar* referred to earlier is instructive in this context. In this case the plaint did not contain as required by section 45 of the Civil Procedure Code, a statement of facts setting out the jurisdiction of the Court to try and determine the claim ; the Court by an oversight omitted to notice the defect and to exercise its power of rejecting the plaint under section 46(2) of the Civil Procedure Code. Upon the defendant's lawyers pointing out the defect an application was made by the plaintiff to amend the plaint. The appeal to the Supreme Court was apparently against an order of the District Court refusing the application to amend. Chief Justice Bertram, with Justice Porter agreeing, after quoting the dictum of Bonser, C.J. in *Read vs. Samsudin*, added:

> "The defect has now been made good by the application of the proctor for the plaintiff and no further action is therefore necessary."

On this basis the appeal was allowed.

In the present case there is no doubt that the Attorney-General pointed out the failure to comply with clauses (*b*) and (*c*) of section 155 at the first available opportunity ; but by the time

the Court came to make its order, which is the subject of this appeal there was before the learned District Judge both an affidavit of ownership and also material, in documents P1 to P5 and D1, sufficient to satisfy him that notice and security had been given before institution of action. I therefore think that the learned District Judge was wrong in dismissing or 'rejecting' plaintiffs' action at that stage.

I would accordingly allow the appeal and set aside the order of the learned District Judge with the direction that the trial proceed on the plaintiffs' claim and on the claim in reconvention on issues other than those numbered 12, 13, 14, 15, 18 and 19.

As these proceedings were brought about by the plaintiffs' own carelessness, there will be no order for costs.

PATHIRANA, J.—I agree.

WEERARATNE, J.—I agree.

Appeal allowed.