

~~G.H. 2.~~

15,1953

In the Privy Council.

No. 46 of 1951.

33512

ON APPEAL FROM THE SUPREME COURT
OF CEYLON

UNIVERSITY OF LONDON
W.C.1
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INSTITUTE FOR RESEARCH
IN SOCIAL SCIENCES

BETWEEN

THE ATTORNEY-GENERAL OF CEYLON (*Defendant*) APPELLANT
AND
A. D. SILVA (*Plaintiff*) RESPONDENT.

CASE FOR THE APPELLANT

RECORD

1.—This is an appeal from a decree of the Supreme Court of Ceylon p. 61
(Dias, S.P.J., and Gunasekara, J.) dated the 6th June, 1951, which set aside p. 51
a decree of the District Court of Colombo (N. Sinnetamby, Esq.), which had
dismissed with costs an action by the Respondent against the Appellant, as
representing the Crown in right of Ceylon, pursuant to Section 456 (1) of
the Civil Procedure Code, which provides that all actions by or against the
Crown shall be instituted by or against the Attorney-General. The Supreme p. 61, 1. 21
Court ordered judgment to be entered in favour of the Respondent for
Rs. 40,000 with costs in both courts.

10 2.—The action arose out of the purported sale by a customs official to
the Respondent for Rs. 1,068 of certain goods, including steel, which
belonged to the Crown in right of the United Kingdom and which were
offered for sale by public auction as unclaimed goods under provisions of
the Customs Ordinance (Laws of Ceylon, 1938, Chapter 185).

3.—A print of The Customs Ordinance, to which the Appellant will refer
in detail, is in the pocket of the record. The following sections may be
relevant :

159—which defines “Collector,” “King’s warehouse” and “warehouse” ;

17—which authorises the Collector to charge warehouse rent at rates and under regulations fixed by the Governor, and to detain goods until rent due be paid ;

22 (1) (a)—which exempts from duties goods imported or exported for the public use of His Majesty’s regular armed forces in Ceylon ;

36—whereby goods landed are to be deposited in the King’s warehouse, and entered and cleared within three days ; double rent being payable in default during such time as the goods remain in warehouse ; 10

49—which provides for the person entering goods inwards delivering to the Collector a bill of entry with specified particulars ;

82—which requires warehoused goods to be cleared within two years or such further period as the Collector may allow ; or rewarehoused ;

83—whereby warehoused goods not cleared, exported or rewarehoused within two years or the further time allowed shall, after notice, be sold and the proceeds applied to paying the duties, rent and charges, the surplus being paid to the owner of the goods if known and otherwise to Government account to abide the claim, within one year, of the owner ; 20

104 (4)—which provides that goods (unless within special provisions in respect of perishable or damaged goods and live stock) lodged in any King’s warehouse left more than ninety days from landing in any custom house or King’s warehouse, shall, after public advertisement, be sold by public auction and the proceeds applied to pay duties, warehouse rent, expenses of sale ; then freight, primage, general average and charges secured by lien ; any surplus being paid to the owner or to the Treasury to be treated as revenue if not claimed within a year ; 30

108—which provides (with special provisions in respect of perishable goods) that all goods left in any King’s warehouse or on customs premises more than three months, unless by the Collector’s special permission, shall after public advertisement be sold by auction to answer the duties, warehouse rent and other charges due thereon, any surplus if claimed within twelve months to be paid to the owner who shall have no further claim, or if not so claimed to be revenue. 40

148—whereby no proceedings against any officer of the customs for anything done in exercise of his office shall be taken unless one month's written notice be given stating the cause of action and other particulars, proof of such notice being a condition precedent to the plaintiff's obtaining judgment ;

149—which requires every action under Section 148 to be brought within two months of the cause thereof ;

10 150—whereby the officer within one month of the notice may tender amends, which if pleaded and found sufficient entitles the officer to judgment with costs, though the officer may plead other defences and, with leave, pay money into court as in other actions.

4.—The main facts are not in dispute. By admissions or findings of the courts in Ceylon it is established that : pp. 7-8 ; 11-12 ;
44-46 ; 55-56

(a) Certain naval war supplies belonging to the Crown in right of the United Kingdom were lying in customs premises in Ceylon for a considerable time prior to the 4th March, 1947.

(b) These supplies, in November, 1946, were taken over by the British Stores Disposals Board, a branch of the Ministry of Supply of the United Kingdom.

20 (c) This Board made an agreement to sell all the steel plates (estimated at approximately 11,000 tons) in the supplies to Maharajan & Co., but the steel plates had to be surveyed and measured and payment was to be made as the goods, over a period of six months, were to be weighed and delivered.

(d) By an honest mistake the Principal Collector of Customs treated certain of the supplies, including steel plates, as unclaimed goods ; and wrongly advertised them amongst goods to be sold by auction on the 4th March, 1947.

30 (e) The advertised goods were put up for auction, and certain of them (of which steel plates were the valuable part) were bought by the Respondent for Rs. 1,068, who paid the required deposit, received a delivery order, and paid the balance of the price.

(f) A wharf clerk stopped the Respondent from taking the goods when he came to take delivery.

(g) The Respondent had an interview with the Collector and a representative of the British Stores Disposals Board at which he was told that the goods belonged to the Board who had agreed to sell the steel plates to Maharajan & Co.

40 (h) The Collector offered to repay the purchase price paid by the Respondent, but the Respondent insisted that he was entitled to delivery, and when delivery was refused, brought this action.

(i) The Respondent lost Rs. 40,000 by not having the goods for resale.

pp. 13, 14, 50

5.—Issues were framed, and were answered by the District Judge, as follows :

(1) Did the Principal Collector of Customs in publishing the notification in the Government Gazette referred to in paragraph 2 of the plaint act for and on behalf of the Crown ?

Answer : He purported to act for the Crown but outside the scope of his authority.

(2) If so, does a cause of action accrue to plaintiff against the Crown ?

Answer : No, in view of my answer to (1).

(3) Did the said notification amount to a representation that the Principal Collector of Customs had the right and/or authority to sell the said goods ?

Answer : Yes.

(4) If so, is the defendant estopped from denying that he had such right and/or authority ?

Answer : No.

(5) To what damages, if any, is the plaintiff entitled ? 20

Answer : Nil.

(6) If issue (1) is answered in the negative, does any cause of action accrue against the defendant as representing the Crown ?

Answer : No.

(7) In selling the goods referred to, did the Principal Collector of Customs act or purport to act in the exercise of his statutory powers under Section 108 of the Customs Ordinance ?

Answer : Yes.

(8) If issue (7) is answered in the affirmative, did the Principal Collector act for and on behalf of the Crown ? 30

Answer : No.

(9) Was there any valid contract entered into between the Crown and the plaintiff for the sale to the plaintiff of these goods ?

Answer : No.

(10) (a) In selling the said goods, did the Principal Collector of Customs sell on the basis that they were unclaimed goods ? 31

Answer : Yes.

(10) (b) In purchasing the said goods, did the plaintiff act on the basis that they were unclaimed goods ?

Answer : Yes.

(10) (c) At all material times were the said goods claimed by the British Stores Disposals Board for and on behalf of the Ministry of Supply ?

Answer : Yes.

(10) (d) If issues (a), (b), and (c) above are answered in the affirmative, is there a valid contract between the Principal Collector of Customs and/or Crown and the plaintiff ?

Answer : Argument on this question was not addressed to the Court. It can hardly be said on the facts that there was a mutual mistake which would have rendered the contract invalid.

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6.—In his judgment the District Judge gave his reasons for reaching these conclusions, and on them dismissed the Respondent's action with costs. pp. 44-50

7.—On appeal the Supreme Court (Dias and Gunasekara, JJ.) set aside the judgment and decree of the District Court, and ordered judgment to be entered for the Respondent for Rs. 40,000 with costs in both courts. p. 61

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8.—The Appellant respectfully contends that :

(a) In construing the Customs Ordinance effect must be given to Section 3 of the Interpretation Ordinance which provides :
 “ No enactment shall in any manner affect the right of the Crown
 “ unless it is therein expressly stated, or unless it appears by
 “ necessary implication, that the Crown is bound thereby.”

(b) The Principal Collector had no authority under the Customs Ordinance to sell goods which were the property of the Crown.

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(c) The Principal Collector had no authority to act as agent for the Crown for effecting the sale.

(d) The Principal Collector sold the goods on the basis that the goods were unclaimed goods, whereas they were not in fact unclaimed goods. The Respondent bought the goods on the same basis, and by reason of the common or mutual mistake there was no valid contract of sale.

(e) If the Principal Collector acted within the powers conferred on him by the Customs Ordinance, he was performing a statutory duty.

(f) Although the Principal Collector is a servant of the Crown, acts done in performing a statutory duty are done by him not as servant of the Crown but as the officer designated by the statute.

(g) When the Principal Collector sells goods under Section 108 he performs such a statutory duty and does not thereby make the Crown privy to the contract of sale.

(h) The proper party to be sued for a breach on the part of the Principal Collector of a contract of sale entered into under the provisions of the Customs Ordinance, is the Principal Collector himself. 10

(i) In such a case Sections 148, 149 and 150 of the Customs Ordinance provide the only remedy open to an aggrieved party.

9.—Amongst the regulations fixed by the Governor under Section 17 of the Customs Ordinance, were three regulations under the heading “Exemptions—Imported Goods,” of which one provided :

5. The following goods shall be exempt from first rent—Government cargo, coal, coke landed at coal grounds, military baggage, Dhobies’ bundles, kerosene oil in bulk, liquid fuel in bulk and all goods which, at the time of importation, are exempt from duty under Section 21 or Section 23 of the Customs Ordinance. 20

The Respondent contended that this regulation shows that later warehouse rent was due from the Crown in respect of the goods owned by the Crown which the Principal Collector purported to sell to the Respondent. Such a liability could only have been imposed on the Crown by statute, and if Regulation 5 is to be read as imposing it, the regulation exceeds the powers conferred on the Governor by Section 17 and would be to that extent void. Conceding, however, that warehouse rent was payable by the Crown, the Appellant submits that there is no statutory provision, certainly not Section 108, which permits the compulsory sale of goods belonging to the Crown to satisfy unpaid rent. 30

10.—The judgment of the Supreme Court was delivered by Dias, J., who, after setting out the facts, held that warehouse rent was due to the Crown for the goods which, in his opinion, were therefore liable to be sold under Section 108 for the recovery of a debt due to the Crown. The Principal Collector in acting under Section 108 is acting, in his view, solely on behalf of the Crown to whom the rent was due ; and that section authorises contracts for the sale of goods. Whether he acted under statutory powers or not, the Principal Collector in making such a contract binds the Crown, which in Ceylon can be sued in contract unless there is a statutory bar. The suit must be against the Attorney-General ; for a public officer who contracts in *bona fide* exercise of the powers of his office cannot be sued personally, unless the Crown can show that the public officer acted without 40

authority, actual or ostensible, and the Crown had not held him out as its agent. Dias, J., therefore thought that in the present case the Principal Collector could not be sued, and that suit was properly brought against the Appellant. He found support for his view in authority that a public servant cannot be sued for breach of warranty, since if the Appellant's contentions in the present case were sound the Respondent would be without remedy as he could sue neither the Crown nor the Principal Collector. Dias, J., held that Sections 148 to 150 of the Customs Ordinance do not create any rights of action, and do not divert the subject's cause of action from the Crown to the public officer. Accordingly the Respondent was entitled to recover Rs. 40,000 as damages with costs.

11.—The Appellant submits that his contentions set out in paragraph 8 above are sound, and are not met by the reasoning of the Supreme Court which, in the Appellant's submission, is fallacious. The Appellant therefore submits that this appeal should be allowed and that the Respondent's action should be dismissed with costs for the following amongst other

REASONS.

1. BECAUSE there was no valid or enforceable contract for the sale of the goods in question to the Respondent.
2. BECAUSE if there were such a contract, the Crown was not a party thereto.
3. BECAUSE the Respondent has no right of action against the Crown.
4. BECAUSE the Respondent's remedy, if any, was by action against the Principal Collector under the procedure laid down by sections 148, 149 and 150 of the Customs Ordinance.

GILBERT J. PAULL.

FRANK GAHAN.

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