Privy Council Appeal No. 2 of 1970

Don Leonard Jayawardane – – – – – – *Appellant*

v.

V. P. Silva and others – – – – – – – *Respondents*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH JULY, 1970

Present at the Hearing:
LORD HODSON
LORD GUEST
LORD DONOVAN
LORD PEARSON

(*Delivered by* LORD GUEST)

This appeal is from a decision of the Supreme Court of Ceylon whereby the Supreme Court upheld a preliminary objection taken on behalf of the respondents, and refused the appellant's application for a mandate in the nature of a Writ of *Certiorari* to quash an Order of the 1st respondent an Assistant Collector of Customs, Colombo, dated 30th September 1968. By this Order the Collector found the appellant guilty of charges under section 130 of the Customs Ordinance (Cap. 235 of 1870) and imposed upon him a forfeiture of Rs.5,010,504. The preliminary objection was that the Writ of *Certiorari* did not lie because the order of the Collector was not a judicial order.

The circumstances which led up to the Order made by the Collector under section 130 of the Customs Ordinance were as follows:

The Vavasseur Trading Co. Ltd., of which the appellant was a director is a Ceylon Company doing business as shippers, *inter alia,* of desiccated coconut. The Ceylon Company had entered into contracts with J. H. Vavasseur & Company Limited, London and the Ceylon Company had exported from Ceylon three consignments of desiccated coconut. In each case the sale to the English Company was on F.O.B. terms. In respect of these consignments the Ceylon Company obtained export licences issued by the Manager of the Ceylon Coconut Board. In the form of application for the Licence which is not a prescribed form the Port of destination was stated to be the Canadian Port of Halifax and this was also stated on the licence. The allegation is that the consignee diverted the goods to the Port of New York.

On 17th September 1968 the Collector wrote to the appellant and three others connected with the Ceylon Company (two of the Company Directors and the third the Office Manager of the Company) in the following terms:

> "An Inquiry will be conducted by me in my office commencing at 9.30 a.m. on 23rd and 24th September, 1968 in regard to the following shipments of Desiccated coconuts effected by your establishment in contravention of Sections 58, 57 and 130 of the

Customs Ordinance, Chap. (235) read with the Coconut Products Ordinance, (Chap. 160).

(i) ' Jeppessen Maersk ' sailed on 22-4-68 742,900 lbs. D.C. Nuts valued at Rs 713,553/00.

(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 desiccated coconuts contrary to restriction, in that the above Desiccated 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 Desiccated Coconuts in each case, on each of you, in terms of Section 130 of the Customs Ordinance, Chap. 235."

When the Inquiry took place the Collector informed the appellant that the applications referred to in this letter were the " Intend-to-Ship " applications made under section 58 of the Customs Ordinance.

At the Inquiry before the Collector which took place under section 8 of the Customs Ordinance evidence was called upon oath and certain documents were produced which were put to the appellant. The appellant was allowed to cross-examine witnesses and although he was represented by Counsel they were precluded from cross-examining witnesses. The Collector kept a written record of the proceedings.

The Collector by letter dated 30th September 1968 informed the appellant as follows:

" I have carefully considered the evidence that was led before me at this inquiry, and I hold that Mr. D. L. Jayawardene is guilty of the charges made against him and conveyed to him by my notice No. EXP. 470 of 17-9-68.

I elect in terms of Section 130 of the Customs Ordinance (Cap 235) to impose a forfeiture of three times the value of the goods in question. *viz :*

(*a*) ' Jeppessen Maersk ' Rs 2,140,659·00

(*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)."

Similar letters were addressed to the other persons referred to with this difference that in the case of the Office Manager of Vavasseur Trading Company Limited the Collector stated that he was exercising his powers of mitigation under section 163 of the Customs Ordinance and reduced the amount of the forfeiture to Rs. 1,670,168·00. The appellant was subsequently required by the Collector to pay the forfeiture within two weeks.

On 16th October 1968 the appellant made an application to the Supreme Court for a mandate in the nature of a Writ of *Certiorari* to quash the order of the Collector dated 30th September 1968. It was agreed that the position of the others concerned in the Ceylon Company would be governed by the result of this case. The grounds of the application, so far as relevant to this appeal, were:

(1) There was no valid or lawful restriction on the exportation of desiccated coconut from Ceylon.

(2) There was no contravention by the appellant or by the Ceylon Company of any lawful restriction on the exportation of desiccated coconut from Ceylon.

(3) That there was no exportation contrary to the provisions of the Coconut Products Ordinance to which further reference will be made or contrary to the provisions of the Customs Ordinance because the intended place of destination appearing on the face of the export licence did not constitute a valid or lawful condition or restriction of the Licence. Affidavits and counter-affidavits were filed by the parties.

At the hearing before the Supreme Court the Supreme Court were invited by both parties to hear arguments not only on the preliminary question whether the Writ of *Certiorari* would lie, but also upon what has been described as " the merits " of the case, namely whether the licence contained a valid restriction. The purpose of this invitation was that if an appeal was taken to the Board, the Board might have the benefit of the views of the Supreme Court on all the questions involved.

In the event the Supreme Court held that the Writ of *Certiorari* did not lie, but when they proceeded to consider " the merits " although they expressed views on some of the questions, they were not unanimous upon the final question whether the Port of destination was a valid restriction on the export licence. Accordingly this vital matter was left at large.

Before coming to deal with the two questions before the Board it is convenient to set out some of the relevant provisions of the Customs Ordinance.

Section 130 of the Customs Ordinance alleged to have been breached is in the following terms:

> " 130. Every person who shall be concerned in exporting or taking out of Ceylon or attempting to export or take out of Ceylon any prohibited goods or any goods the exportation of which is restricted contrary to such prohibition or restriction, whether the same be laden for shipment or not and every person who shall export or attempt to export any goods liable to duty the duties for which have not been paid or secured, or in any manner deal with any goods liable to duties of customs with intent to defraud the revenue of such duties or any part thereof, or who shall be knowingly concerned in any fraudulent evasion or attempt at evasion of such duties or any part thereof, shall in each and every of the foregoing cases forfeit either treble the value of the goods, or be liable to a penalty of one thousand rupees at the election of the Collector of Customs."

Reference to Schedule B to that Customs Ordinance, introduced by section 12, shows under the Table of Prohibitions and Restrictions outwards " Articles the exportation of which is restricted by any enactment or any legal order now in force."

Section 145 of the Customs Ordinance provides as follows:

> " 145. All penalties and forfeitures which shall be incurred under this Ordinance shall and may be sued for and recovered in the name of the Attorney-General in the respective courts of Ceylon, in like manner as other revenue cases."

Section 163 provides as follows:

> " 163. In all cases in which under this Ordinance any ships, boats, conveyances, goods, or other things have become liable to forfeiture, or shall have been forfeited, and in all cases in which any person shall have incurred or become liable to any penalty, it shall be lawful for the Collector, should he deem such forfeiture or penalty unduly severe, to mitigate the same; but all cases so determined by the Collector shall nevertheless be liable to revision by the Minister."

The first question which arises is whether the Writ of *Certiorari* lies to quash the Order made by the Collector under section 130 of the Customs Ordinance. Under the terms of that section the Collector is given authority, where a person is concerned in exporting out of Ceylon any goods the exportation of which is restricted contrary to such restriction, to impose a forfeiture of treble the value of the goods, or a penalty of Rs.1,000/- at his election. By the terms of section 145 of the Customs Ordinance all penalties and forfeitures which are incurred are sued for and recoverable in the name of the Attorney-General in the District Courts of Ceylon. In terms of section 163 the Collector is given power should he deem such forfeiture or penalty under section 130 unduly severe to mitigate the same. All cases of mitigation are liable to revision by the Minister. The argument for the appellant was that under section 130 the Collector was performing a judicial or quasi-judicial function in electing to impose a forfeiture rather than a penalty. It was further argued that in the exercise of his discretion to mitigate under section 163 the Collector was equally performing a judicial or quasi-judicial function. But the Collector has not yet been asked to exercise his power of mitigation under section 163 in relation to the appellant. In their Lordships' view the Supreme Court rightly held that the proper test for deciding whether the function performed by a tribunal such as the Collector was quasi-judicial is to be found in a case of *Durayappah v. Fernando* [1967] 2 AC 337 where, delivering the judgment of the Privy Council, Lord Upjohn at page 349 states the three matters which have to be enquired into:

> " 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."

These matters were correctly examined by the Chief Justice in relation to the instant case. Lord Upjohn found it unnecessary to review the previous authorities referred to in the judgment of the Chief Justice.

In their Lordships' view the Supreme Court rightly over-ruled the previous case in Ceylon of *Tennekoon v. The Principal Collector of Customs* 61 N.L.R. 232 where Weerasooriya, J. had held that the Principal Collector of Customs under a similar section to section 130 had a duty to act judicially and that *Certiorari* would lie to quash his decision. *Omer v. Caspersz* 65 N.L.R. 494 which followed *Tennekoon* was also rightly over-ruled by the Supreme Court.

Their Lordships can express their views quite shortly. The Collector had two functions to perform under section 130. In the first place he had to decide as a preliminary matter whether an offence was committed and if so whether the appellant was concerned in it. It is agreed that this was a preliminary decision which did not bind the appellant. This issue would be tried when and if the Attorney-General took proceedings under section 145. The rights of the appellant were not in any way affected by this decision. Having so decided, so to speak, that a *prima facie* case existed under section 130, the ultimate decision being left to the District Court, the Collector then had to elect between imposing a forfeiture of treble the value of the goods or a penalty of Rs.1,000/-. When the Collector came to perform his second function of election, this was no doubt an important matter, but a question purely within his discretion. What he did in the present case was to impose a forfeiture of treble the amount of the goods amounting to some Rs.5,000,000.

This figure resulting from the Collector's election could not be altered by the District Court (who have no jurisdiction over the quantum of the punishment) but could be mitigated by the Collector under section 163. What he did was not to fix the extent of the appellant's liability, but to fix a ceiling beyond which the District Court if it gave judgment for the Attorney-General could not go. It was argued for the appellant that the Collector's power of mitigation under section 163 must be exercised before the proceedings taken by the Attorney-General under section 145 in respect that the District Court would only have power to give judgment for the forfeiture as mitigated by the Collector. It was further argued that when the Collector had made his determination under section 130, he was *functus* and debarred from performing any function under section 163 to mitigate. If the position had been that the Collector in his determination of forfeiture under section 130 had in fact passed from any question of mitigation and the subject was thereby debarred from raising any question of mitigation thereafter, there might be great force in the appellant's argument that this was a quasi-judicial function which he had to perform. He would obviously in considering the question of mitigation have regard to all the circumstances and have to consider the degree of culpability. There was no appeal from his decision. Their Lordships however are not satisfied that this is the position. Whether or not the Collector has power to mitigate the forfeiture after the Attorney-General takes proceedings under section 145—a question which does not arise for decision in this case—it is plain that the appellant is not debarred from raising the question of mitigation after the Collector has acted under section 130 and that the Collector would not be prevented from mitigating the forfeiture at that stage. In the present case the stage of section 145 has not yet arrived. The Collector has elected the forfeiture of treble the value of the goods but this would be without prejudice to the appellant raising the question of mitigation before the Attorney-General took proceedings under section 145.

The only effect which can be said to flow from the Collector's right of election is that he is given power to fix Rs.1,000/- or some greater sum involving treble the value of the goods and that it would be an advantage to the subject if he could persuade the Collector at that stage to fix the lower sum. But this is purely a matter of convenience to the subject and his rights are adequately preserved. Their Lordships do not consider that at this stage the Collector had made any determination or decision which could be described as quasi-judicial. For these reasons their Lordships consider that the Supreme Court arrived at the correct conclusion when they held that the Writ of *Certiorari* would not lie.

Like the Supreme Court their Lordships were invited to deal with what is described as "the merits" of the case, namely whether there was power to impose a condition in the Licence as to the Port of Destination. It is not in accordance with the practice of the Board to express views which can in the circumstances only be *obiter*. But as both parties anticipated that the views of their Lordships on these matters would carry great weight in other proceedings which are understood to be pending in the District Court in the special circumstances of this case and to avoid possible further expense their Lordships are prepared to accede to the parties' wishes.

The translation of the relevant terms of the export Licence are as follows:

> "Messrs. Vavasseur Trading Co. Ltd., of Colombo are hereby permitted to export per s.s. to Halifax lbs. (in words) One Hundred Thousand pounds of desiccated coconut as specified hereunder"

and this is signed by the Manager. The question is firstly whether the

restriction in the Licence of the export of the goods to Halifax is a valid restriction having regard to the terms of the various Ordinances and Regulations and secondly if it is valid whether the export of the goods to the Port of New York was a breach of this restriction. Their Lordships accordingly turn to the first question: Is there any power in the Ordinances or Regulations to restrict by Licence the export of desiccated coconut to any particular Port?

It now becomes necessary to give the history of the Coconut Products Regulations. In 1961 regulations were passed which provided for a limited control of the manufacture and export of desiccated coconut. These regulations were *ultra vires* but by section 3 (2) of the Coconut Products (Amendment) Act, 1962 the 1961 Regulations were validated and given retrospective effect from 1935, the date of the original empowering enactment.

Section 20B of the Coconut Products Ordinance as amended by the 1962 Act empowered the making of regulations for the purpose of *inter alia*

> "(*a*) the regulation, inspection, supervision, and control of the manufacture, packing, transport, storing, and export of desiccated coconut;"
>
> "(*e*) the issue, renewal, suspension, and cancellation of desiccated coconut general export licences and desiccated coconut special export licences, and the terms and conditions subject to which such general or special licences shall be issued, and the manner of disposal of desiccated coconut in respect of which such licences are refused;"

In purported exercise of the power conferred by section 20 B regulations were gazetted on 4th April 1963 amending the Desiccated Coconut (Manufacture and Export) Regulations 1961. Pausing for a moment it is necessary to return to section 20A introduced by the Coconut Products (Amendment) Act 1962 which is in the following terms:

> "20A. On and after such date as may be fixed in that behalf by the Minister by Notification published in the *Gazette*, no person shall export any desiccated coconut from Ceylon except under the authority of a desiccated coconut general export licence or a desiccated coconut special export licence issued by the Board."

Following upon the passing of the Coconut Products (Amendment) Act 1962 Regulation 7 (1) and (2) appeared in this form:

> "7. (1) No desiccated coconut shall be exported from the Island except on a general export licence issued in that behalf by the Manager on a payment of a fee at the rate of 15 cents per hundredweight or part thereof."
>
> (2) Every application for a Desiccated Coconut General Export Licence shall be substantially in such form as may be approved for the purpose by the Board, and shall be accompanied by a declaration that the statements contained therein are true and accurate."

There followed certain sub-paragraphs which will be referred to hereafter.

Three separate submissions were made by the appellant in relation to the validity of the licence. The first submission was that as no date had been fixed by the Minister by Notification published in the Gazette section 20A had never come into operation and that there was no valid prohibition of the export of desiccated coconut from Ceylon except under the authority of a Desiccated Coconut General Export Licence issued by the Board. The view of the Supreme Court as expressed in the judgment of the Chief Justice was that the passing of Regulation 7 was "tantamount" to the Minister notifying the date in the Gazette. Their

Lordships are not prepared to follow the Supreme Court in this regard. Their Lordships' view is that as no date has been fixed by the Minister by Notification published in the Gazette section 20A has never come into effect. Nevertheless section 20B has an independent existence apart from section 20A and affords the authority for the passing of the 1963 Regulations including Regulation 7.

The second argument for the appellant was that Regulation 7 (1) was *ultra vires* in that section 20A speaks of a Licence to be issued by the Board, whereas Regulation 7 (1) speaks of a Licence to be issued by the Manager and that accordingly section 20A and Regulation 7 (1) are inconsistent and Regulation 7 (1) is repugnant to the statutory provision. But if section 20A has never been brought into effect, *cadit quaestio*. There is no repugnancy. Moreover section 30 (4) of the Coconut Products Ordinance gives statutory effect to Regulation 7 and it is incompetent to challenge its validity (See *Institute of Patent Agents v. Lockwood* [1894] A.C. 347) Regulation 7 is in their Lordships' view *intra vires*. So far their Lordships are in agreement with the result of the Supreme Court's judgment.

They now proceed to consider the question upon which the judges of the Supreme Court were divided and upon which they did not express any concluded opinion. This question is whether there is any power to impose in a Licence for the export of Desiccated Coconut a restriction as to the Port of Destination. For the Collector it was conceded that the only power to impose such a condition must be found in Regulation 7 and it was argued for the Collector that it was inherent in a scheme of licencing the Export of Desiccated Coconut to provide in the Licence for a restriction as to the Port of Destination. Such an incidental matter could in the nature of things and having regard to the statutory provisions be included in an export licence. Reference was made to *Attorney-General v. Great Eastern Railway Company* 5 A.C. 473 and *Deuchar v. Gas Light and Coke Company* [1924] 2 Ch. 426 Warrington L.J. at page 434. It is important at the outset to consider therefore the scope of Regulation 7. It provides in the first place by paragraph 1 that no desiccated coconut shall be exported except on a general export licence issued by the Manager. Paragraph 2 provides that an application for a Desiccated Coconut Export Licence is to be substantially in a form as approved for the purpose by the Board. No such form has been approved by the Board. By paragraph 3 if the Manager is satisfied that the particulars given in the application are correct and if the bacteriological reports relating to the production of the mill have consistently been satisfactory in that they do not indicate contamination with pathogenic organisms "the Manager shall issue a Desiccated Coconut General Export Licence to the applicant". There follow provisions in paragraphs 4, 5 and 6 in regard to the bacteriological reports. By paragraph 7 if the manufacturer is dissatisfied with an order made by the Manager under paragraph 6 the manufacturer has a right of having the consignment sampled. By paragraph 8 in the event of a refusal by a Manager to grant a Desiccated Coconut General Export Licence an appeal may be made by the manufacturer to the Board and the Board after inquiry may allow or refuse such an export Licence. It is therefore apparent that the terms of Regulation 7 relate solely to the quality of the Desiccated Coconut and its freedom from pathogenic organisms. In passing it is noteworthy that these requirements are made in regard to all Desiccated Coconut regardless of whether it is destined for the United States or for some other country. The clear implication of Regulation 7 is that it is not concerned with the destination of the goods, but solely with their quality. For the Collector it was argued that because Regulations could be made under section 20B (*a*) for the "regulation and control" of the Export of Desiccated Coconut a condition as to port of destination could be

inserted in the licence. But no such regulations have been made apart from Regulation 7. Such a power would not entitle the Manager at his own hand to insert a restriction as to the port of destination. Reference was also made to section 3 (3) of the Coconut Products Ordinance whereby the Board were given power to promote the sale of coconut products in the markets of the world and this was sufficient to justify restriction of Port of Destination. Their Lordships do not agree. In this connection it is not without importance to note that "exportation" is defined by section 8 of the Imports and Exports (Control) Ordinance (Cap. 236) which is to be read with the Customs Ordinance in the following terms.

> "8. In this Act unless the context otherwise requires:
> 'exportation', with its grammatical variations and cognate expressions, means the carrying and taking out of Ceylon, or causing to be carried or taken out of Ceylon, whether by sea or by air;
> 'goods' includes any article, animal, substance or property whatsoever;
> 'importation', with its grammatical variations and cognate expressions, means the importing or bringing into Ceylon, or causing to be imported or brought into Ceylon, whether by sea or by air;
> 'indent agent' means a person who canvasses orders in Ceylon for any goods from other persons and places or causes to be placed with his principals in a country of export indents for such orders; and
> 'prescribed' means prescribed by regulation made under this Act."

So that unless the context otherwise requires export is limited to the actual export or taking out of Ceylon of the goods in question and does not cover their transportation to a Port outside the territorial waters. It is also important to note that under section 2 (2) (*c*) of the Imports and Exports Ordinance the Minister may with the approval of the Cabinet of Ministers "prohibit or regulate the importation or exportation of goods from or to prescribed countries". It is unlikely that the Manager would have power to insert a restriction which required Cabinet approval. Their Lordships have reached the conclusion that there is no statutory power given to the Manager to control the Port of Destination for Desiccated Coconut.

The contention for the Collector is that it was open to the Manager to insert in a General Export Licence any condition which might fairly come within the regulation and control of the export of desiccated coconut. This is an extremely wide power which might result in the imposition of a penalty as high as was suffered by the appellant in the present case. Moreover under section 146 of the Customs Ordinance the appellant might be guilty of a criminal offence and be liable to the penalties therein specified. Their Lordships are not prepared in the circumstances to imply any such wide power at the hands of the Manager as is suggested which might result in a criminal prosecution. In the result their Lordships' view is that the restriction to the port of Halifax was not a valid restriction and accordingly there was no breach of section 130 of the Customs Ordinance.

A further question was debated before their Lordships namely assuming that there was lawful authority for a licence restricting the export of the goods to Halifax whether the export of the goods to the United States would be a breach of the Licence. Upon this difficult question their Lordships do not require to come to any conclusion as if the Licence itself is invalid this question does not arise.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. There will be no Order as to costs.

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In the Privy Council

DON LEONARD JAYAWARDANE

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DELIVERED BY
LORD GUEST

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