CAR PLAN LTD AND OTHERS
v
K.L.G. PERERA, DEPUTY DIRECTOR OF CUSTOMS AND OTHERS

COURT OF APPEAL
SRIPAVAN, J.
CA NO 1169/2001
MARCH 14 AND 17 AND
MAY 2 AND 20, 2003

Customs Ordinance, sections 52, 165, 164 and 165 – Exercise of power of mitigation – Can it be exercised after the vehicles are seized as forfeit?

Held:

(i) Once the vehicles are seized as forfeit in terms of section 52, the ownership of such vehicles vest in the State.

(ii) It is the Minister who has the power to order the restoration of the vehicle under section 164.

(iii) The Minister is also empowered in terms of section 165 to direct the seized vehicles to be delivered to the proprietor subject to terms and conditions.

(iv) Director General of Customs (2nd respondent) has no power to release the vehicles in question acting in terms of section 163.

(v) The only power the 2nd respondent has in terms of section 163 is to mitigate a forfeiture or penalty when such forfeiture or penalty is deemed to be unduly severe.

(vi) The power of mitigation conferred upon the 2nd respondent by section 163 cannot be exercised after the vehicles are seized or forfeit as the power to restore or/deliver seized vehicles is vested in the Minister alone.

APPLICATION for *writ of certiorari.*

Cases referred to:

1. *Culasubadhra* v *University of Colombo and others* (1985) 1 SRI LR 244 at 257
2. *Bangamuwa* v *S. M. J. Senaratne, Director General of Customs* (2000) 1 SRI LR 106

Shibly Aziz P.C. with *Nigel Hatch* for petitioner

Y.J.W. Wijayatilake Deputy Solicitor General for respondents

July 7, 2003

SRIPAVAN, J.

The first petitioner is a duly incorporated company engaged in the business of, *inter alia,* the importation and sale of motor vehicles. The second and third petitioners are the Managing Director and the Director of the petitioner company respectively. The first petitioner company was appointed as the sole distributor and/or agent of the KIA Motor Company of Korea in 1996. The following clients placed their orders with the first petitioner for the importation of right hand drive KIA Sportage jeeps.

i.	Janatha Estates Development Board	-	5 vehicles
ii.	Sri Lanka State Plantations Corporation	-	4 vehicles
iii.	McLarens International Limited	-	1 vehicle
iv.	Mr. S. Ratnayake	-	1 vehicle
v.	Mr. B. Jayaratne	-	1 vehicle
vi.	Mr. A. Cramer	-	1 vehicle
vii.	Udapussellawa Plantation Limited	-	1 vehicle
viii.	Dr. M.M. Janapriya	-	1 vehicle

It is common ground that the CIF price of a left hand drive KIA Sportage jeep is US$ 10,920. Separate payments of US$ 1,500 per vehicle to the Korean Company were made on behalf of the following clients through telegraphic transfer in order to convert each vehicle from left hand drive to right hand drive.

i.	Janatha Estates Development Board	-	5 vehicles

ii. Sri Lanka State Plantations Corporation - 4 vehicles
iii. McLarens International Limited - 1 vehicle
iv. Dr. M.M. Janapriya - 1 vehicle

The first petitioner remitted the conversion cost in respect of one vehicle and gave instructions to the Union Bank to remit US$ 1,500 per vehicle by telegraphic transfer in respect of the other three vehicles to the credit of the Korean Company.

On or about 19th September 2000 the said fifteen vehicles arrived in the Port of Colombo. It was found that fourteen of the said vehicles had been consigned to Dr. M. M. Janapriya and one vehicle to Mrs. W. A. Ariyawathie, both of whom obtained one concessionary duty permit each from the Treasury. McLarens International Limited established a letter of credit for US$ 10,990 and remitted US$1,500 by telegraphic transfer in the name of Mrs. W.A. Ariyawathie for the importation of one KIA Sportage jeep. The first respondent commenced an inquiry around 25th January 2001 since there were reasonable grounds to suspect that the declarations made to Customs by the first petitioner in respect of the aforesaid vehicles were false. At the inquiry, the second petitioner stated that US$12,420 remitted in favour of the Korean Company included the conversion cost of US$1,500. (Vide page 10 of the inquiry proceedings resumed at 12.55 pm on 16.02.2001). The second petitioner also admitted that the first petitioner confirmed to the Director General of Customs that the total CIF price including the conversion cost for a KIA Sportage diesel jeep is US$12,420 (Vide page 13 of the inquiry proceedings resumed at 2.55 pm on 16.02.2001). As stated in paragraph 10 (j) of the second petitioner's affidavit dated 30th July 2001, the only explanation given was that the conversion cost of US$1,500 was not declared to the Customs because the Korean Company was to return the said amount charged from the importers due to an undue delay in delivering the said vehicles. However, the first petitioner failed to produce any evidence or correspondence at the inquiry regarding the waiver of the conversion cost of US$ 1,500 by the Korean Company. On the contrary Dr. M.M. Janapriya at the inquiry (page 10 of the inquiry proceedings of 08.03.2001) stated that Mr. Senanayake, Sales Manager of the first petitioner informed him that US$ 1,500 had to be remitted through a Bank of Sri Lanka and that it should be

declared to the Customs and if not, the vehicle would be seized after importation. Dr. M.M.Janapriya further stated that he has not got any refund of the said US$ 1,500 todate. The letter dated 3rd October 2000 sent by Dr. M.M.Janapriya to the second petitioner marked X2 shows that even though he paid the full CIF price of the vehicle, namely, US$ 12,420, the first petitioner failed to declare the total price to the Customs. This is further confirmed by the facsimile message sent by the second petitioner to the Korean Company on 19th May 2000 marked X3. This document X3 gives the total CIF price of a right hand drive KIA jeep as US$ 12,420 which includes a conversion cost of US$ 1,500. The second petitioner by this letter X3 further informed the Korean Company that when negotiating final documents the price must be quoted as US$ 10,920 and if not, the petitioner would have problems with the Customs. This clearly demonstrates the intention of the petitioners to defraud the revenue. It appears that the first petitioner company obtained concessionary car permits from various permit holders in order to import vehicles for its clients. The permit holders who testified at the inquiry stated that they gave their permits through a third person to the first petitioner company and received cash payments. None of the permit holders other than Dr. M.M.Janapriya opened the letters of credit or remitted the money through telegraphic transfer. It was the first petitioner company, the Central Finance Company Limited and McLarens International Limited who established the letters of credit and took steps to remit the money through telegraphic transfers in the names of the permit holders.

In the case of *Culasubadhra* v *University of Colombo and others* (1) Seneviratne, J. stated that "it is not the function of this Court to determine whether the finding is justified or not. A finding of fact by a Tribunal such as this can be set aside by way of a writ only if it is found that there was no evidence at all to base such a finding or if the Tribunal has not properly directed itself in evaluating the evidence and drawing necessary inferences and could not have come to that conclusion if it properly directed itself."

I am satisfied that based on the evidence led at the inquiry, the first respondent came to a correct finding. In the circumstance, I see no reason to interfere with the order dated 28th June 2001 made by the first respondent, namely, that the first petitioner com-

pany has failed to declare the conversion cost of US$ 1,500 on every imported vehicle and thereby made false declarations to Customs in order to evade the payment of correct duty and other levies. The order forfeiting the said vehicles in terms of sections 52 and 119 of the Customs Ordinance therefore stands.

Once the vehicles are seized as forfeit in terms of section 52 of the Customs Ordinance, the ownership of such vehicles vest in the State. Thereafter, it is the Minister who has the power to order the restoration of the vehicles under section 164 of the said Ordinance. The Minister is also empowered in terms of section 165 to direct the seized vehicles to be delivered to the proprietor in certain cases subject to certain terms and conditions. Therefore, the order of the first respondent does not preclude the Minister from considering an application made by the petitioners in that behalf. The second respondent has no power to release the vehicles in question acting in terms of section 163 of the said Ordinance. [*Vide Bangamuwa* v *S.M.J. Senaratne, Director General of Customs and another* (2)]. The only power the second respondent has in terms of section 163 is to mitigate a forfeiture or penalty where such forfeiture or penalty is deemed to be unduly severe. The power of mitigation conferred upon the second respondent by section 163 of the said Ordinance cannot be exercised after the vehicles are seized as forfeit, as the power to restore or deliver seized vehicles is vested in the Minister alone. In the circumstances, a *writ of mandamus* directing the second and/or the third respondents to mitigate the order of forfeiture and release the vehicles to the petitioner, is refused.

For the reasons stated, the petitioners application is dismissed, however in all the circumstances without costs.

Application dismissed.