My view of that section gains support from the following observations of Bertram C.J. in *Silva v. Hamid* [1]:

"Where property has been stolen, and the charge is made against the person for receiving the property so stolen, even though the Magistrate acquits the person charged with so receiving it, he may, if he comes to the conclusion that the property actually was stolen, order it to be delivered to the person from whom it was taken, and disregard the possession of the receiver."

The order of the learned Magistrate is affirmed.

Appeal dismissed.

1949 *Present:* **Gratiaen J.**

PALASAMY NADAR *et al.*, Petitioners, *and* LANKTREE (Principal Collector of Customs), Respondent

S. C. 402—IN THE MATTER OF AN APPLICATION FOR A MANDATE IN THE NATURE OF A WRIT OF MANDAMUS UNDER SECTION 42 OF THE COURTS ORDINANCE (CAP. 6)

Writ of mandamus—*Customs Ordinance—Seizure and forfeiture of goods—Claim by person from whom they were seized—Computation of time prescribed for giving notice of claim and tendering security—Detention of goods for examination—Does not amount to seizure—Sections 46, 123, 146.*

Where there is a claim to seized goods under section 146 of the Customs Ordinance the period of one month within which notice of the claim should be given to the Collector should be reckoned from the date when the goods were seized with the intention that "ultimate loss" by forfeiture and condemnation would result from the seizure.

The power of seizure conferred by section 123 of the Customs Ordinance includes by implication the power, for the purpose of examination, to detain for a reasonable period any goods which a Customs officer suspects to be liable to be seized as forfeited goods.

APPLICATION for a Writ of *Mandamus* on the Principal Collector of Customs directing him to accept a notice of claim tendered to him by the petitioners under section 146 of the Customs Ordinance.

H. V. Perera, K.C., with *C. Suntheralingam*, for petitioners.

R. R. Crossette-Thambiah, Solicitor-General, with *H. W. R. Weerasooriya*, Crown Counsel, and *B. C. F. Jayaratne*, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

October 1, 1949. GRATIAEN J.—

Certain facts relating to these proceedings are not in dispute. On May 11, 1949, the petitioners obtained from the Controller of Exports

[1] *(1918) 20 N. L. R. 414.*

a licence to export to a firm in Madras 129 tons of motor accessories of various descriptions specified with elaborate detail in the licence. Purporting to act on the authority of this licence they caused a number of packages containing motor spare parts to be loaded into a brig named "Patucul Cani" which was berthed in the Port of Colombo. On 17th May, before the vessel had sailed, information was received by the Customs authorities which aroused their suspicions in regard to this cargo. The vessel was closely watched, and at 10 a.m. on 20th May three Assistant Preventive Officers boarded her after first sending a message to a representative of the petitioners' firm notifying him of their intention to examine the cargo. Four other Customs officers followed the original party on board. One of them, named Brohier, examined certain cases which were lying on deck and he was satisfied that they contained motor spares which were covered by the licence. In the stern of the vessel, however, he discovered other packages containing goods which in his opinion were not covered by the licence. In the meantime some of the other Customs officers, including Aluwihare, had examined further packages and come to the conclusion that they too contained goods not covered by the licence or, in some cases, goods covered by the licence but in excess of the authorised weight. Further detailed examination of the goods on board with a view to investigating the extent of the suspected contravention of the terms of the licence was in the very nature of things impracticable. The entire cargo, *including the goods which Brohier had satisfied himself to be beyond suspicion and therefore not liable to forfeiture as contraband*, were "detained" (I use this non-committal term in my summary of the facts in view of the legal arguments which were addressed to me at the hearing of the present application).

On returning ashore Aluwihare duly reported the action taken by himself and his brother-officers to the Deputy Collector of Customs who gave instructions that all the goods should be re-landed. Mr. Christoffelsz, who was then the Principal Collector of Customs, was summoned for consultation. He approved of the action taken, and gave directions that the goods were to be further examined with a view to ascertaining which of them were covered by the licence, and which were not so covered. He also directed that his Deputy should hold an official inquiry into the matter after the detailed preliminary examination of the goods had been completed. This inquiry commenced on June 10th and was continued on June 18th. In the meantime Mr. Lanktree had succeeded Mr. Christoffelsz in the office of Principal Collector of Customs. There is no evidence as to the precise date on which a final decision was arrived at arising from the Deputy Collector's inquiry nor did the petitioners receive any information on this matter until August 1, when the Principal Collector wrote to them in the following terms :—

"Motor Parts seized ex s.v. 'Patucul Cani' 20.5.49

"Gentlemen,

With reference to the above seizure of motor parts, I have the honour to inform you that the following goods have been forfeited under section

46 of the Customs Ordinance read with the Defence (Control of Exports) Regulations :

(*a*) Packages consisting of unlicensed goods ;

(*b*) Packages consisting of licensed and unlicensed goods mixed together ;

(*c*) Goods in excess of the individual maxima of each item specified by licence, subject to a maximum of 113 tons as covered by the cart notes.

2. The rest of the articles will be released.

3. You have been found guilty of an offence under section 128 of the Customs Ordinance in connection with this attempted shipment and are accordingly ordered to pay a penalty of Rs. 1,000. This amount should be remitted to me at a very early date.

4. The examination of the goods for the purpose of implementing paragraph 2 will commence at Pettah 3 Warehouse at 2. 30 p.m. tomorrow, 2nd August, 1949. Please be present in person or by representative.

I am, Gentlemen,
Your obedient Servant,

(Sgd.) G. P. THAMBYAH,
for Principal Collector."

The released goods were in due course recovered by the petitioners and were sold by them to a third party. This application relates to the remaining goods which the Principal Collector has, in terms of his letter which I have quoted above, declared to be forfeited for alleged contravention of the provisions of section 46 of the Customs Ordinance (Chapter 185).

Section 46 provides that any goods exported or taken out of the Island contrary to certain specified prohibitions and restrictions "*shall be forfeited* and shall be destroyed or disposed of as the Principal Collector of Customs may direct." The Customs Ordinance is an antiquated enactment which first found its way into the Statute Book in 1869, and has been subjected to various amendments from time to time thereafter. Some of its provisions declare that in certain circumstances goods "shall be forfeited" while in other circumstances they are merely "liable to be forfeited". The learned Solicitor-General has been kind enough to assist me with a careful analysis of the somewhat obscure scheme of the Ordinance, and I am prepared to concede that the draftsman must be given credit for having intended the terms "forfeited" and "liable to forfeiture" to convey different meanings. If goods are declared to be "forfeited" as opposed to "liable to forfeiture" on the happening of a

given event, their owner is automatically and by operation of law divested of his property in the goods as soon as the event occurs. No adjudication declaring the forfeiture to have taken place is required to implement the automatic incident of forfeiture. This seems to be the effect of the decisions of the English Courts in *The Annandale*[1] and *De Keyser v. Harris*[2].

A forfeiture of goods by operation of law would, of course, be of purely academic interest until the owner is in fact deprived of his property by some official intervention. Section 123 of the Ordinance provides the machinery for this purpose. It empowers any officer of the Customs to seize any goods which are "declared to be forfeited" by the Ordinance. When that is done, the goods "shall be deemed and taken to be condemned" and may be dealt with in the manner directed by law unless the person from whom they have been seized or their owner "shall, *within one month from the date of seizure* . . . . give notice in writing to the Collector . . . . that he intends to enter a claim to the . . . . goods . . . . and shall further give security to prosecute such claim before the Court having jurisdiction to entertain the same." (Section 146). If notice is given and security tendered within the prescribed time, the Collector is required to deliver up the goods to the claimant who is given a further thirty days within which to prosecute his claim in the appropriate Court. Unless notice and security are so given, and the action filed within the prescribed period, the owner no longer retains a right to claim property in the goods and is also precluded from challenging the validity of the seizure and alleged forfeiture in judicial proceedings. In that event he may only hope for but he may not demand as of right from the appropriate authority a merciful mitigation of the full rigours of the forfeiture. (Sections 155, 156 and 157.)

The petitioners claim that they have complied in all respects with the requirements of section 146. On receipt of the Collector's letter of August 1 informing them of his decision, their lawyers interviewed Mr. Lanktree and eventually it was agreed that a sum of Rs. 50,000 should be fixed as security for the goods and a further Rs. 3,500 as security for the costs of the action which they comtemplated instituting in terms of section 146. Thereafter, on August 26, they gave the Collector formal notice of action and tendered security in the sums agreed upon. An affidavit in terms of section 147 was also furnished to the Collector. All these facts are not denied. In the meantime Mr. Lanktree had personally consulted the Crown lawyers, and on their advice he rejected the notice and the security on the ground that they were tendered out of time.

The case for the petitioners is that the goods were not "seized as forfeited" until August 1 on which date Mr. Lanktree arrived at and communicated to them his final decision as to which part of the cargo did and which part did not represent goods condemned for alleged contravention of the terms of the export licence under whose authority they purport to have been shipped. On this basis it would follow that the notice of action was given and the agreed amount of security tendered

[1] *(1877) 38 L.T. 139.* [2] *(1936) 1 K.B. 224.*

well within the time prescribed by section 146. They accordingly apply for a writ of mandamus directing the Principal Collector of Customs to accept the notice and security and affidavit tendered to him on August 26 and to release to them the goods declared by him to be forfeited in terms of his letter dated August 1, 1949.

The application is resisted on the ground that the goods were " seized as forfeited " not on August 1 but on May 20 when they were *detained* (I again employ a non-committal term) on board the brig and in due course re-landed for further examination and inquiry. If this be the correct view, the petitioners' right to challenge the alleged forfeiture is admittedly barred by lapse of time, as the period of one month fixed by section 146 had clearly expired long prior to August 26. It is therefore necessary to determine upon the affidavits submitted by the respective parties whether the action by the Customs party on May 26 constituted a seizure of the goods " as forfeited " within the meaning of section 146.

It appears that the petitioners were represented by Counsel at various stages of the examination of the cargo ashore and also at the proceedings conducted by the Deputy Collector. Much lively discussion no doubt ensued as to whether any part of the cargo did in fact contravene the terms of the export licence. Only one letter was received by the petitioners from the Customs authorities during this period, and there is certainly nothing in that letter which could reasonably be construed as indicating that the goods had all been irrevocably seized as forfeited goods. Nor is there any suggestion that the examination of the cargo was being carried out for any purpose other than to assist the authorities in forming a decision as to the extent, if any, to which the terms of the export licence had been contravened. I agree with the learned Solicitor-General that the Customs Ordinance nowhere requires the authorities to notify the owner of the fact that his goods have been seized or of the grounds of seizure. (Some such provision is made, I find, in the Customs Consolidation Act of England—39 and 40 Vic. c. 36, section 207.) Be that as it may, it stands to reason that any communication which is in fact made to the owner should be unambiguous and should leave no room for misunderstanding on the point.

It is necessary to examine the affidavits relied on by the Crown. The Deputy Collector states that on May 20 he was informed by Aluwihare that he, Aluwihare, " had seized the entire cargo on board ". Aluwihare's affidavit does not state in so many terms that he had seized the cargo, but he asserts that on May 20 one of his brother officers, named Pathirane, informed the petitioners' Manager who was on board " that the entire consignment and the brig were seized ". No affidavit from Pathirane is however forthcoming which helps me to ascertain what he actually said on this occasion. The word " seized " is not a term of art, and a great deal therefore would turn on the language employed by Pathirane before one can decide what meaning the words conveyed and were intended to convey. The second petitioner's original affidavit indicates that he formed the impression that the goods on board had been " seized for examination " and that the Customs officials had not yet arrived at a final decision that they were irrevocably divested of

their property in the cargo by reason of a forfeiture arising by operation of law. In a counter-affidavit filed in reply to Aluwihare's affidavit, the petitioners' Manager states that he was at no time prior to August 1 informed that any part of the cargo was "seized as forfeited". This is the only affidavit in which the language of section 146 is specifically employed.

The view I have formed is that the affidavit of Aluwihare does correctly set out what actually occurred on board on May 20, but that the official action taken by the Customs officials on that day did not constitute a seizure of the goods "*as forfeited*" within the meaning of section 146 of the Ordinance. I hold that on May 20 the intention was merely to detain the goods and impound them pending a final decision after further examination and inquiry. When a final decision was arrived at by Mr. Lanktree on August 1, the continued detention of part of the cargo as contraband constituted in law a "seizure" as contemplated by section 146. I believe that this was the impression created in the minds of the petitioners by the various steps taken by the Customs officers between May 20 and August 1. I doubt if any Customs officer himself entertained any contrary view until the position was subsequently reviewed in the light of what was understood to be the true legal position. In my opinion, if the petitioners had taken steps as early as May 21 to resort to the machinery of section 146 for the purpose of challenging the validity of the so-called seizure, that action would have been rightly regarded by the authorities as premature.

I am fortified in my view when I pause to consider the position with regard to the steps taken on board with regard to that part of the cargo which was not suspected of having been shipped in contravention of the export licence. Brohier's affidavit shows that these goods at least were not and could not be regarded as "forfeited", and indeed they were ultimately released—not in the exercise of some statutory prerogative of mercy vested in the Principal Collector of Customs, but because no other alternative action was legally possible. Nevertheless, *the entire cargo* (comprising alleged contraband as well as unoffending goods) were detained so that the extent to which the terms of the licence had been contravened could be precisely ascertained. This, I think, was a reasonable method of exercising official powers involving the possibility of an eventual forfeiture of a man's property in goods.

As against the view which I have expressed, the learned Solicitor-General pointed out that section 123 empowers Customs officers to "seize" goods which are "declared to be forfeited", but no power is expressly conferred on them to *detain* them temporarily pending a decision as to whether or not they should be seized. This is in my opinion an unduly narrow interpretation of the powers conferred on public officers. Where power to do an act is conferred by statute, it carries with it an implied power to do whatever may fairly and reasonably be regarded as incidental to the exercise of that power. (*Attorney-General v. Great Eastern Railway Co.*[1], *Attorney-General v. Fulham Corporation*[2] and *Winnipeg Electric Railway Co. v. Winnipeg City*[3].). I

[1] *5 App. Cas. at p. 478.*
[2] *(1921) 1 Ch. 440.*
[3] *(1912) A. C. 355.*

therefore hold that the power of seizure conferred by section 123 includes the power, for the purposes of examination, to detain *for a reasonable period* any goods which a Customs officer suspects to be liable to be seized as forfeited goods. Any other construction would only lead to precipitate action in respect of goods where no offence against the Customs laws may have been committed.

The meaning of the word "seizure" with reference to action by Customs officers was considered by the House of Lords in *Cory v. Burr*[1]. It was there held that goods must be regarded as seized when they are "taken forcible possession of, and that *not for a temporary purpose*" (per Lord Selborne) but with the intention that "ultimate loss" by forfeiture and condemnation would result from the seizure (per Lord Bramwell). In the present case there was no seizure intended to cause "ultimate loss" to the petitioners until August 1. The action taken on May 20 fell short of seizure. It was only detention for the temporary purpose of further examination pending a decision as to whether "seizure" would ultimately be justified.

For the reasons which I have given I direct that a *mandamus* do issue to the Principal Collector of Customs as prayed for in the petition. When the security bond has been duly perfected, the goods must be returned to the petitioners, and they will be entitled to institute proceedings in the appropriate Court within thirty days from that date for the purpose of challenging the validity of the seizure of their goods.

The respondent will pay to the petitioners their costs of this application as taxed by the Registrar of this Court.

Application allowed.

1950 *Present :* **Basnayake J.**

FERNANDO, Appellant, *and* PAIVA, Respondent

S. C. 9—C. R. Colombo, 18,917

Rent Restriction Act—Claim that premises are required for occupation by a member of landlord's family—Should that person give evidence ?—Act No. 29 of 1948—Section 13 (c).

When a landlord seeks to eject a tenant under section 13 (c) of the Rent Restriction Act on the ground that the premises are required for the occupation of a member of his family there is no requirement in law that the member of the family for whom the house is required should give evidence.

APPEAL from a judgment of the Court of Requests, Colombo.

E. B. Wikramanayake, K.C., with *C. E. Jayewardene*, for plaintiff appellant.

E R. S. R. Coomaraswamy, for defendant respondent.

Cur. adv. vult.

[1] *(1883) 52 L.J.Q.B. 657.*