

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC
OF SRI LANKA**

In the matter of an Application for mandates
in the nature of Writs of Certiorari and
Prohibition in terms of Article 140 of the
Constitution of the Democratic Socialist
Republic of Sri Lanka.

CA (Writ) Application No : 415/22

Prestige Automobile (Private)
Limited
No. 234-238, Pannipitiya Road,
Battaramulla.

Petitioner

v.

1. Mr. P.B.S.C. Nonis
Director General of Customs,
Sri Lanka Customs,
No. 40, Main Street,
Colombo 01.
2. Mr. M.S. J. De Silva,
Deputy Director of Customs
Sri Lanka Customs
No. 40, Main Street,
Colombo 11.
3. Mr. H.A. Reuter,
Chairman and Managing Director,
Prestige Automobile (Private) Limited,
No. 234-238, Pannipitiya Road,
Battaramulla.

4. Mrs. Ruth Reuter
Director,
Prestige Automobile (Private) Limited,
No. 234-238, Pannipitiya Road,
Battaramulla.
5. Mr. Jan Christian Reuter
Director
Prestige Automobile (Private) Limited,
No. 234-238, Pannipitiya Road,
Battaramulla.
6. Julian Reuter
Director,
Prestige Automobile (Private) Limited,
No. 234-238, Pannipitiya Road,
Battaramulla.
7. Ranjan De Sila
Director
Prestige Automobile (Private) Limited,
No. 234-238, Pannipitiya Road,
Battaramulla.
8. Viola Karunaratne
Director
Prestige Automobile (Private) Limited,
No. 234-238, Pannipitiya Road,
Battaramulla.
9. The Hon. Attorney General,
Attorney General's Department,
No. 159, Hulftsdorp,
Colombo 12.

Respondents

AND NOW

**In the matter of an application for
intervention**

Murugesu Thayabaaan
40, Lily Avenue
Colombo 06.

Petitioner Seeking to be heard

v.

Prestige Automobile (Private)
Limited
No. 234-238, Pannipitiya Road,
Battaramulla.

Petitioner- Respondent

v.

1. Mr. P.B.S.C. Nonis
Director General of Customs,
Sri Lanka Customs,
No. 40, Main Street,
Colombo 01.
2. Mr. M.S. J. De Silva,
Deputy Director of Customs
Sri Lanka Customs
No. 40, Main Street,
Colombo 11.
3. Mr. H.A. Reuter,
Chairman and Managing Director,
Prestige Automobile (Private) Limited,
No. 234-238, Pannipitiya Road, Battaramulla.

4. Mrs. Ruth Reuter
Director,
Prestige Automobile (Private) Limited,
No. 234-238, Pannipitiya Road,
Battaramulla.
5. Mr. Jan Christian Reuter
Director
Prestige Automobile (Private) Limited,
No. 234-238, Pannipitiya Road,
Battaramulla.
6. Julian Reuter
Director,
Prestige Automobile (Private) Limited,
No. 234-238, Pannipitiya Road,
Battaramulla.
7. Ranjan De Sila
Director
Prestige Automobile (Private) Limited,
No. 234-238, Pannipitiya Road,
Battaramulla.
8. Viola Karunaratne
Director
Prestige Automobile (Private) Limited,
No. 234-238, Pannipitiya Road,
Battaramulla.
9. The Hon. Attorney General,
Attorney General's Department,
No. 159, Hulftsdorp,
Colombo 12.

Respondent- Respondents

Before : N. Bandula Karunarathna P/CA, J.
B. Sasi Mahendran, J.

Counsel: Sanjeewa Jayawardena, PC with Rajeev Amarasuriya for the Petitioner.
Nagananda Kodithuwakku for the Intervenient- Petitioner
Sumathi Dhamawardhaena ASG, PC with A. Jayakody SC for the 1st, 2nd,
and 9th Respondents
Dr. Romesh De Silva. PC with N. Anketell 3rd and 4th Respondents
M.A. Sumanthiram PC with Divya Mascranghe for the 5th to 6th
Respondents.
Yuwin Matugama for the 8th Respondent.

Written 12.03.2024 (by the 1st, 2nd and 9th Respondent)

Submissions: 12.03.2024 (by the 5th and 6th Respondents)

On: 12.03.2024 (by the 3rd and 4th Respondents)
14.03. 2024 (by the Petitioner)

Supported on: 15.02.2024

Order On: 07.05.2024

B. Sasi Mahendran, J

This order is pertaining to Issue notices to the Respondents, regarding the interim reliefs as well as the notices.

Petitioner has instituted this action to obtain the following reliefs prayed for in the prayer of the Petition dated 8th November 2022,

- a. Issue Notice on the Respondents
- b. Issue a mandate in the nature of a Writ of Certiorari, quashing the Notice/ Summons dated 27.10.2022 (P-3) by which the Petitioner has been requested to be present for a purported Inquiry under Customs Case No. CIB/INV/32/2013 produced marked P-3
- c. Issue a mandate in the nature of a Writ of Certiorari, calling for and quashing any and all written decision/s of the 1st to 2nd Respondents and/ or their servants and

agents, to recommence and/ or continue with the Customs Inquiry bearing Customs Case No. CIB/ INV/32/2013 as evidenced by the Notice/ Summons dated 27.10.2022 produced marked P-3.

- d. Issue a mandate in the nature of a Writ of Prohibition, restraining and preventing the 1st to 2nd Respondents and/ or their servants and a
- e. Issuing an Interim Order suspending the operation of the purported resolution P40 or such other appropriate order;
- f. Issuing an Interim Order restraining the Respondent from taking any steps pursuant to the said purported resolution P40 and/ or from auctioning the properties specified in the purported resolution P40, until the hearing and determination of this Application, or such other appropriate order;
- g. Calling for the Record maintained by the Respondent pertaining to the subject matter of this Application, including all documents pertaining to facilities granted to the Petitioner, ad decisions taken with regard to and/ or consequent to the default in repayment of such facilities, and all correspondence between the Petitioner and the Respondent.
- h. For Costs and
- i. For such further and other relief as to Your Lordship's Court shall seem meet.

It should be noted that, before filing this action, Petitioner filed a Writ Application bearing No 255/2017 in the mandate of nature of Writ of certiorari challenging the order made on 14.07.2017 with regarding to an inquiry bearing Number CIB/INV/32/2013 by which the 2nd Respondent who is the Director General of Customs came to a conclusion that the Petitioner has committed an offence in terms of section 119 of the Customs Ordinance and imposed a forfeiture of Rs 117,700,000/-.

According to the written Submissions filed by the 1st to 9th Respondents, the said inquiry was commenced by Director General of Customs pursuant to a **post and if** investigation conducted by the Customs office regarding the undervaluation of 1728 Brand New BMW Vehicles which was imported by under concessionary duty permits issued to the Public Officers which were imported during 2011 to 2014.

One of the conditions imposed in the particular permit was that, any violation of the valuation mentioned therein would result in the recovery of duty. During the investigation, it was revealed that, the Pro-forma invoices which disclosed the value of

the vehicles to open the Letter of Credit which had never been issued by the BMW AG Germany.

Further it was revealed that, actual value of the vehicles are very much higher than the value disclosed to the customs. After the inquiry was concluded on 14.07.2017, inquiring officer found that the Petitioner has committed an offence in terms of section 119 of the Customs Ordinance and imposed Rupees One hundred Thousand on each transaction.

Against the said order, they have filed a Writ Application bearing No Writ 255/2017 where supported on 04.08.2018. It should be noted that once Murugesu Dayabaran who was the former Director of the Central Investigation filed an intervenient Petition. That application was refused.

Counsel for the 1st Respondent filed a motion on 28.05.2018 and informed the Court that they are willing to withdraw the order dated 14.07.2017 but continue the Customs Inquiry according to the law and further informed Court to mention this case on 06.06.2018, which enabled the Counsel to support this motion.

On 18.06.2018 Petitioner filed a motion stating that the particular inquiry could not be continued and moved a date to fix for argument on 09.11.2018.

According to the Journal Entry of the said record "Writ 255/2017", counsel for the Petitioner has objected to the proposal made by the State. Number of dates were given by Courts for settlement.

On 06.03.2020 Court made the following order.

"The learned Deputy Solicitor General appearing for the 1st Respondent informs Court that the 1st Respondent has no objections Writ being issued as prayed for in paragraph 'b' of the prayer to the Petition dated 30.07.2017.

Accordingly, "a mandate in the nature of a Writ of Certiorari, quashing the order made by the 2nd Respondent on 14.07.2017, produced marked P-9, in the aforesaid purported Customs Inquiry/ Case bearing No. CIB/INV/32/2013, by which the 2nd Respondent has purported to conclude that the Petitioner Company has committed an offence in terms of

Section 119 of the Customs Ordinance and imposed a forfeiture of Rs. 117,700,000/-" is issued.

No costs.”

Thereafter, on 22.10.2022 the Petitioner received notice/summons from the 1st Respondent to appear and to participate at the inquiry. According to the Petitioner, the particular notice P3 is illegal, unlawful and ultra vires and moved this Court to quash the P3 document.

When the matter was supported on 15.02.2024, 1st to 2nd Respondents informed Court that in their Limited Objections they have mentioned the reason to summon the Petitioner. According to their Written Submission, the 1st Respondent has received invoices issued by the BMW AG Germany with regard to a special discount, which was found on German Customs export database.

The Respondent submitted that, since he has received new evidence against the Petitioner, there was a necessity to review the proceedings of the said inquiry. Further it was submitted that the 1st Respondent exercises the powers vested in him, under section 2 of the Custom Ordinance for him to order for fresh inquiry.

It should be noted that, the earlier inquiry was held under section 8 of the customs ordinance. Under the said inquiry, it is an inquisitorial process where the inquiring officer at the time of inquiry, whatever material placed before him and Witnesses and documents they are relying on to commence the investigation.

After the conclusion of the inquiry, he has given reasons for his decision. According to the document marked P9 in CA Writ Application 255/2017 the prosecution requested the inquiring officer to postpone the inquiry, in order to the Petitioner to produce invoices issued by BMW AG Germany. However, the inquiring officer has refused the request by giving the following reasons.

“Now there are two request by the prosecution and one is to postpone the inquiry and the other is to order to PAPL to produce invoices issued by BMW AG Germany. However, I am constrained by Sec 51B of the Customs Ordinance under which my powers are restricted to give a such an order as the period of three years from the date of importation the persons legally obliged to keep the documents with them and the date of these imports

began from the 31st of March 2011 which is well beyond the period specified in Sec 51B of the Customs Ordinance.

I refuse this request also for the following reasons.

(a) The existence of such a document has not been proved

(b) The Inquiring officer cannot be called upon to conduct further investigations while the inquiry has progressed for some time.

c) I find it rather strange that such a request is being made at this stage when the inquiry has progressed for so long when the investigating officers had all the opportunity to recover those documents if they were in existence

In the absence of the so called invoices I am unable to make any adverse finding against M/s PAPL on the basis of any invoices of BMW AG not produced at the inquiry.”

The particular conclusion of the inquiring officer itself suggests that, he has not considered the particular documents relevant to the said proceedings. The position of the Director General Customs to reopen the inquiry is justifiable.

So it is clear that the prosecution was unable to submit the relevant invoices to the inquiring officer with regard to the invoices sent by BMW AG Germany to the Petitioner. According to the Written Submission filed by the 1st Respondent they have received this invoices from German on 15.10.2020. The issue before this Court is whether the 1st Respondent, when he received fresh evidence, whether he had the authority to recommence the inquiry. According to the section 2 of the said Act Respondent has the Powers to review the said inquiry. This was discussed by Justice Wanasundara J in

W.G, Chandrasena and Another v. Sudharma Karunaratne and other, SC Appeal 31/2016, Decided On 19.10.2018, which held that;

However the inquiring officer had made order to release the Vehicle to the present owner. Yet the Sri Lanka Customs did not release the same. The Director General wanted to inquire more into the matter and sent a notice to come for a further inquiry. This notice is the subject matter for the Petitioner’s application to the Court of Appeal. The Court of Appeal dismissed the application made by the 1st Petitioner for a writ of certiorari to quash the said notice.

Section 2 of the Customs Ordinance as amended reads thus:

“ There may be appointed a Director General of Customs (hereinafter referred to as the ‘Director General’) and other officers and servants for the management and collection of the Customs, and the performance of all duties connected therewith; on such salaries and allowances as may be provided in that behalf, and there may be required of every person now employed or who shall hereafter be employed in the service of the Customs, such securities for his good conduct as the Minister may deem necessary, and the Director General shall, throughout Sri Lanka, have the general superintendence of all matters relating to the Customs.”

In the Court of Appeal case of Navaratne Vs Director General of Customs No CA 664/2001 decided on 24.1.2003, Court had held that the Director General of Customs had the power to revise any order made by the subordinate officer on legitimate grounds. Justice Wijayaratne analyzed the matter before court in this way: “ The main thrust of the arguments of the counsel for the Petitioner was on the suggestion that the 1st Respondent has no power or authority of revising the 9 order made by the 2nd Respondent. There are no specific provisions found in the Customs Ordinance specifically authorizing or empowering the Director General of Customs to revise an order made by an inquiring officer deputizing the Director General of Customs. However , the provisions in Sec. 2 of the Customs Ordinance vested the Director General of Customs with the power of superintendence.”

Later on the said Judgment, Justice Wijayaratne states thus:

“Accordingly, this Court is of the view that the Director General of Customs has implied power and authority in the exercise of his ‘superintendence’ of all matters relating to the Customs to revise any order made by any deputy. Reasons dictate that for the proper management and due administration of all matters relating to customs and specially to such abuse of power and authority by the officers of the Department , the Director General of Customs should be vested with such powers and authority. Consequently I hold that the Director General of Customs had the power to revise any order made by any Deputy or subordinate officer on legitimate grounds and or for reasons stipulated, in the direction of proper management and due administration of all matters relating to customs.”

Further she held that,

Under Section 2 of the Customs Ordinance, the Director General of Customs has authority to superintend the order of the inquiring officer and consequent to that to order a further inquiry into the matter.

With the above authorities, we hold that 1st Respondent has the authority to recommence the said inquiry. We are mindful that when the said inquiry was held the Respondent has requested the petitioner to submit the relevant invoices sent by the BMW AG Germany to ensure that commission payable to the Petitioner was not reflected in the value of the vehicle. That is to say, if the true value of the vehicle is affected a vehicle could exceed the permit threshold and be liable to pay duty to the customs. It is abundantly clear that the Petitioner has failed to cooperate with the Customs officers during the inquiry and have wilfully suppressed the invoices. This conduct of the Petitioner, which tantamount to lack of Uberrima fides is sufficient to dismiss the Petitioners' application.

Be that as it may be issue before us is whether Fresh Evidence can be considered.

We are mindful that the Original investigation was initiated by Director General Customs on 12.05.2016 pursuant to the Post Audit Investigation with regarding the under valuation of 1728 Brand New BMW's which were imported under the concessionary duty permit. According to the said inquiry, Petitioner has given false and misleading information that inquiry was concluded on 14.07.2017.

According to the objections, on the request of the 1st Respondent, Central Customs Authority in Germany has submitted the invoices in respect of sales only on 15.10.2020. Although the said invoices was with the Petitioner they have not tendered it to the Customs or the Inquiring officer. This fact was not disputed by the Petitioner in their counter objections. Under the said inquiry, the inquiring officer has to ascertain the truth of the declaration made by the Petitioner. Without the said invoices this inquiry was concluded. Main object of the said inquiry was that the purpose of ascertaining the veracity and credibility of the statements that has been recorded in terms of the Customs Ordinance. We are mindful that at the said inquiry the particular invoices were not produced.

We hold that the inquiring officer has come to a conclusion without perusing the said original documents. We are also mindful that the documents submitted by the Petitioner was not the original documents which was sent by the BMW AG Germany Company. In the written submission filed by the Respondent on 12.03.2024 in Paragraph (h) (i) (j) indicates that,

(h) A comparison of the invoices issued by BMW AG Germany with the value of the vehicle as found on German Customs Export database indicates that the accurate value of the vehicle has not been set out in the invoices sent to the Petitioner by BMW AG Germany i.e., the addition of the special discount €9.794 would reflect the accurate value of the vehicle (Please see paragraph 3 of 1R1):

(i)Such a complicated arrangement in respect of invoices issued by BMW AG Germany to the Petitioner is to ensure that the commission payable to the Petitioner is not reflected in the value of the vehicle i.e., if the true value of the vehicle is reflected the vehicle would exceed the permit threshold and be liable to customs duty in the ordinary course in addition to the concessionary rate;

j)Also, the Petitioner to date has failed to submit these invoices issued by BMW AG Germany to Sri Lanka Customs despite several requests by SLC during the investigation and inquiry stages and the Petitioner has failed to thus far acknowledge the existence of the said invoices thus the Respondents obtained these invoices only on 15 October 2020 (1R2).

We are mindful of the words expressed in Administrative Law, Eleventh Edition, page 233, H.W.R. Wade And C.F. Forsyth states,

DISCOVERY OF FRESH EVIDENCE

“Where some tribunal or authority has power to decide questions of fact, and no power to reopen its own decisions, its decision cannot be reviewed by the High Court merely on the ground that fresh evidence, which might alter the decision, has since been discovered. This is because the decision is within jurisdiction and there is no basis on which the court can intervene. The remedy of certiorari will therefore not lie in such a case.

Regina v. Sussex Quarter Sessions, Ex parte. Albert and Maud Johnson Trust Ltd and Others, 1974 QB 24 at page 35, Lord Denning M.R held that;

The admission of fresh evidence

On principle, I think that there should be a remedy. Let it be assumed, for the purposes of argument, that the decision of quarter sessions was a wrong decision on the facts, and that the decision was come to because it was misled by false evidence, or because fresh evidence has since been discovered which vitiates the decision. As a matter of principle, there should be some way of setting the decision aside and ordering a new trial. Every legal system should provide machinery for a new trial when the justice of the case so requires. Our own legal system has always had such machinery to hand in regard to the superior courts. In the case of trial by jury (whose decisions on fact could not be appealed and were not subject to review) Lord Mansfield C.J. said:

" If unjust verdicts, obtained under these and a thousand like circumstances, were to be conclusive forever, the determination of civil property, in this method of trial, would be very precarious and unsatisfactory. It is absolutely necessary to justice, that there should, upon many occasions, be opportunities of reconsidering the cause by a new trial": see *Bright v. Eynon* (1757) 1 Burr. 390, 393-394.

After that ruling, the courts of common law regularly made an order for a new trial whenever the justice of the case so required, including cases where fresh evidence was discovered which vitiated the previous decision. It is so stated by the most reliable textbooks of that time, such as *Tidd's Practices*, 9th ed. (1828), vol. II, p. 906; *Chitty's General Practices* (1842), vol. III, pp. 823, 832. Similarly, the Court of Chancery would allow a bill of review upon discovery of new matter. In *Hosking v. Terry* (1862) 15 Moo. P.C.C. 493, 503-504 Lord Kingsdown said:

". . . the party who applies for permission to file a bill of review, on the ground of having discovered new evidence, must show that the matter so discovered has come to the knowledge of himself and of his agents for the first time since the period at which he could have made use of it in the suit, and that it could not, with reasonable diligence, have been discovered sooner; and secondly, that it is of such a character that, if it had been brought forward in the suit, it might probably have altered the judgment."

With the view of the above authority, We hold that, where it is clear, with the fresh evidence available to the Director General of Customs he has a right to call for a fresh inquiry. We are mindful that the inquiry is not concerning with regard to the valuation of the Motor Vehicles but is a matter of grave abuse of tax concessionary.

It is clear that the Plaintiff has not made a prima facie case that the decision taken by the 1st Respondent to hold a fresh inquiry in presence of fresh evidence is ultra vires. Also we hold that the Petitioner has failed to establish the balance of convenience lies towards him. For the above said reasons, we dismiss this application with costs.

JUDGE OF THE COURT OF APPEAL

N. Bandula Karunarathna,J (P/CA)

I AGREE

JUDGE OF THE COURT OF APPEAL