GOVINDASAMY v. ATTORNEY-GENERAL

COURT OF APPEAL
RATWATTE, J. & ABDUL CADER J.,
C.A. (S.C.) NO. 157/75 (F),
D.C. COLOMBO 78754/M
SEPTEMBER 30, 1980.

Evidence – Customs Ordinance, sections 152 and 155 – Degree of proof.

On 02.06.1973 customs officers seized 29 full bags of garlic and two open bags of garlic from the plaintiff's shop. After inquiry, the goods were declared forfeited as they were imported into the country unlawfully.

Plaintiff instituted this action to recover a sum of Rs. 38,630/- being the value of the garlic alleged to have been seized wrongfully from him. It was the case of the plaintiff that the garlic was supplied by two local cultivators and therefore not imported and hence not liable to be seized.

Held :

(i) The burden is on the State to prove that the garlic had been imported, before the plaintiff can be called upon to prove that it was lawfully imported.

(ii) The Customs Ordinance is a penal enactment which imposes severe penalties on those who violate its provisions. The State must therefore establish any breach of those provisions beyond reasonable doubt as in a criminal prosecution *(Attorney-General v. Lebbe Thamby* 61 NLR 256 followed).

(iii) In terms of section 155 of the Customs Ordinance the plaintiff must be the owner of the goods.

Cases referred to:

(1) *Associated Battery Manufacturers (Ceylon) Ltd.* v. *United Engineering Workers Union* 77 NLR 541.
(2) *Attorney-General* v. *Lebbe Thamby* 61 NLR 256.
(3) *Attorney-General* v. *Sathasivam* 69 NLR 110.

APPEAL from Judgment of the District Court of Colombo.

C. Ranganathan. with *G. Kumaralingam* for the appellant.

C. Sithamparampillai, SSC for respondent.

Cur adv vult.

31st October, 1980
ABDUL CADER, J.

On 2.6.1973, customs officers seized 29 full bags of garlic and two open bags of garlic from the plaintiff's shop in 4th Cross Street, Pettah, and after inquiry by Panditaratne who was then serving as the

Deputy Director of Customs, the goods were declared forfeit as goods unlawfully imported into the country. However, the plaintiff was given an opportunity to take the bags of garlic on depositing Rs. 38,000/- which the plaintiff declined. The Customs thereafter delivered the garlic to the C.W.E. for a sum of Rs. 7,812/-.

The plaintiff has filed this action to recover a sum of Rs. 38,630/- being the value of 3863 pounds of garlic alleged to have been seized wrongfully from the plaintiff. It was the case of the plaintiff that this garlic was supplied by two local cultivators, Sudu Banda and Rupasinghe, and, therefore, not imported and hence not liable to be seized. Various persons gave evidence for the two sides and the learned District Judge after a careful consideration of the evidence dismissed the plaintiff's action.

Before us, Counsel for the appellant drew pointed reference to the fact that this garlic had been kept in the open in the shop and that the two open bags were displayed in the front to be seen by anyone who entered the shop, and when Customs raided the place, plaintiff did not conceal the unopened bags. He drew our attention to the fact that the learned District Judge has drawn an adverse inference against the plaintiff in that "he does not say why he did not tell these names to the customs officers who took down the deposition" and referred us to the evidence of Nadarajah, one of the customs officers, who admitted that he did not question the plaintiff as to from whom he got the garlic. Counsel, therefore, commented that that was an unfair inference which is not justified by the evidence. But we have the evidence of Panditaratne, the Inquiring officer, who stated that even at the inquiry which was conducted on the same day, the plaintiff did not mention the names of those persons from whom he got the garlic, though he was asked. Counsel pointed out that the witness admitted that he had not made a note of that and, therefore, suggested to us that we should accept the evidence of the plaintiff on that point that he was, in fact, not questioned about the names of the persons who supplied him with the garlic.

I am of the opinion that there is no reason to disbelieve Panditaratne merely because he had failed to record that fact. In fact, it appears that he had not even noted the time at which the inquiry was held or the place where he had held the inquiry. But that apart, all the circumstances would clearly point to the fact that he would have necessarily questioned the plaintiff about the names of his alleged suppliers. After all, the inquiry was being held to ascertain whether this garlic had been imported as the Customs suspected or grown locally as the plaintiff contended and when the plaintiff maintained that he had bought them locally from two cultivators at Nuwara-Eliya and Welimada, the obvious question that any inquiring officer would put under those

circumstances would be to inquire for the names of these suppliers. This officer had been in public service for 34 years; in the Customs for 7 years, and was considered sufficiently competent to be promoted as G.A. Nuwara-Eliya, at the time he gave evidence. The learned District Judge accepted his evidence *in toto*.

The plaintiff stated that his lawyer was in attendance, seated by him, when the inquiry was being held. Panditaratne stated that the lawyer made a statement at the conclusion of the inquiry. It is strange that the plaintiff did not call his lawyer to support his story that he was not asked for the names of the two witnesses by Panditaratne.

Therefore, I do not think that his failure to record the fact that he asked for the names of the two alleged suppliers should stand in the way of our accepting his evidence that what he says is true. It is sufficient to note that the learned District Judge rejected the evidence of the plaintiff *in toto*. Therefore, the Distirct Judge's inference that the evidence of Sudu Banda and Rupasinghe was procured to put forward a defence to the charge of the Customs is justified.

It is also significant to note that the plaintiff produced no documents whatsoever to show that he had received these bags of garlic from his two alleged cultivators. He admits that he has not made such an entry, but his explanation for his failure to make such an entry is contradictory. At one stage, he stated that it was the practice to merely stock them in his shop and when he sells the stock, he writes out the bill deducting his commission and pays the balance to the cultivator. But in cross-examination, he stated that when we receive goods, we issue receipts to the suppliers (page 20). Later on, he stated at page 22:

> "I sell the goods and write a bill for them. In that bill I write the name of the person by whom the goods are sent . . . . If anyone sends me goods I write the sender's name. After selling the goods I write a bill for the person who sent the goods."

To Court:

> It is not from these bill books that bills are issued to those who buy goods and to those who send goods. I have a separate book for that."

But the plaintiff never produced either the separate book or the receipts issued to the two alleged local producers of garlic.

I do not think that any reasonably prudent businessman would adopt this procedure. Such a person would make a note at least in a rough book of the quantity of garlic that he had received and the person from

whom he had received, the date and the vehicle in which it was received, because in the event of a dispute, it is only then it would be possible for him to ascertain and satisfy the cultivators that what he says is the truth. One can at least even visualise a situation where there was only one supplier in which event his goods may be stored in a particular part of the shop and sold without such a note being made, even though that would not be a prudent form of business, but in this case, there are two suppliers - 20 bags from Rupasinghe and 21 bags from Sudu Banda, so that I find it difficult to believe that the plaintiff was in the habit of receiving goods from cultivators without making a contemporary record of the receipt of such goods.

So far, I have dealt with this question on the basis that Nadarajah's evidence is that he did not ask for the names is true. The District Judge has not referred to it. To my mind, that evidence of Nadarajah that he did not question the plaintiff, who his suppliers were is suspect. Any intelligent customs officer raiding a place to seize unlawfully imported articles would be concerned with the defence put up by the suspect and when the plaintiff stated that he had received these garlic from two local producers, naming the area of their residence, it is strange indeed that Nadarajah did not ask who these suppliers were. The plaintiff's evidence on that matter contradicts the evidence of Nadarajah. I refer to page 24 of his evidence in the brief.

Q. "When making the statement to the customs officers you did not state the names of these witnesses ?

A. Though the names of the suppliers of goods were stated by me they did not accept it."

This is far different from the evidence of Nadarajah who stated that at the time the deposition was made, the complainant did not mention the person from whom he obtained this garlic. (On page 45). "I questioned him . . . . I did not question him as to from whom he got them. I am confident that I did not ask him so." Once again, the plaintiff stated on page 24:

Q. "Did you say who sent it ?

A. I said, but the officers did not accept it. . ."

Today I remember quite well that I told customs officers the names of those who sent me goods and that they did not accept it."

As regards his entire defence that garlic is grown in large quantities in Nuwara-Eliya and Welimada, it is interesting to note that the witness

has stated in D3 that he buys two to three bags for money from people who bring these goods in lorries, and to the question:-

Q. "The defence further suggests that it is impossible to find garlic of the order of three thousand pounds in the Welimada area ?

A. The answer was 'yes'.

The relevant section 152 reads as follows:-

> "If any goods shall be seized for non-payment of duties or any other cause of forfeiture, and any dispute shall arise whether the duties have been paid for the same, or whether the same have been lawfully imported, or lawfully laden or exported, the proof thereof shall lie on the owner or claimer of such goods, and not on the Attorney-General or the officer who shall seize or stop the same."

State Counsel conceded that the burden is on him to prove that the garlic had been imported before the plaintiff can be called upon to prove that it was lawfully imported. But a dispute arose as regards the degree of proof. While Counsel for the plaintiff contended that since this is a matter leading to the forfeiture of goods, proof should be to the degree of proof beyond reasonable doubt as in a criminal case, State Counsel stated that that high degree of proof is not required in a civil case, and submitted that all that is necessary is a preponderance of probabilities. He has cited the case of *Associated Battery Manufacturers (Ceylon) Ltd. v. United Engineering Workers Union*[1] where Vythialingam, J. has stated that the standard of proof beyond reasonable doubt required in criminal cases has not been extended to our civil courts. But that was not a Customs' case. I am bound by the decision in a similar Customs' case reported in the case of *Attorney-General v. Lebbe Thamby*[2] where Basanayaka, C.J. states as follows:-

> "The Customs Ordinance is a penal enactment which imposes severe penalties on those who violate its provisions. The Crown must therefore establish any breach of those provisions beyond reasonable doubt as in a criminal prosecution. The onus of proving that the gold bars were imported being on the Crown it should have established that fact beyond reasonable doubt."

I shall, therefore, examine the evidence in this case on the basis that the State must prove beyond reasonable doubt that the goods were imported into the country. Besides the many circumstances set down by the learned District Judge in his judgment, there are the various circumstances which I have myself set down in the early part of this judgment. The evidence of E. R. K. D. M. W. Deheragoda and

Ranaweera Abeyratne convinced the learned District Judge that there was not sufficient cultivation of garlic in this country at that time as can reasonably account for as much as 3863 pounds in the possession of the plaintiff for public sale. The evidence of the Grama Sevaka is that Nimal Rupasinghe had one acre of land and he had planted garlic in about 10 to 15 perches and whatever garlic cultivated was on a small scale and they are sold in that area itself and he had not seen garlic being sent out in large quantities of thousands of pounds. S. M. Fernando had stated at page 42 that he examined the garlic taken from the possession of the plaintiff and found a difference between the garlic produced locally and the garlic taken from the plaintiff.

Finally one is compelled to ask why the plaintiff is so interested as to litigate for goods which do not belong to him. He was obliged to pay the cultivators only after the sale of the garlic. If the garlic had perished or diminished in weight before sale, would he have been obliged to pay the cultivators? Obviously, no, as he had not even weighed the garlic at the time of seizure. If the Customs forfeited it before a sale, was the plaintiff obliged to reimburse the cultivators? He has not said so anywhere.

I am conscious of the fact that circumstantial evidence should not admit of any other inference except that of the guilt of the accused. Adopting that standard, I am convinced beyond reasonable doubt that this garlic was not produced locally but imported from a foreign source.The Customs Officer has given evidence that they had information that garlic was unlawfully unloaded in certain places in the north and was brought with red onions that came to Colombo from Jaffna. This would be hearsay. Therefore, it cannot be acted upon, but it gives a clue as to how the plaintiff came by the garlic. I am satisfied on the admissible evidence that the defendant has discharged the burden imposed on the State.

The burden now shifts to the defendant to prove that this garlic was lawfully imported. It is not even the plaintiff's case that this garlic was imported and, therefore, he has failed to prove lawful importation in terms of section 152.

Yet another hurdle that the plaintiff has to clear is section 155, **Chapter 235** of **Volume VIII,** which reads as follows:-

> "No claim to anything seized under this Ordinance shall be admitted by such court, unless such claim be entered **in the name of the owner,** with his residence and occupation, nor 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, nor 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."

Mr. Ranganathan conceded that it is an owner that can maintain an action of this nature, but he argued that since the plaintiff was in the position of transferring title to a purchaser from him, the plaintiff can be considered to be the owner of the goods in question for the time being. I find myself unable to agree with this contention. In his plaint, the plaintiff did not claim to be the owner. (Vide para 4 of the plaint). The plaintiff admitted at page 27 that he was not the owner of the goods and he is bound by that admission. It is true that the plaintiff would be able to convey title to a purchaser, but that would be in the role of an agent. It is not necessary to reiterate that an agent can never be the principal. In *Attorney-General* v. *Sathasivam*,[3] T. S. Fernando, J. stated as follows:-

> "The onus of establishing that he was the owner . . . was indisputably on the plaintiff."

He went on to say:-

> "But 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."

I hold that the plaintiff cannot maintain this action in view of section 155.

Mr. Ranganathan urged that since this matter was not put in issue expressly, this Court should not take up this question for the first time, but I find that several questions have been addressed to the plaintiff on the question of ownership to which no objection has been taken. Since I am depending entirely on the evidence of the plaintiff to answer this question against the plaintiff, the plaintiff cannot be heard to complain that prejudice has been caused to him by the failure of the defendants to raise this matter by way of an issue in the lower court. The action in limine fails. Nevertheless, I have discussed the facts in this case and I have come to the conclusion that the plaintiff cannot succeed in this action.

The appeal is, therefore, dismissed with costs.

RATWATTE, J. – I agree.

Appeal dismissed.