1963 *Present :* **T. S. Fernando, J.**

N. M. S. OMER, Applicant, *and* M. L. D. CASPERSZ and another, Respondents

S. C. 89 of 1963—In the matter of an Application for a Mandate in the nature of a Writ of Mandamus and of a Writ of Certiorari directed to the Principal Collector of Customs

*Customs Ordinance (Cap. 235)—Sections 8(2), 43, 129, 144, 165—Wrongful refusal to pass goods imported—*Mandamus*—Order of forfeiture—Duty of customs officer to act judicially—*Certiorari.

Where a customs officer, purporting to act under section 144 of the Customs Ordinance, wrongly refuses to pass any goods which a person imports, *mandamus* lies to compel him to pass the goods. In such a case, the validity of an order of forfeiture under section 129 of the Customs Ordinance can be challenged by including a prayer for intervention by way of *certiorari* on the ground that, before ordering the forfeiture, the customs officer in question failed to act judicially. The liability of a person to a penalty or forfeiture has to be objectively assessed after an inquiry at which he is given an opportunity to show that by importing the goods in question he did not act in contravention of law.

An order of a customs officer refusing to pass goods until a sum of money declared forfeited or imposed as a penalty is first paid is not an order reviewable by the Minister under section 165 of the Customs Ordinance.

APPLICATION for writs of *mandamus* and *certiorari* against the Principal Collector of Customs.

H. W. Jayewardene, Q.C., with *L. Bartlett*, for the applicant.

H. L. de Silva, Crown Counsel, for the respondents.

Cur. adv. vult.

June 28, 1963. T. S. FERNANDO, J.—

The papers filed on this application reveal the facts which are set out hereunder :—

The petitioner on or about March 2, 1962 applied to the Controller of Imports for a licence to import certain watch spare parts from Switzerland described in an indent (marked X. 1) and was granted a licence therefor. The petitioner claims that he imported into Ceylon on or about March 19, 1962 in four parcels the goods described in indent X. 1 which are covered by the import licence. He was not permitted to pass a bill of entry in respect of the goods so imported, but was served with a summons dated April 11, 1962 purporting to be issued under section 8 (2) of the Customs Ordinance (Cap. 235) requiring him to appear before the Collector on April 18, 1962 " as your evidence is necessary for the purpose of an inquiry to be held into the seizure of parcels Nos. Chiasso Air 42/1, 42/2, 42/3 and 42/4 by my officer at parcel post ".

The petitioner states that he attended as required by the summons aforesaid and an officer of the Customs Department questioned him as to whether the four parcels were consigned to him. He alleges that apart from calling upon him to identify the goods, by which I understand that he was only asked whether he was the importer of the goods, no other inquiry was held by any officer of Customs on that day. This allegation stands uncontradicted in the affidavits filed on behalf of the respondents on this present application.

Thereafter, in August 1962, the petitioner applied for and obtained another licence to import certain watch spare parts, this time from Hong Kong, described in indent (marked B) and goods on this indent appear to have reached Ceylon in September 1962. The petitioner alleges that he has not been permitted to pass bills of entries in respect of goods imported on indent B although certain customs duties aggregating to a sum of Rs. 24,675/57 have been collected from him by the respondents.

The respondents claim that the goods imported in March 1962 are forfeit in terms of section 43 of the Customs Ordinance by reason of the importation being contrary to the table of prohibitions and restrictions inwards. The decision of this Court in *Palasamy Nadar v. Lanktree* [1] emphasizes that where an importation contrary to prohibitions and restrictions takes place the forfeiture is automatic and that no adjudication declaring the forfeiture to have taken place is required to implement that automatic incident of forfeiture. In practice, however, the importer is informed of the forfeiture and that information naturally is so conveyed some time after the importation. The petitioner appears to have been informed of the forfeiture by a letter of October 15, 1962; but, if the importation was unlawful, the forfeiture in my opinion actually took effect on March 19, 1962. The validity of the seizure of the goods imported on indent X. 1 is being canvassed by the petitioner in the District Court of Colombo, in case No. 1052/Z, instituted by him after notice of action claimed to have been given in pursuance of section 154 of the Customs Ordinance. I am not called upon in these proceedings, and I do not intend, to consider here the validity of the forfeiture of the said goods.

It would appear that the Crown has made in D. C. Colombo, Case No. 1052/Z a claim in reconvention in respect of a sum of Rs. 149,850 said to be due to it from the petitioner, being a forfeiture of treble the value of the goods imported on indent X. 1 on March 19, 1962. By the letter of October 15, 1962 addressed by the Principal Collector to the petitioner, and referred to by me above, the Collector informed him that an additional forfeiture of Rs. 149,850 has been imposed on him under section 129 of the Customs Ordinance, and called upon him to pay that additional forfeiture on or before October 29, 1962. The validity of the forfeiture of this sum will, no doubt, arise for consideration in the District Court in the above-mentioned case. The same question, however, arises before me on the

[1] (1949) 51 N. L. R. 520.

present application by reason of certain action which I shall now refer to, and which followed the receipt by the petitioner of this letter of October 15, 1962.

On November 12, 1962 the petitioner gave notice of action against the forfeiture of the goods imported on indent X. 1. By letter dated November 13/15, 1962 the Principal Collector informed the petitioner as follows :—

> " Further to my letter of even number of 15.10.62 I have the honour to inform you that under section 144 of the Customs Ordinance (Chapter 235), I am taking steps to stop all your imports or goods you bring into or you are seeking to export or taking out of Ceylon until the additional forfeiture Rs. 149,850 is paid. "

It is not denied that action is being taken on this letter and that the petitioner is being prevented from removing goods consigned to him and which are covered by valid licences and in respect of which the petitioner is willing to pay the appropriate customs duties and to deliver the requisite bills of entry. Although the prayer in the petition before me was one in respect of a Writ of Mandamus " to compel the Principal Collector to deliver to the petitioner the goods which have been seized and forfeited by the Principal Collector by his orders of 15th October 1962 and 15th November 1962 ", it became manifest in the course of the argument that the prayer in that form was misconceived. I therefore permitted the petitioner to amend his prayer to one in respect of a Writ of Mandamus to compel the Principal Collector of Customs to permit the petitioner to present bills of entry in respect of goods other than those said to be forfeit by reason of importation contrary to the prohibitions and restrictions inwards and to remove the said goods on payment of customs and other dues and on compliance with other relevant requirements of law. It is manifest that no writ of mandamus can issue on the Collector to deliver goods claimed to be forfeited where the validity of the forfeiture is yet awaiting adjudication by the appropriate tribunal.

I can now turn my attention to the real grievance of the petitioner on this application. Section 144 of the Customs Ordinance enacts as follows :—

> " If any person fails to pay any sum of money which he, under this Ordinance, has forfeited, or becomes liable to forfeit or to pay as a penalty, the officers of customs may refuse to pass any goods which that person imports or brings into or is seeking to export or take out of Ceylon until that sum is paid.
>
> Provided that nothing in the preceding provisions of this section shall be deemed to prohibit the recovery of such sum by the Collector under any other provision of law. "

If the petitioner has forfeited or become liable to forfeit or to pay as a penalty the sum of Rs. 149,850 specified in the letter of November 13/15, 1962 referred to above, then it is not open to this Court to seek to prevent

the action of the Collector in refusing to pass the goods imported by the petitioner. The petitioner however claims that the alleged additional forfeiture of Rs. 149,850 referred to in the Collector's letter of October 15, 1962 is null and void. He relies on the decision of this Court in *Tennekoon v. The Principal Collector of Customs* [1] where Weerasooriya J. observed that the liability of a person to a penalty or forfeiture under section 127 (now 129) of the Customs Ordinance has to be objectively assessed on an evaluation of the evidence on oath of the persons examined at the inquiry and that the officer of the customs concerned has to act judicially. The only inquiry held before the forfeiture of Rs. 149,850 was imposed on October 15, 1962 was the inquiry to which the petitioner was summoned for April 18, 1962. It is not disputed, so far as the papers before me disclose, that all that transpired on that day was a questioning of the petitioner confined to ascertaining whether it was the petitioner who imported the goods. It may be mentioned here that the indent was in favour of " Fareeda Jewellers ". There was nothing done on that day to ascertain whether the goods actually imported were different from the goods authorised by the licence to be imported into Ceylon.

Weerasooriya, J. in the case referred to above held that, as no opportunity had been given to the person there concerned to meet the case against him at the inquiry held, the findings reached by the officer of customs were of no legal effect. Learned Crown Counsel for the respondents contended that the decision in *Tennekoon v. The Principal Collector of Customs* (*supra*) is wrong, and that it should be reconsidered. He argued that the Collector acts in terms of that section throughout in an executive capacity without attracting to his functions the duty to act judicially, and that the expression " at the election of the Collector of Customs " in section 129 means no more than an election which is purely subjective. I do not consider it necessary for me to embark upon a fresh consideration of the nature of the duty imposed on the Collector by section 129. I am content for the purposes of the present application respectfully to follow the decision relied on by the petitioner. Applying that authority I am compelled to reach the conclusion that the imposition of the additional forfeiture of Rs. 149,850 is of no legal effect. It is pertinent to point out here that the decision in that case was delivered by this Court on February 23, 1959. As it has hitherto remained unreversed, the plain duty of the public officer is to conduct himself in accordance with that decision. The facts before me do not show that there was an inquiry at which the petitioner had an opportunity to show that by importing the goods in question he had not acted in contravention of the law.

It was pointed out to me by learned Crown Counsel that the petitioner had not sought on this application an order in the nature of a writ of certiorari. Intervention by way of certiorari arises only incidentally on this application for mandamus, but in order not to defeat the ends of

[1] *(1959) 61 N. L. R. 232.*

justice through some technical flaw in the application, I permitted the petitioner to amend his application by including a prayer for intervention by way of certiorari to effect a quashing of the order of November 13/15, 1962 in so far as it relates to the additional forfeiture.

If, then, the imposition of the additional forfeiture is of no legal effect, the refusal to pass goods relying on section 144 of the Customs Ordinance is without authority. The resulting position is that the Principal Collector of Customs has refused to perform his implied statutory duty to permit this importer to present bills of entry and remove goods after payment of customs and other dues and after complying with other relevant requirements of the law. In that view of the matter, the contention of learned Crown Counsel that the remedy of mandamus is not available because mandamus does not lie to effect an undoing of what has already been done is irrelevant. I feel it is right to add that the order complained of is harsh in the extreme and amounts virtually to a throwing of the petitioner out of business. Large powers reposed by Parliament in public officers must be exercised in a responsible manner and not forgetful of a sense of fairness. In this case it should have been apparent to the Principal Collector by November 13/15, 1962 that the petitioner was not accepting the position that he had imported goods contrary to prohibitions and restrictions inwards or not covered by the licence. While the question upon which the validity of the forfeiture of Rs. 149,850 depended was being brought up in a court having jurisdiction to make a binding adjudication thereon, it does not appear to be fair that obstacles should be placed in the way of the importer doing business lawfully. While I have thought it necessary to make these observations here, I must emphasize that the claim for a mandamus is being decided by me not on the ground of alleged unfairness but solely on the point whether the public officer has refused to perform his statutory duty.

Another objection raised to intevention by this Court by way of mandamus was based on the principle that mandamus, being a discretionary remedy, should not issue where another remedy was available. It was contended that there was a remedy by way of application in terms of section 165 of the Ordinance to the Minister for mitigation or remission of penalties. The restoration of any goods seized as forfeit does not arise here because what is now in dispute is "the section 144 order", if I may so term it, of November 13/15, 1962. As I interpret the powers of the Minister conferred by section 165, they do not include a power to cancel or vary an order which is not a forfeiture or a penalty or a fine. An order of an officer of customs refusing to pass goods until a sum of money declared forfeited or imposed as a penalty is first paid is not an order reviewable by the Minister.

For reasons which I have indicated above, I direct that an order be issued on the 2nd respondent, who is the present Principal Collector of Customs, to permit the petitioner to present bills of entry and other relevant documents and remove goods which are, not claimed to be

forfeit as having been imported contrary to prohibitions and restrictions inwards or on any other ground, on payment of the appropriate customs and other dues and on compliance with other requirements of law.

The petitioner is entitled to the costs of this application.

Application allowed.