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TAX LAW

SUPREME COURT

Vallibel Lanka (Pvt) Limited Vs Director General of Customers and Two Others

SC Appeal 26/20008,
SC (Spl) CA 351/2007,
CA (Writ) Appl. 962/2001

Decided on 29th August 20008 by His Lordship
Hon. Sarath N.Silva ,P.C., C.J.
Hon. R.A.N.G.Amaratunga, J & Hon. K.Siripavan, J.

Sections 16, 47 and 107 of Customs Ordinance- GST Act No.34 of 1996 as amended-Defence Levy Act No.52 of 1991 as amended- whether a vessel arriving in the ordinary course of navigation carrying on goods on board falls within the definition of an "imported good" in terms of Section 16 and 47 of the Customs Ordinance.

The Petitioner Company which is duly incorporated in Sri Lanka is engaged in the business of *inter alia*, international and national transportation by sea. The Petitioner purchased a sea going Vessel from Japan and brought the same in to Sri Lankan Territorial waters in April 1991. The Vessel was registered under the Sri Lanka flag and name of MV Induruwa Vally."

In 2001, officers of Department of Customs having entered the premises of the Petitioner held an inquiry on the basis that there were uncustomed goods and/or goods the importation of which were restricted under schedule "B" of the Customs Ordinance and the 3rd Respondent held an inquiry. The 3rd Respondent after inquiry concluded that since the Petitioner Company has not proved that it has paid GST and NSL to the said Vessel, the said Vessel liable to be forfeiture under Sections 47 and 107 of Customs Ordinance. How ever since the Vessel is carrying essential cargo to the North, the 3rd Respondent decided to impose a mitigatory penalty of Rs.7.5 Million under Sections 129, 163 and 47 of Customs Ordinance.

The Petitioner sought a writ of Certiorari to quash the said Order and the said application was dismissed by the Court of Appeal and the Petitioner made the instant Special Leave to Appeal application to Supreme Court.

The Following questions *inter alia*, were mainly dealt in appeal.

1. Did the Court of Appeal fail in to substantial error by holding that the vessel "MV Induruwa Vally" had been imported in to Sri Lanka and the provisions of the Customs Ordinance pertaining to recovery and sanction could be legitimately invoked in the case of an alleged default in payment of Goods and Services Tax and National Levy?

2. Did the Court of Appeal err by failing to consider that unlike in the case of certain other specific fiscal statutes, that in the Goods and Services Act No.34 of 1996 as amended by Act No.11 of 1998, it is only the charging, levying and collection of GST that can be made as if it were a customs duty, whilst recovery of tax in default on the other hand is purely within the jurisdiction of the Commissioner General of Inland Revenue?

3. Did the Court of Appeal fall in to substantial error in law by classifying a ship/vessel as being a "good" in terms of Customs Ordinance and also by holding that such a ship/vessel could be imported within the meaning of the provisions of the Customs Ordinance?

Siripavan J. held that

"I am unable to find any provisions of Customs Ordinance which contemplates or make provisions for a sailing vessel as being a "good" within the meaning of Section 16 of Customs Ordinance. Section 46 which was relied upon by the Respondents obligates an importer to deliver a bill of entry in respect of "goods" imported in a ship. Section 107 of the Ordinance too speaks of goods, packages or parcels taken or passed out of any ship. In carrying out its task of enforcing the law, the Court has to insist on powers being exercised truly for the purpose indicated by Parliament and not for any ulterior motive. .....*I am therefore unable to hold that a vessel arriving in the ordinary course of navigation carrying goods on board falls within the definition of an "imported good" in terms of Section 16 read with Section 47.*

The intention to impose duties and/ or tax on imported goods must be shown by clear and unambiguous language and can not be inferred by ambiguous words. The Court can not give wider interpretation to Section 16 of the Customs Ordinance merely because some financial loss may in circumstances be caused to the state. Considerations of hardships, injustice or anomalies do not play any useful role in constructing fiscal statues. One must have regard to the strict letter of law and can not import provisions in Customs Ordinance so as to supply any assumed deficiency. For the aforesaid reasons too, I hold the Vessel in question was not imported to Sri Lanka within the meaning of the Customs Ordinance.

His Lordship further held that

"In terms of GST Act as amended by Act No.26 of 2000,

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the charging and collecting GST could be made as if it were a Customs duty whilst the recovery of tax in default on the other hand is vested with the Commissioner of Inland Revenue by virtue of Sections 39 to 49 in Chapter VII of the GST Act No.34 of 1996 as amended. *Thus, when GST Act makes general provisions in respect of certain matters and make specific provisions with regard to "recovery" must therefore be exercised by Commissioner General of Inland Revenue and not by Director General of Customs.*

The Defence Levy Act No.52 of 1991 as amended by Act No.25 of 1994 in Section 5A(2) makes clear that the Defence Levy be deemed to be customs duty payable under the Customs Ordinance and the provisions of Customs Ordinance shall apply to the collection and recovery of any such amount. Therefore, the 3rd Respondent has the power to recover Defence Levy, if any, under Customs Ordinance without forfeiting the Vessel.

Ref. 01/09/2008

COMMERCIAL LAW

Court of Appeal

Colombo Municipal Council Vs K.P.C. Builders (pvt) Limited and Bank of Ceylon

CA Appeal No.776/94(F)
D.C.Colombo Case No.10794/M

Decided on 29th April 2008 by Her Ladyship, Rohini Perera, J.

Honouring the Bank Guarantees in commercial transactions-Issuance Injunction preventing the Banks from honouring the Guarantee-Law of Banking- Difference between indemnity and guarantee.i

The Respondent entered in to contact with the Appellant, the Municipal Council of Colombo for the construction of a housing scheme at Church Street, Colombo 02. The entire contract sum was for Rs.8,028,258 and according to the terms of the contract dated 30th March 1988, the National Insurance Corporation issued a performance bond and additionally the Respondent was to provide a Bank Guarantee and the bankers of the Respondent accordingly issued a bank guarantee. Though works commenced and advance payment was made by the Appellant, works of the site was abruptly terminated and the Respondent took up the position that they were compelled to terminate the contract due to the fault of the Appellant.

The Appellant required the Bank of Ceylon, the bankers of the Respondent to pay the full amount on the Bank Guarantee. Thereafter, the Respondent filed this Action in the District and obtained an injunction preventing the Bank of Ceylon from paying any money to the Appellant on the said Guarantee Bond.

The question the Court of Appeal was called upon to determine was whether the Respondent was entitled to a judgment against a payment of the Bank Guarantee.

Her Ladyship having referred to several authorities held that

"The Guarantee in this case was a demand guarantee which had to be honoured on a written demand. The Court will not grant an injunction unless there had been;

1. lack of good faith,
2. there had been no valid demand,
3. the agreement to which the guarantee related was illegal,
4. the demand was tainted by fraud,
5. the bank had knowledge of the fraud.

The justification for this lies in the commercial purposes of the Bank Guarantee. Such a Bank Guarantee is effectively as valuable as a promissory note and is intended to affect the "tempo" of the parties obligations in the sense that, when an allegation of breach of contract is made (in good faith) the beneficiary can claim the Bank Guarantee and receive it's value pending resolution of the contractual dispute. He does not have to wait till the final determination of his rights before he receives money. On an application for an injunction, it is, therefore, not pertinent that beneficiary may be wrong to have claimed the Bank Guarantee because the Court would be frustrating the commercial purpose of the Bank Guarantee. In a Bank Guarantee it is not a prerequisite that the beneficiary should show non performance or sustained damages.

"The essential feature of a Guarantee is that it is born out of a contract as such it bears all the hallmarks of a fully contract. It requires consideration or it must be made under seal. The normal Bank Guarantee are under Seal. Under such a contact, one person, who is the guarantor, the bank or surety, promises to be answerable for a liability of another. Where that other fails to discharge his liability which he has undertaken to perform for the benefit of a third party for which the guarantee was given, then the guarantor become liable under the terms of the contract to pay. The latter become creditor in this triplicate relationship. In such

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partnership the Guarantor must pay the moment the conditions undertaken in the guarantee arises and calls for payment. *Whether the principal contract was truly breached for which the guarantee contract was made has no relevance to the guarantor's obligation to pay. The Guarantee contract is an autonomous contract and is similar in that sense to the "Autonomy of the Letter of Credit". Yet another creature of the Law of Banking.*

Further, the guarantee contract being an autonomous contract, there is an obligation arising out of it, independently of the principal contract. This is another reason why the Courts will not, lightly, issue injunctions to stop the performance of guarantee contracts. For modern commerce relies greatly on them.

If the payments under the Bank Guarantee were to exceed the real loss sustained by its claimant then the party who provided the guarantee is entitled to recover whatever monies that were paid in excess of the quantum of his rightful claim when so determined by the Court or arbitrator, as the case may be, then an adjustment shall take place and order for rectification, normally, through a repayment would follow.

Ref. 02/09/2008

CIVIL PROCEDURE CODE

A.Dissanayake Vs K.D.Premachandra And 18 Others

CA 652/88(F)
D.C.Kalutara Case No.2358/MR

Decided on16th April 2008 by His Ladyship Chandra Ekanayake J. (P/C.A) and Anil Goonerathe J.

Section 114 of Civil Procedure Code tendering the documents to the Court- should the documents be in the custody of the Court

This case was arisen out of building contract entered between the Plaintiff and the Defendants. The contract was to build a Science Laboratory for a school at Dharga Town. The Plaintiff instituted the Action to recover the monies that he pleaded as due on the completion of the stage IV of the said contract. He claimed that he was paid only for stages I to III. The Court entered a judgment for the Plaintiff while rejecting the Claim-in Reconvention of the Plaintiffs. The 1st and 2nd Defendants appealed against the said judgment.

At the trial, the Plaintiff produced documents marked "P1" to "P18".The Defendants produced documents marked "D1" to "D24". The Journal Entry No.64 dated 11th September 1987 stated that the Defendant's documents are finally due on 18th September 1987 and Journal entry 65 of 18th September 1987 shows that Defendant's documents are due finally and not produced and the judgment fixed for 29th October 1987.

At the arguments, the Defendants contended that judgment had been entered without referring to documents of the Defendants nor the Court has not called for documents though documents marked "D1" to "D24" produced in evidence and as such the Court to that extent failed in its duties in terms of Civil Procedure Code.

His Lordship Gooneratne J. held that

"It is apparent that Trial Judge had failed to give his judicial mind to the documents marked in evidence on behalf of the Defendants. Almost 24 documents with some annextures had been marked in evidence at the Trial by the Defendants. Civil Procedure Code imposes a duty on Court to filed the documents in the Court record and take custody of the same. The procedure to be adopted is embodied in Section 114(2) and (3) of the Civil Procedure Code which enacts as follows.

(2) Every document so proved or admitted shall be endorsed with some number or letter sufficient to identity it. The Judge shall then make an entry on the record to the effect that such document was proved against or admitted by (as the case may be) the person against whom it is used, and shall in such entry refer to such document by such number or letter in such a way as to identify it with the document so proved or admitted. The document shall then be filed as part of the record.

(3) All documents produced at the hearing and not so proved or admitted shall be returned to the parties respectively producing them.

His Lordship, further relied on the judgment of the case of **Podiralahamy Vs Ran Banda** reported in 1993 (2) SLR 20 to arrive in the said findings in which case it was specifically held by Senanayake J of the Court of Appeal that *" There is a duty cast on the Court once the, document is admitted and endorsed with a letter to identify it that the Court should have the custody of the documents so marked and identified, though the original Courts for convenience return the documents to Attorneys of the respective parties to tender the documents if necessary after being stamped with an accurate list of the documents."*

Ref.03/09/2008

Appreciations

■ Mr. Sampath Punchihewa - Avissawella Bar

Fresh from the Sri Jayawardena Pura University and Law College Sampath PunchihewFa came to the Avissawella Bar or rather he stormed the place bringing with him a breeze of fragrant fresh air to the presently often dreary life surrounding this complex of Court houses situated on the foothills of the Sri Padha. From the beginning Sampath palled up with the entire crowd of equal minded people and plunged into the life here and enlivened the lives of everyone around with his charm and good humor.

Soon after arriving here we celebrated his marriage to Mahesha. Just a month ago the second celebration came with the arrival of his first child. Everything seemed to move at a delightful pace and speed. Speed indeed seemed to be his hallmark.

Like all dedicated lawyers in this historic station he was meticulous in all his professional work and worked hard and took great care in preparing his civil and notarial work. He put his heart and soul into his work and left nothing undone in order to reach that level of perfection, which is a sine qua non in this highly competitive world of an outstation lawyer. From almost the inception he displayed immense promise as a pleader managing to catch the serious attention of every Honourable Judge before whom he appeared and vigorously pleaded his client's cause.

Sampath was a greatly loved son and brother, a very loving husband and a proud and happy father. He was for us a very trustworthy and a treasured friend. His untimely death is surely, as Horatio said of Hamlet, the cracking of a noble heart.

We are surely going to miss seeing him smile with much sadness for a long time to come.
Good night, sweet friend !

The Outstation Bars Committee of the Bar Association of Sri Lanka

OBITUARIES

Mr. kandiah Nadarajah	-	Colombo
Mr. Natarajah Pathmanathan	-	Mt. Lavinia
Mr. A. S. Johnthasan	-	Mannar
Mr. Reginald Gunawardena	-	Colombo

JUNIOR BAR COMMITTEE

Orientation Programme to welcome new entrants

An orientation programme to welcome the new entrants to the profession was organised by the Junior Bar Committee of the Bar Association. The Programme was held at Galadari Hotel on 6th September 2008 and commenced with the Registration at 8.30 and culminated with lunch for the participants and the dignitaries. The event was attended by over 100 participants of the new batch of Attorneys at Law and received an excellent feed back The agenda included several topics of interest to new entrants including "Professional Ethics" by Mr. Rohan Sahabandu, Senior Attorney at Law, and "Be a Lawyer- Be a Leader" by Mr. Prashtha Lal de Alwis, Attorney at Law, and was followed by a presentation on career opportunities for junior lawyers in the corporate sector.

Of particular interest was the practical programmes organised which included a Moot Court (both civil and criminal) and a panel discussion where any question of concern regarding the profession could be put to the distinguished panel

The event was attended by the Hon. Justice Chandra Ekanayake, President of the Court of Appeal, District Judge of Colombo, Hon Sisira Ratnayake and several other dignitaries including the President and Secretary of the Bar Association and other senior President's Counsel. The Chairman for the event was Mr. Amal De Silva Weerasinghe, assisted by Mr. Thivanka Ekaratne.

Eraj de Silva, Convenor Junior Bar Committee

60th Anniversary Celebrations of the Faculty of Law Academic Sessions

The Faculty of Law, University of Colombo, a pioneer in offering undergraduate and postgraduate degree courses in law in Sri Lanka proudly marked its 60th ANNIVERSARY in 2007. Since its inception it has produced many scholars who have embarked on careers in different fields.

To commemorate this landmark event the Faculty has planned many activities, including Academic Sessions to be held on Friday 24th and Saturday 25th October, 2008 on the theme " Law in Context: An Agenda for Reform"

The Faculty invites scholars including academics and professionals in any area of law to make presentations in the forthcoming event to make this event a success. This organizing committee hopes to publish all the seminar papers.

any scholar who is interested in presenting a paper at this Academic Session may do so by sending

* an abstract of not more than 500 words of his/her paper, should be submitted.
* contact the Faculty of Law, for further details and forms.