Filed 20 Jan 1970

IN THE PRIVY COUNCIL No. 2 of 1970

ON APPEAL

FROM THE SUPREME COURT OF CEYLON

BETWEEN:

DON LEONARD JAYAWARDENE (Petitioner) Appellant

AND

1. V. P. SILVA, Assistant Collector of Customs

2. V. P. VITTACHI, Principal Collector of Customs

3. G. CUMARANATUNGE, Acting Principal Collector of Customs (Respondents) Respondents

CASE FOR THE RESPONDENTS

RECORD

1. This is an appeal from a Judgment and Decree of the Supreme Court of Ceylon, dated the 30th March, 1969, dismissing the Appellant's petition for the grant and issue of a Mandate in the nature of a Writ of Certiorari to quash an Order of the 1st Respondent whereby, as between the alternatives of a penalty of Rs.1,000/- or a forfeiture of three times the value of certain goods which the Appellant was found to have exported contrary to restrictions imposed by the Ceylon Coconut Board the 1st Respondent had elected, in terms of Section 130 of the Customs Ordinance (C.235), to impose the said forfeiture upon the Appellant. pp.35-52

2. The main questions for determination on

this appeal are whether or not the Supreme Court was, in the circumstances of this case, right to decide that :

(A) The election by the Collector of Customs not to impose a penalty on the Appellant but instead, in terms of Section 130 of the Customs Ordinance (C.235), to impose a forfeiture of three times the value of certain shipments of dessicated coconut from Ceylon to the port of New York, which the said Collector had found to be shipments in contravention of Sections 58, 57 and 130 of the said Ordinance read with the Coconut Products Ordinance (C.160) was, in effect, an election between two arbitrary alternatives made by a public servant in the course of his administrative duties and not a decision or determination taken by an official who, in respect of the said election, was under a duty to act judicially or quasi-judicially in respect of which action a Mandate in the nature of a Writ of Certiorari could issue.

(B) The export of dessicated coconut from Ceylon to New York is within the restrictions contemplated in Sections 12 and 130 read with Schedule B to the Customs Ordinance (C.235).

(C) The export by the Appellant of certain shipments of dessicated coconut (hereinafter specified) from Ceylon to New York was unlawful, being in contravention of the terms of licenses which authorised the export of the said shipments to Halifax (Canada) alone.

(D) The Order of the Collector of Customs imposing the said forfeiture was not made in contravention of any principle of natural justice.

3. The facts, as stated by the learned Chief Justice in delivering the Judgment of the Supreme Court (hereinafter referred to in greater detail) are as follows :-

"The Petitioner in this case" (present "Appellant) "is a Director of a company "carrying on business inter alia as "exporters of dessicated coconut from "Ceylon. Early in March, 1968, the "Company made applications to the Principal "Collector of Customs stating its intention "to ship certain quantities of dessicated "coconut to Halifax (Canada). These "applications were made under Section 58 "of the Customs Ordinance for permission "to export the goods prior to the "presentation of the Bill of Entry for the "goods. Customs duty and dues having "been duly recovered or secured, the "dessicated coconut was exported in April, "and March, 1968. Although, however, the "applications and the ships' manifest "specified Halifax as the port of "destination, the three shipments of "dessicated coconut were in fact landed at "the port of New York. p.26,ll. 5-15

4. Continuing his narration of the facts, the learned Chief Justice said:

"On the 17th September, 1968, the 1st "Respondent to the present application, "an Assistant Collector of Customs, issued "a notice to the present Petitioner" (now "the Appellant)" in the following terms:- p.26,ll. 16-39

"SHIPMENT OF D.C. NUTS

"An Inquiry will be conducted by me in my "office ..... on the 23rd and 24th "September, 1968, in regard to the "following shipments of Dessicated Coconut "effected by your establishment in "contravention of Sections 58, 57 and 130 "of the Customs Ordinance (C.235) read "with the Coconut Products Ordinance (C.160).

"(i) 'Jeppessen Maersk' sailed 22.4.58
" 742,900 lbs. D.C. Nuts valued at
" Rs.713,553/90

"(ii)'Johannes Maersk' sailed 5.4.68

" 504,400 lbs D.C. Nuts valued at
" Rs.483,780/48
"(iii) 'Leda Maersk' sailed 14.3.68
" 499,900 lbs. D.C.Nuts valued at
....Rs.472,835/75

"As persons being concerned in the
"exportation of the above shipments of
"Desiicated Coconuts contrary to
"restriction, in that the above Dessicated
"Coconuts were shipped to the Port of New
"York instead of the Port of Halifax as
"stated in your application in respect of
"each consignment, you are requested to be
"present at this inquiry and show cause
"as to why I should not proceed to make
"Order of forfeiture of three times the
"value of the said Dessicated Coconut in
"each case on each of you in terms of
"Section 130 of the Customs Ordinance C.235"

"Similar notices were also issued to other
"Directors of the same Company and to the
"Office Manager of the same Company."

5. The learned Chief Justice's narration of the facts continued as follows :-

p.27, ll. 1-4 "On the 25th September, 1968, the 1st
"Respondent informed the Petitioner
"(present Appellant) that the 'application'
"referred to in the above notice was 'the
"intend-to-ship application' made by the
"Company under Section 58 of the Customs
"Ordinance in respect of the shipments
"specified in the notice"

p.27, ll. 5-10 "The inquiry referred to in the notice
"was ultimately held on the 25th and 26th
"September at which sworn evidence was
"recorded of the Petitioner and other
"Directors or employees of the Company,
"and at which also some other documents
"were produced by the Customs. The 1st
"Respondent kept a written record of the
"evidence. The inquiry was followed by
"a letter of the 30th September, 1968,
"addressed to the Petitioner in the
"following terms:-

"SHIPMENTS OF D.C. NUTS

p.27, ll. 11-22

"I have carefully considered the evidence "that was led before me at this inquiry "and I hold that Mr. D. L. Jayawardene "(present Appellant), is guilty of the "charges made against him and conveyed to "him by my notice ..... of 17.9.68

"I elect in terms of Section 130 of the "Customs Ordinance (C.235) to impose a "forfeiture of three times the value of "the goods in question

"viz. (a) "Jeppessen Maersk"....
" Rs.2,140,659.60
" (b) "Johannes Maersk" ....
" Rs.1,451,340.00
" (c) "Leda Maersk" .....
Rs.1,418,505.00

"amounting to a total of Rs.5,010,504.00 "(Rupees Five Million ten thousand five "hundred and four)"

"Letters were addressed in identical terms "to the two other Directors and the Office "Manager, subject only to the difference "that in the case of the Office Manager, "the amount of the forfeiture was "mitigated to Rs.1,670,168/-."

p.27, ll. 23-25

6. By his letter, dated the 4th October, 1968, (Ex.C) the 1st Respondent required the Appellant to pay the said forfeitures totalling Rs.5,010,504.00 within two weeks of the receipt of the letter.

Ex.C,p.247

On the 16th October, 1968, the Appellant filed a Petition in the Supreme Court of Ceylon praying inter alia for a Mandate in the nature of a Writ of Certiorari quashing the said Order and/or Decision of the 1st Respondent, including the Order of Forfeiture of Rs.5,010,504/-.

pp. 1-6

In his said Petition the Appellant said, inter alia, that the Decision and/or Order of

p.3,ll.25-28

the 1st Respondent was "wholly unsupported by the evidence", was "a wholly unreasonable finding" and was "erroneous in law". He referred to the export licences issued to his Company (Vavasseur Trading Co. Ltd. of Colombo) under the Coconut Products Ordinance (C.160) for the export of the consignments of dessicated coconut in question. Those licences, signed by the "Manager, Ceylon Coconut Board", "permitted" the export of the dessicated coconut to Halifax (Canada) alone but, said the Appellant, even if the consignments ..... eventually reached New York, at the time of the exportation ... there was no contravention of any restriction upon this export and, accordingly, no contravention of Section 130 of the Customs Ordinance. In his submission there was no export contravention of the Coconut Products Ordinance (C.160) or the Customs Ordinance "in that the intended place of destination and/or discharge of the said consignments of dessicated coconut, appearing on the said export licences, is not a valid and/or lawful condition or restriction of the licence and as such is void and of no effect in law".

p.4,ll. 15-20

p.4,ll. 24-31

7. In his said Petition the Appellant said, further, that "the 1st Respondent had no power and/or jurisdiction in law to make the aforesaid Order of forfeiture under Section 130 of the Customs Ordinance" unless it was first established that the Petitioner was a person concerned in exportation contrary to restriction which, he said, was not the case here. He said also, that "the said Decision and/or Order of the 1st Respondent contains ex facie errors of law" and complained of "a violation of the principles of natural justice."

p.4, ll. 36-39

p.5,ll. 1-3

p.5,ll. 12-16

8. Paragraph 15 of the Appellant's Petition, was as follows :-

> "15. In any event, the 1st Respondent "having been appointed by the Public "Service Commission has not been lawfully "appointed to act under Section 130 of the "Customs ordinance in that the 1st "Respondent when so acting is performing

p.5, ll. 17-22

"the functions and duties of a Judicial "Officer within the meaning of that term "in Section 55 of the Ceylon (Constitution) "Order in Council of 1946 and/or is "exercising judicial power."

9. In reply, the 1st Respondent, in his Affidavit, dated the 9th January, 1969, said, inter alia, that pp.15-22

"(A) The Petitioner's (present Appellant's) "Company viz. the Vavasseur Trading Co. "Ltd. (herein also referred to as "the "Company") was at all material times a "registered shipper of dessicated coconut "under the Coconut Products Ordinance "(C.160) and the Regulations made "thereunder. p.15,11. 36-38

"(B) The Ceylon Coconut Board (herein also "referred to as "the Board") acting in "exercise of its powers 'provided, by "circulars and instructions issued to "millers and shippers certain special "procedures for the manufacture and export "of dessicated coconut to the U.S.A. in "view of the stringent requirements and "controls imposed by the U.S. Government "authorities on the import of food! p.16, 11.1-7

"(C) In terms of the said circulars only "mills which were equipped with "thermostatic control of the sterilizer "system and heat sealers were approved for "manufacture of dessicated coconut for "export to the U.S.A. In the case of "U.S. exports special inspections, more "stringent sampling and laboratory testing "were carried out by Officers of the Board "both in regard to the process of "manufacture and the quality of the "manufactured product to ensure compliance "with the required standard." p.16, 11. 8-14

"(D) Shippers of dessicated coconut to the "U.S.A. were required, in terms of the "said special procedures, to inform the p.16, 11. 15-22

"Board of the quantities intended to be "shipped, and the names of the millers "who had contracted to supply the shipment. "Licences were not issued in respect of such "shipments until tests of samples of the "product were found to be satisfactory."

A less stringent and different procedure was followed in respect of exports to countries other than the U.S.A.

10. Continuing, the 1st Respondent, in his said Affidavit, stated:- 10

p.16, ll. 25-31 "(E) The Company applied to the Board for "licences to export 5,000 bags of "dessicated coconut weighing 500,000 lbs "on board the ship 'Leda Maersk' to the "port of Halifax in Canada, specifying, "inter alia, the particular mills where "the dessicated coconut was manufactured "and giving the numbers of the said mills.

"The Company declared in the said 20 "applications that the statements contained "therein were true and accurate .....

p.16, ll. 33-35 "Dessicated Coconut General Export Licences "were granted by the Board to the Company "authorising the export of the said "dessicated coconut per s.s. 'Leda Maersk' "to the said port of Halifax."

p.16, ll 37-44 "(F) The Petitioner (now Appellant) a "Director of the Company, instructed the "Assistant Shipping Manager (S.W. Ameratunge) 30 "of Carson Cumberbatch & Co., Colombo, "local agents of the Maersk Line, to book "freight aboard the said 'Leda Maersk' for "the said cargo of dessicated coconut and "to arrange for its storage with the "option of discharge at Halifax or at the "port of New York, all of which was done.

"Bills of Lading, specifying the port of "discharge at Halifax were issued in "respect of the goods. 40

"(G) The Company then applied: (a) under "Section 58 of the Customs Ordinance for "permission to export the said 500,000 lbs "of dessicated coconut prior to the "presentation of Bills of Entry for such "goods stating their intention to ship the "cargo per s.s. 'Leda Maersk' for Halifax; "and (b) under Section 22 (3) of the "Exchange Control Act, re export of the "said cargo by the said ship to the parent "Company in London, the country of "destination of the cargo being Canada and "the port of final discharge, Halifax. "Both applications were granted. p.17, ll. 1-5 p.17, ll. 8-16

"(H) The particulars stated in the General "Export Licences, in the applications "under Section 58 of the Customs Ordinance "and in the permits granted under Section "22 (3) of the Exchange Control Act were "found to correspond with the particulars "stated in the Bills of Lading issued in "respect of the goods and the exportation "was therefore authorised. p.17, ll. 18-24

11. The 1st Respondent, in his said Affidavit continued his narration of events as follows:- p.17, ll. 25-28

"(I) The 'Leda Maersk' sailed from "Colombo on the 15th March, 1968, "discharged 4,999 bags of dessicated "coconut at the port of New York, U.S.A. "and delivered the same to the consignees.

"Bills of Entry (Export entries) delivered "by the Company under Section 57 of the "Customs Ordinance showed the total "quantity of dessicated coconut as "499,900 lbs and the total f.o.b. value "as Rs.472,835/75. The final destination "in each of the said documents was "declared to be Canada. p.17, ll. 29-35

"(J) On the 22nd March, 1968, the Company "instructed the local agents of the Maersk "Line to request discharge of the said "cargo on board the "Leda Maersk" at New p.17, ll. 37-41

"York and to amend the Bills of Lading "for discharge at New York.

p.17, ll. 42-45 "On the 12th April, 1968, the Company was "informed that 5,000 bags of dessicated "coconut on board the "Leda Maersk" had "passed U.S. Health Examination.

12. The 1st Respondent, in his said Affidavit, referred to the Appellant's other shipments and continued as follows :-

p.19, ll. 8 - 11 "(K) The s.s. "Johannes Maersk", sailed "from Colombo on the 5th April, 1968, "purporting to carry an authorised "consignment to Halifax (Canada) of "800,000 lbs of dessicated coconut. It "discharged 504,400 lbs at the Port of "New York and delivered the same to the

p.19, ll. 22-29 "consignees. Subsequently, on the 15th "and 17th May, 1968, the Company's Manager "presented, under Section 57 of the Customs "Ordinance, Bills of Entry dated the 15th "and 17th May, 1968, showing the total "quantity shipped on the "Johannes Maersk" "as 504,400 lbs. (total f.o.b. value "Rs. 483,780/48) and stating the final "destination of the cargo to be U.S.A.

p.20, ll. 28-39 "(L) The s.s. "Jeppessen Maersk" sailed "from Colombo on the 22nd April, 1968, "purporting to carry an authorised "consignment to Halifax (Canada) of "749,500 lbs. of dessicated coconut. It "discharged 7,393 bags of dessicated "coconut of the said cargo at the Port of "New York and delivered the same to the "consignees. In regard to this shipment, "a Director of the Company, in answer to an "enquiry as to outstanding New York "commitments, informed the parent Company "in London, on the 23rd April, 1968, that "the "Jeppessen Maersk" had been loaded "with a total of 7,045 bags of Medium and "Fine Quality bags of dessicated coconut.

p. 21, ll. 11-18 "Between the 18th and the 22nd May, 1968, "the Company presented 4 Bills of Entry

"under Section 57 of the Customs "Ordinance, showing inter alia the total "quantity of dessicated coconut shipped "on the "Jeppessen Maersk" as 742,900 lbs, "total f.o.b. value of the cargo being "Rs.713,553. In three of the said Bills "of Entry the final destination was "declared to be U.S.A. and in the other "Canada.

"On the 5th August, 1968, the Company "wrote to the 1st Respondent requesting "alteration of four Bills of Entry "relating to the "Johannes Maersk" of the "15th April, 1968, and three Bills of "Entry relating to the "Jeppessen Maersk" "of the 22nd April, 1968. The Company "requested that in the said Bills of "Entry the final destination of the vessel "should be altered from U.S.A. to Canada".

13. The 1st Respondent, in his said Affidavit, stated further that he had investigated the Company's shipments of dessicated coconut in pursuance of the Board's inquiries, following the rejection at the port of New York, on the 28th February, 1968, of 100 bags of dessicated coconut shipped by the Company per s.s. "Jeppessen Maersk" on voyage 40. p.21, ll. 33-41

In conclusion the 1st Respondent, referring to the inquiry held by him, said that the Petitioner (now the Appellant) who, at the enquiry, was represented by Leading and Junior Counsel, was aware of the allegation that he was concerned in the exportation of goods in contravention of the restrictions contained in the Dessicated Coconut General Export Licences relating to the port of destination, that he (the 1st Respondent) was addressed at length by the Petitioner's Counsel on "the question whether the stipulations as to the destination constituted a valid restriction, and whether the shipment was a contravention of Section 130 of the Customs Ordinance", that the inquiry was not conducted in violation of the principles of natural justice, that his decision that the Petitioner was liable to forfeit the said sums p.21, l.42 to p.22, l.18

(see paragraph 5 hereof) under Section 130 of the Customs Ordinance, was based solely upon evidence and documents which were shown to the Petitioner at the inquiry and that the material upon which he had based his decision had been placed before the Attorney- General for the institution of proceedings to recover the sums which he had decided the Petitioner was liable to forfeit.

pp.22-25 14. In reply, the Appellant in his further Affidavit, dated the 27th January, 1969, said inter alia that at all material times he was the official in charge of the shipping arrangements of the Company, that the consignments aboard all three of the said vessels had been shipped to Halifax, that the Company obtained General Export Licences in respect of the consignments which Licences did

pp.23-24 not contain any valid restriction limiting the export to a particular place or Port (e.g. Halifax); that the request for optional Halifax/New York stowage was made at the request of the Company's London buyers (J. H. Vavasseur & Co. Ltd.); that the instructions as to the

p.24,ll. 21-26 said optional stowage in all three cases was given just prior to loading; that the

p.24, ll. 32-37 consignments were sold by the Company to its said London buyer on f.o.b. terms; that no instructions were given by the Company as shippers and/or exporters to deliver the cargoes at the port of New York to any person; and that after the "Leda Maersk" (the first of the three

p.24, ll. 38-42 vessels concerned) had sailed from Colombo the Appellant had, on instructions from, and at the request of, the said London buyers, requested the local agents of the shipping line concerned to discharge the cargo at New York.

15. The Petition was heard in the Supreme Court by a Bench which consisted of H. N. G. Fernando C. J., and Samerawickrema and

pp. 25-51 Weeramantry JJ. who, by their Judgment, dated the 30th March, 1969, dismissed it but made no order as to costs.

Availability of certiorari

16. In substance the Respondents' submissions were that the function of the first Respondent under the said Section 130 was not judicial or quasi judicial. His "decision" "determination" or "order" had no conclusive effect, since his opinion that the Appellant was a person concerned in the exportation contrary to restrictions imposed was not binding on the Appellant. It was not an order or determination which the Executive branch of the Government could enforce without the interposition of an adjudication by a Court of competent jurisdiction. A forfeiture or penalty under Section 130 of the Customs Ordinance was binding and conclusive on a party only when the District Court having jurisdiction held that party guilty of the alleged contravention in an action instituted by the Attorney-General under Section 145 of the Customs Ordnance for the recovery of the amount of the forfeiture or penalty.

While the election of the amount to be claimed was final and binding on the Court, it did not of itself affect any legal rights of the Appellant because the Appellant's liability depended on the objective existence of the facts to be proved before the Court. Further, in making the election the Collector was not called upon to apply any pre-existing legal rule or norm to the facts as found by him. His election depended on what was expedient in the circumstances and was therefore a purely administrative function.

17. Delivering the main Judgment of the Supreme Court, H.N.G. Fernando C.J. (with whom Samerawickrema and Weeramantry JJ. agreed) narrated the relevant facts (as set out in paragraphs 3 to 5 hereof) and, continuing, referred to the case of the Collector of Customs thus:- The export of dessicated coconut from Ceylon is subject to a licensing scheme established by Regulations made under the Coconut Products Ordinance (C.160). The scheme requires an export licence to authorise

p. 27, ll. 31-39

the said export and, accordingly, an appropriate licence was issued to the Company but only for the exportation of the consignments of dessicated coconut to Halifax (Canada). The exportation of the consignments to New York, in which the Petitioner (present Appellant) was concerned, was contrary to restrictions imposed by the said Regulations.

p.28, ll. 1-5 Continuing, the learned Chief Justice said that if the case of the Collector of Customs was correct then the exportations to New York had contravened Section 12 of the Customs Ordinance (C.235) read with the last paragraph of Schedule B thereto

18. The learned Chief Justice, further examining the case of the Collector of Customs said that by the said contravention of Section 12 of the Customs Ordinance (C.235) read with the last paragraph of Schedule B thereto the Collector said that the Petitioner (present Appellant) had incurred a liability to one of the two penalties set out in Section 130 of the said Ordinance the relevant portion of which is as follows :-

p.28, ll. 6-35

> "Every person who shall be concerned in "exporting . .. any goods the exportation "of which is restricted contrary to such "... restriction ..... shall ... forfeit "either treble the value of the goods, or "be liable to a penalty of Rs. 1,000/-. at "the election of the Collector of Customs."

The learned Chief Justice drew attention to the fact that, in slightly different language, a similar election by the Collector of Customs was provided for in Sections 33, 129, 132 and 133 of the Customs Ordinance. Correcting the grammar of Section 130, he assumed its intention to be that a person concerned in any of the acts referred to in the Section "shall forfeit treble the value of the goods, or the penalty of Rs.1,000/-. at the election of the Collector of Customs" which assumption, he said, had not been questioned by Counsel at the hearing.

19. On "the automatic incident of forfeiture" as a penalty where Customs Laws and Regulations are contravened, the learned Chief Justice referred to the decision of the Supreme Court in Palasamy Nadar v. Lanktree (1949) 51 N.L.R. 520, 523, which had applied the principles governing the decision in De Keyser v. British Railway Traffic Co. [1936] 1 K.B.224, a case which was concerned with the language of Section 202 of the English Customs Consolidation Act of 1876, to the effect that conveyances used for the conveyance of goods liable to forfeiture under the Customs Act shall be forfeited. The learned Chief Justice pointed out that "the Judgments in the English case state that 'where certain events have happened the property in question is labelled "forfeited" under Section 202 and that 'as soon as it is ascertained that a conveyance has been used for the conveyance of goods liable to forfeiture, ipso facto that conveyance is forfeited.'

In the learned Chief Justice's view a forfeiture under Section 130 of the Customs Ordinance having been incurred as soon as a prohibited or restricted exportation takes place, it becomes the function and duty of the Collector of Customs under the said Section to elect between the two alternative amounts of the incurred forfeiture (both of them specified) and in the instant case he had decided in favour of "treble value of the goods exported." p.29, ll. 8 - 20

20. The learned Chief Justice said that the first question for decision was -

> "Whether a Writ of Certiorari will lie to "quash the action taken by the Collector "or Customs under Section 130 of the "Customs Ordinance?" p.29, ll. 26-29

He referred to the argument for the Appellant that the Collector's election under the said Section 130 "cannot lawfully be made unless the Collector has first determined that the facts by reason of which the statutory p. 29, ll. 29-42

forfeiture is incurred do actually exist"; that "such determination is one which affects the rights of the person concerned in the exportation, in that the consequence of the election can be that the person will have to pay the larger of the two alternative sums"; and that "having regard to the magnitude of the difference between the two alternative sums which may have to be paid in the instant case.... a determination which precedes an election and which can have so serious a consequence must be reached in a quasi-judicial manner." He referred also to the further argument for the Appellant "that the application of Section 130 may well involve two stages of quasi-judicial decision, namely, the stage at which the Collector satisfies himself in regard to the existence of what were described as the jurisdictional facts, and, secondly, the stage when he brings his mind to bear on the question of electing between the alternative statutory forfeitures"; and the argument that "because the election made at the second stage can seriously affect the rights of subjects, the quasi-judicial character attaches to both stages of the consideration which the Collector must give to the matter."

p. 29, l. 43 to p. 30, l.8

For reasons that he gave, the learned Chief Justice rejected all these arguments.

21. The learned Chief Justice drew attention to the importance of the existence of a duty to act judicially whenever it was sought, by means of a Writ of Certiorari, to review and quash the decision of a person or body of persons. In support, he referred to the observations of Atkin L.J. (as he then was) in R. v. Electricity Commissioners [1924] 1 K.B. 171 at p. 205 and to those of Lord Hewart C.J. in R. v. Legislative Committee of the Church Assembly [1928] 1 K.B. 411 at p.415. Applying those observations to the circumstances of the instant case, he said:-

p.30, l.15 to p.31,l.20

> "We must say that the existence of such a "duty" [to act judicially] " is not made "manifest in Section 130 and in connected "provisions of our Customs Ordinance."

p.31, ll. 20-24

22. On the principle of natural justice, audi alteram partem, which, it was argued for the Appellant, was applicable in the instant case and had not been applied by the Customs Collector, the learned Chief Justice referred to the decision of the Board in Durayappah v. Fernando (1966) 69 N.L.R. 265 upon which Counsel for the Petitioner had relied. The learned Chief Justice said that in that case, where one of the questions for consideration was whether a Minister of the Government of Ceylon, in making an Order for the dissolution of a Municipal Council, had a duty to observe the principle audi alteram partem, the Board had said :- p.31, ll. 25-44

> "There are three matters which must always "be borne in mind when considering whether "the principle should be applied or not. "These three matters are :-
>
> "First, what is the nature of the property, "the office held, status enjoyed, or "services to be performed, by the "complainant of injustice.
>
> "Secondly, in what circumstances or upon "what occasions is the person claiming to "be entitled to exercise the measure of "control entitled to intervene.
>
> "Thirdly, when a right to intervene is "proved what sanctions in fact is the "latter entitled to impose upon the other.
>
> "It is only upon a consideration of all "these matters that the question of the "application of the principle can properly "be determined."

23. In coming to the conclusion that nothing in the said observations of the Board made the application of the principle audi alteram partem necessary or appropriate in the instant case, the learned Chief Justice, for reasons that he gave, expressed the following views:-

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p.32, ll 28-40

"The fact that the Collector makes an "election of one of the two alternative "sums which Section 130 declares to be "forfeit, does not, and must not, in any "way affect the duty of a competent Court "to decide whether or not the statutory "forfeiture was actually incurred in a "particular case. Indeed the judgment "in the case of Palasamy Nadar v. Lanktree "(1949) 51 N.L.R. 520 makes it clear that "the Collector makes no adjudication when "he elects to seize goods which Section 46 "declares to be forfeited.

"We are satisfied that similarly there is "no adjudication on the facts by the "Collector when he makes his election under "Section 130 and that the only determination "having the legal effect of an "adjudication is that which a Court will "make in an action" /to enforce the demand "for payment of the forfeiture/ "brought by "the Attorney-General. There is thus no "sanction attached to the Collector's "election in the nature of any compulsion "to make payment."

24. Further observations of the learned Chief Justice on the applicability or otherwise of the principle of audi alteram partem where the Collector of Customs makes an election under Section 130 of the Customs Ordinance were as follows :-

p. 33, ll. 15-20

"The election of the Collector under "Section 130 .. does not create a new "jeopardy to the Petitioner's right" /to "keep his money/;" the election serves only "to fix the extent of the statutory "jeopardy to one of two alternatives "arbitrarily imposed by Section 130. The "election will have validity only if a "Court holds, in an action instituted under "Section 145, that there has been a "contravention of Section 130 ....."

"It is significant that in Section 130, as

"well as in a few other Sections of the "Ordinance, the Legislature compels the "Collector to make a choice between what "manifestly appear to be two arbitrary "alternatives. The Sections give no "guidance to the Collector as to the "considerations which might affect his "choice between these two alternatives, "and they do not leave it open for him at "the stage of election to demand no "forfeiture at all or to demand a sum "lower than either of the two arbitrary "sums specified in these Sections ....." p.33, ll. 23-29

"... In Pritchard's Case [1953] 1 W.L.R. "1158, Parker J., as he then was, observed "that it cannot be too clearly understood "that the remedy by way of Certiorari "only lies to bring up to this Court and "quash something which is a determination "or a decision (the italics are ours). "This description of the character of the "matter which may be quashed can scarceley "be said to apply to an election between "two arbitrary alternatives, one or other "of which must necessarily be chosen under "Section 130." p.33, ll. 34-40

25. The learned Chief Justice, referred to, but did not accept the argument advanced on behalf of the Appellant that "the duty of election imposed on the Collector must necessarily carry with it the duty to have due regard to the extent of the participation of the offender in any of the acts referred to in Section 130, to the question whether his participation was with guilty knowledge of the breach of any relevant law and also to the question whether his blameworthiness was such as to render more appropriate the one peaalty or the other." The learned Chief Justice said :- p.33, l. 42 to p. 34, l.2

"The answer to this submission is two-fold: p.34, ll. 11-22

"Firstly, the Legislature has nowhere "indicated the principle on which the "Collector is to be guided in making his "election; -

"Secondly, the Legislature has not expressly "contemplated the process of a quasi- "judicial determination of this matter by "the Collector.

"Moreover the possibility that the lesser "penalty may appear to a Court to be the "more appropriate in a particular case is "not in our opinion a consideration upon "which to base an inference that the "Legislature intended the Collector to act "quasi-judicially. While it is true that "one can contemplate cases in which the "milder choice may appear more appropriate, "one can also contemplate cases in which "either choice which the Collector may "make would be harsh in the particular "circumstances ....."

p.34, ll. 27-40

"In any event if the election actually "made by the Collector under Section 130, "whether of the graver or less grave "forfeiture specified in Section 130, is "excessive, the matter does not end there. "The Ordinance provides in Section 163 for "mitigation by the Collector of any "forfeitures incurred under the Ordinance "and for appeals to the Minister ..... "In enacting Section 163 the Legislature "took account of the fact that the "penalties which it itself arbitrarily "imposed, or which it compelled a "Collector to select, may be arbitrary and "should as a matter of policy be mitigated "in appropriate circumstances."

p.34, l.42 to p.35, l.5

26. The learned Supreme Court Judge rejected arguments for the Appellant based on decisions (such as R. v. Postmaster-General , Exparte Carmichael, /1928/ 1 K.B. 291 and R. v. Boycotte /1939/ 2 K.B. 65) in which it was held that the need for confirmation or the possibility of alteration or abandonment of some determination does not have the effect that there is no duty to act judicially in reaching the stage of determination. He referred, to the decision in R. v. Manchester Legal Aid Committee /1952/ 2 Q.B. 413 and, distinguishing the

decisions relied on from the instant case, said:

> "It suffices to point out that there is "no indication in Section 130 of the "Customs Ordinance that the Collector need "consider any matters other than matters of "policy or expediency". — p.35, ll. 6-8

As to the second matter which, in Durayappah v. Fernando (1966) 69 N.L.R. 265, the Board had said should be considered when dealing with the application of the principle of audi alteram partem - the circumstances or occasions when the person claiming to be entitled to exercise is entitled to intervene - the learned Chief Justice said that in the present case the Legislature had not, in the relevant statutory provisions, specified even a vague ground upon which the election of the Collector is to be based and thus the circumstances or occasions on which the Collector intervenes are not such as to require that a party should be heard before an election unfavourable to him is made. — p.35, ll. 9-20. — p.35, ll. 20-24

27. Summarising the conclusions of the Court on the application of the said Durayappah's Case, the learned Chief Justice said :-

> "At the highest the Collector's election "may, in a provisional manner and to a "limited extent, affect a 'right' of the "Petitioner; but the circumstances in "which the election is made are not such "as to require the Collector to hear the "other side; and no sanction in the "proper sense can either be imposed by "the Collector upon a person liable to a "forfeiture or can else attach under the "Ordinance to render the election "effective — p.35 ll. 26-32

> "We hold therefore that the principle "audi alteram partem does not apply in the "case of the making of the election "authorised or required by Section 130." — p.35, ll. 33-35

RECORD

p.35,l.36 to p.36,l.23

p.35,ll. 40-41

p.36,ll. 24-35

28. Rejecting, for reasons that he gave, arguments based on decisions of the Supreme Court of India on the quasi-judicial nature of certain proceedings under the Indian Sea Customs Act which Act, he said, had a distinctly different structure to the Customs Ordinance of Ceylon, the learned Chief Justice considered the argument advanced on behalf of the Appellant that, in view of the provisions of Sections 7, 8 and 9 of the Customs Ordinance as to the power of the Customs Officers to administer oaths, to hold inquiries, to examine witnesses on oath, to call for and inspect documents, and to punish persons who give false evidence at inquiries, it could be inferred that an election under Section 130 must be made in a quasi-judicial manner. The learned Chief Justice did not agree that any such inference was justified. He said :-

p.36, ll. 36-41

"There are many statutes which require "that returns, statements and declarations "furnished to a statutory authority must "be made or verified under oath, but this "circumstance by itself does not justify "an inference that in the consideration of "such returns, statements or declarations "for the purpose of reaching some decision "thereon, the statutory authority has a "duty to act judicially."

p.37, ll. 1-25

29. The learned Chief Justice next considered and, for reasons that he gave, rejected, the reasoning and the accuracy, in law, of the decision in Tennekoon v. Principal Collector of Customs (1959) 61 N.L.R. 232 which was followed in Omer v. Caspersz (1963) 65 N.L.R. 494. These decisions were relied upon to support the argument that the Collector of Customs in the instant case was under a duty to act judicially; but the learned Chief Justice, although disposed to encourage the procedure of a notice and inquiry, adhered to his view that, in the circumstances of this case, the Collector was under no duty to act judicially in making an election between the two alternative forfeitures set out in Section 130.

RECORD

30. In order to arrive at the true character of the monetary forfeiture set out in the said Section 130, the learned Chief Justice examined, and compared, the character of other forfeitures for which the Customs Ordinance provides. He referred to and considered Sections 43, 44, 46, 47, 50, 65, 75, 125, 129, 154, 163, 164 and 165. In accordance with the decision of the Supreme Court in Palasamy Nadar v. Lanktree (1949) 51 N.L.R. 520 (see paragraph 19 hereof), and overruling Tennekoon v. Principal Collector of Customs (1959) 61 N.L.R. 232 and Omer v. Caspersz (1963) 65 N.L.R. 494, he held that the character of the monetary forfeiture under Section 130 is not such as to require a prior judicial or quasi-judicial enquiry before the Collector makes his election between the two arbitiary alternatives set out in the said Section. He expressed the decision of the Court thus:-

p.37, l.26 to p.38 l.39

p.40,ll. 1-10

> "We hold that the Writ of Certiorari does "not lie to quash an election made by the "Collector under Section 130 of the "Ordinance and we must accordingly dismiss "this application."

p.40, ll. 14-16

THE MERITS

(a) VALIDITY OF REGULATION 7

31. The learned Chief Justice next referred to, but, for reasons that he gave, rejected, the argument advanced on behalf of the Appellant to the effect that the said exportations of dessicated coconut were not within the restrictions contemplated in Section 130 read with Schedule B to the Customs Ordinance and that accordingly there did not exist the jurisdictional facts upon which the Collector could lawfully exercise his statutory power of election. This argument was based on an interpretation of Section 20A of the Coconut Products Ordinance (C.160) which, it was said, established that Government attempts to regulate and control the export of dessicated coconut from Ceylon had been ineffective.

p.40, l.45 to p.41, l.7

RECORD

p.42, ll. 35-39

In the view of the learned Chief Justice, Parliament's intention to control the export of dessicated coconut by a licensing system would have been directly implemented if, as envisaged in the said Section 20A, the Minister, having previously obtained Parliament's approval for Regulations in regard to licences issued under the new Section 20B, had fixed a date prohibiting export of dessicated coconut from Ceylon except under licence. (It is convenient to note here that paragraph (a) of Section 20B, authorises the making of Regulations for "the regulation, inspection, supervision and control of the manufacture, packing, transport, storing and export of dessicated coconut). The learned Chief Justice said that the Minister was content, in April 1963, to obtain Parliament's approval to Regulations which amended the 1961 Regulations, thus bringing into operation a new Regulation 7 the provisions of which made it clear that any lawful export of dessicated coconut from Ceylon could take place only under a General Export Licence issued by the Manager of the Coconut Board on payment of a fee.

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p.42, l.41 to p.43,l.20

p.43, ll. 21-39

32. The learned Chief Justice then referred to the arguments of both sides as to the effect of the Minister's omission to fix a date as envisaged in the said Section 20A.

p.43, ll. 24-31

For the Appellant it was argued that as a result of the said omission there was not in force any lawful provision restricting the exportation of dessicated coconut from Ceylon, the said new Regulation 7 being ultra vires.

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For the Respondents, the argument was - in the words of the learned Chief Justice - as follows :

p.43, ll. 32

"The power given by paragraph (a) of "Section 20B to make Regulations for the "regulation, supervision and control of "the export of dessicated coconut, when "read with Section 17 (1) (d) of the "Interpretation Ordinance, includes the "power to provide for an export licensing

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"system. What is involved in the answer "of Crown Counsel is that paragraph (a) of "Section 20B conferred on the Minister, "independently of Section 20A, and as an "alternative to enforcing its provisions, "power to make Regulations for an export "licensing system."

The learned Chief Justice did not accept either argument.

33. In the opinion of the learned Chief Justice, approval of the Regulations by the Parliament of Ceylon had relieved the Minister of the duty to fix a date under the said Section 20A and the coming into force of the Regulations as so approved was "tantamount to the requisite fixation of the date by the Minister". On this subject, he said:- p.44, ll. 33-37

"We have to take note of the fact that the "Regulations which the Minister did make "in 1963 and which introduced the new "Regulation 7, had the approval of both "Houses of Parliament. Insofar "therefore as the Amending Regulations "purport to require a General Export "Licence as a condition for the "exportation of dessicated coconut, we "cannot shut our eyes to the fact of "Parliament's approval of this Regulation "and we are compelled to the conclusion "that Parliament did thus approve what "was in substance a proposal of the "Minister to bring into effect the "intention of Parliament evidenced in "Section 20A that dessicated coconut may "only be exported under the authority of "a licence." p.44, ll. 23-33

34. It was further submitted by the Appellant that the said new Regulation 7 was ultra vires in that it purported to vest the power to issue the licence in the Manager of the Ceylon Coconut Board whereas Section 20A of the Cocomut Products Ordinance (C.160) contemplated the licence being issued only by the Board itself. p.44, ll. 40-50

As to this it was submitted on behalf of the Respondents that Regulation 7 vesting the licensing power in the Manager would have been ultra vires only if there was in force a positive provision in the statute requiring the Board to issue the licenses. Section 20A did not enunciate such a rule. It had a prospective character and one could not infer therefrom that Parliament had already decreed that the licensing authority should be the Board. Since no date had been fixed under Section 20A there was no existing rule requiring licenses to be issued by the Board. Regulation 7 could not therefore said to be ultra vires an existing contra provision in the statute. Paragraphs (a) and (e) were sufficiently wide in scope to enable a Regulation vesting the licensing power in the Manager and Section 20A could not be construed as curtailing the ambit of these provisions.

35. The implication contained in Section 20A that the licence was to be issued by the Board is merely a directory provision and is not mandatory. The Manager is clearly the agent of the Board and its employee and would have no right to act independently of the Board. There is under Regulation 7 (8) a right of appeal to the Board against a refusal by the Manager to issue a licence. The fact that Parliament intended the issue of licenses by the Board as a merely directory provision is evident from the fact that in the case of other coconut products such as copra (Section 18 (1)) and coconut oil (Section 20 (1)) which envisage the issue of the licence by the Board, Parliament has approved Regulations vesting the licensing power in the Manager (vide Regulations 4 (under Section 17 (3)) and Regulation 2 (under Sections 19 (2) and (3) at pages 154 and 156 of Vol. III of the Subsidiary Legislation of Ceylon, 1956).

36. The learned Chief Justice gave the decision of the Court on the said issue in the following terms :-

RECORD

"The Manager is a subordinate officer "appointed by the Coconut Board, and no "doubt acts under the Board's supervision. "Moreover, under paragraph (8) of "Regulation 7 the refusal by the Manager "to grant an export licence is subject to "an appeal to the Board, which may then "allow the licence. p.45, ll. 1-4

"The Regulation thus complies in substance "with the intention of Section 20A that "licenses be issued by the Board." p.45, ll. 4-6

37. It was next submitted by the Appellant that the terms of Regulation 7 did not empower the Manager of the Coconut Board to restrict exports to a particular destination but merely authorised him to allow or refuse the taking out of the goods from Ceylon. It was initially contended by the Appellant that the power to impose such a condition in the licence had to be expressly conferred by Regulation in view of paragraph (e) of Section 20B. The Appellant's contention that the licence did not, in terms, restrict export to Halifax alone or prohibit export to any part in the U.S.A. was rejected by the Court on the evidence produced.

38. On the question whether the Manager had power in law to restrict export to Halifax alone, the Court failed to reach unanimity. The Court however has set out the substance of the Respondents' submissions which the Respondents respectfully submit are correct. p.46, ll. 32-37 p.49-50

(b) NATURAL JUSTICE

39. The Supreme Court has found, having perused the verbatim record of the submissions made by the Appellant's Counsel before the Collector, that the allegation that the Appellant had no proper notice of "a charge" under Section 130 was without foundation and that in no respect did the Collector fail to observe the principles of natural justice. p.50-51

RECORD

pp. 51-52

40. A Decree in accordance with the Judgment of the Supreme Court was entered on the 30th March 1969, and against the said Judgment and Decree this Appeal to Her Majesty in Council

pp.55-56, 59.

is now preferred, Leave to Appeal having been granted to the Appellant by Orders of the Supreme Court, dated the 9th June 1969, and the 1st August 1969.

41. In the Respondents' respectful submission, this Appeal ought to be dismissed, with costs, for the following among other

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REASONS

1. BECAUSE a Mandate in the nature of a Writ of Certiorari cannot, by the law of Ceylon, issue to quash an election made by the Collector of Customs under Section 130 of the Customs Ordinance, the said election being neither a judicial determination or decision and enforceable only by action instituted by the Attorney-General.

2. BECAUSE in making the said election between a penalty of Rs.1,000/-. or a forfeiture of treble the value of the goods the Collector of Customs is under no duty to act judicially or quasi-judicially.

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3. BECAUSE it is clear that in the circumstances of this case there was no contravention of Article 55 of the Constitution of Ceylon.

4. BECAUSE Tennekoon v. Principal Collector of Customs (1959) 61 N.L.R. 232 and Omer v. Caspersz (1963) 65 N.L.R. 494 were, as the Supreme Court rightly held, wrongly decided.

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5. BECAUSE it cannot reasonably be said that in the instant case there was an absence of jurisdictional facts which invalidated the said election of the Collector of Customs.

6. BECAUSE upon proof of the contravention of restrictions concerning an exportation of goods subject to such restrictions liability to the monetary penalty or the said

forfeiture under Section 130 of the Customs Ordinance is incurred automatically and an election between the two penalties is no more than an administrative or executive act on the part of the Collector of Customs.

7. BECAUSE the said election under Section 130 is an election between two arbitrary alternatives in the making of which a Collector is concerned only with questions of policy and expediency.

8. BECAUSE in the circumstances of this case the principle audi alteram partem was not applicable.

9. BECAUSE the exportation of the said shipments of dessicated coconut to the port of New York was in violation of the restrictions contemplated in the said Section 130 read with Schedule B of the Customs Ordinance.

10. BECAUSE the regulation and control of exportations of dessicated coconut from Ceylon is lawfully, sufficiently and independently provided for in Section 20A and 20B of the Coconut Products Ordinance (C.160) and the Dessicated Coconut (Manufacture and Export) Regulations, 1961, as amended in 1963.

11. BECAUSE it was not necessary for the Minister to expressly fix a date under the said Section 20A for the effective operation of its provisions, but even if inadvertently or deliberately he omitted to do so the omission was cured by the introduction of the Amending Regulations in 1963, the approval and publication of which by Parliament was rightly considered by the Supreme Court to be tantamount to a fixing of the said date.

12. BECAUSE the new Regulation 7 (introduced in 1963) is intra vires and remains so even if it does empower the Manager of the

Coconut Board to issue export licences for shipments of dessicated coconut.

13. BECAUSE in any event any exercise of the said power conferred on the Manager of the Coconut Board is subject to an appeal to the Board, itself.

14. BECAUSE by specifying Halifax (Canada) as the port of destination of the shipments in question the licences impliedly prohibited their exportation to any other port and, particularly, to any port in a country in respect of the exportation of dessicated coconut to which special restrictions were, and are, widely known to exist.

15. BECAUSE the Appellant and his Company had been made aware, and were aware, of the restrictions on shipments of dessicated coconut to the U.S.A. and the special precautions associated therewith the prior observance of which was essential before the issue of an appropriate licence.

16. BECAUSE the provisions for the control of the exportation of dessicated coconut from Ceylon as set out in Section 20A and 20B of the Coconut Products Ordinance (C.160) are wide enough to authorise the Coconut Board and/or its Manager to achieve control by means of licences which ensure that the destination of the shipments is strictly as laid down in the licence.

17. BECAUSE it was clearly a contravention of Ceylon's valid licensing system for the three shipments in the instant case to be exported to the port of New York which was not the port specified in the licences.

18. BECAUSE there was no failure to observe the principles of natural Justice.

19. BECAUSE the Judgment of the Supreme Court is right and ought to be affirmed.

DESMOND ACKNER
R. K. HANDOO

No. 2. of 1970

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF CEYLON

B E T W E E N :

DON LEONARD JAYAWARDENE (Petitioner)
Appellant

AND

1. V. P. SILVA, Assistant Collector of Customs

2. V. P. VITTACHI, Principal Collector of Customs

3. G. CUMARANATUNGE, Acting Principal Collector of Customs (Respondents)
Respondents

CASE FOR THE RESPONDENTS

MESSRS. HATCHETT JONES & CO.,
90 Fenchurch Street,
London, E.C.3.