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IN THE SEYCHELLES COURT OF APPEAL

GLOBAL INVESTMENT AND BUSINESS CORPORATION LIMITED APPELLANT

versus

THE ATTORNEY GENERAL RESPONDENT
ZAKSAT GENERAL TRADING COMPANY WLC INTERVENER

Civil Appeal No: 24 of 2000

[Before: Ayoola, P., Silungwe & De Silva, JJ.A]

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Mr. P. Pardiwalla for the Appellant
Mr. A. Fernando, Attorney General for the Respondent
Mr. R. Valabhji for the Intervener

JUDGMENT OF THE COURT

(Delivered by Ayoola, P.)

This appeal is from the judgment of the Supreme Court (Karunakaran, J) given in an action entered by the Global Investment and Business Corporation Ltd ("GIBC") pursuant to Regulation 205 of the Trade Tax Regulation, 1997 ("the Regulation") and consequent upon the seizure of goods imported by GIBC under power given under Regulation 201 of the said Regulation. Karunkaran J after looking into "*all the relevant circumstances of the case*" found that "*the blanket seizure of all the imported goods used or involved in the operation and maintenance of the cable television service of GIBC is legal, correct and valid in law.*" In the result he "*adjudge(d) and declare(d) that all goods seized by the said Division are condemned and forfeited to the State.*" He made consequential order for the disposal of the condemned goods.

The Regulation was made by the Minister of Finance under powers granted by section 11 of the Trades Tax Act, 1992 which provided that:-

> "The Minister may make regulations for carrying into effect the provision of this Act and for any matter which is necessary or required to be specified by regulations."

Part XII of the Regulations provided for:-

> "Forfeiture of goods imported into Seychelles, Legal Proceedings in respect of seizure of such goods and offences in relation to goods imported into Seychelles."

By virtue of Regulation 201(i):-

> "All goods in respect of which any bill of entry, invoice, declaration, answer, statement or representation, which is false or wilfully misleading in any particular, has been delivered, made or produced."

shall be liable to forfeiture and maybe seized by an officer.

Regulation 205 provides for legal proceeding pursuant to seizure of goods as follows:-

> "When any goods have been seized being liable to forfeiture under these Regulations the Comptroller shall give notice of the seizure and the cause thereof to the owner or agent of the goods on the form provided by the Comptroller (unless such owner or agent be present at the seizure in which case no notice will be necessary), and all the goods which have been seized shall be deemed to be condemned by the Comptroller, and may be disposed of in terms of regulation 206 unless the person from whom the goods were seized or the owner thereof gives notice in writing to the Comptroller within seven days of the seizure that he claims the goods and enters an action before the

> competent court within 1 month from the date of his notice to the Comptroller."

By notice dated 22nd September, 1998 signed by Mr. C. Morin Director General, Trades Tax Import Division notice was given substantially in terms of regulation 205 alleging various importation of goods into Seychelles in relation to GIBC over the period starting on January 1997 to September 1998 in respect of which it was believed the invoices submitted were false in that the price of the goods was overstated. GIBC was given notice that, *"In accordance with Regulation 205 of the Trade Tax Regulation I hereby give you notice of seizure of the goods aforesaid,"* and was informed of the steps he could take pursuant to regulation 205.

In the action entered by GIBC pursuant to regulation 205 it alleged that it had no motive to over invoice or under invoice since the equipment (i.e the goods) was not subject to any trades tax, and that the actions of the Government are *"unlawful, baseless and prompted by ill-will"* and further *"in breach of the franchise agreement"* which provided for settlement of differences by arbitration. It claimed that the seizure be declared illegal and the goods be ordered to be released, and for damages and injunction. In his defence the Attorney General, representing the Government of Seychelles, while admitting that GIBC was granted total exemption from trades taxes on imports of all capital equipment as stated on the plaint contended that such exemption was not from the applicability of the Trades Tax Regulations.

Paragraph 5 of the Statement of Defence contained the substance of the defence as follows:-

> "The Comptroller of Trades Tax Imports, (Director General of Trades Tax Imports Division) had given notice of seizure and the cause thereof to the Plaintiff since the bills of entry and invoices

> submitted in respect of goods imported over the period January 1997 to September 1998 were false, in that the price of goods was overstated and was therefore in violation of the Trades Tax Regulations. In the face of such falsification the issue of motive has no relevance. By way of further answer to such paragraph the Defendant states that section 6 of the Investment Promotion Act has no relevance as regards the procedure for bringing the goods to the country."

The state of the pleadings on which the action went to trial did not leave room for controversial questions of fact. It is right to observe at the outset that an action enjoined to be entered pursuant to regulation 205 must be initiated and tried in compliance with procedure for initiating and conducting civil actions. Ours is a system of pleadings and section 71 of the Seychelles Code of Civil Procedure (Cap 213) provides inter alia that a plaint must contain:-

> "a plain and concise statement of the circumstances constituting the cause of action and where and when it arose and (particulars) of the material facts which are necessary to sustain the action."

Similarly section 90 provides that:-

> "Any party shall be entitled to raise by his pleadings any point of law and any point so raised shall be disposed of at the trial..."

In the light of the above facts, what should engage the attention of the court should fall within a much narrower compass, particularly when there is no express denial of the falsity of the invoices in the plaint. To aver that GIBC had no motive to over-invoice did not address the question whether there was an over-invoicing or not, and is evasive.

Much of the background facts that make for a better understanding of the issues on this appeal can be briefly stated since they are undisputed. GIBC is a company carrying on business in Seychelles which under a franchise agreement with the Government of Seychelles was to provide a cable television service of a non-discriminating basis in nature for payment of its rates, fees and other charges for service. By virtue of Article 8 of the agreement the "*materials, equipment or otherwise furnished by the company in performance of its obligations under the agreement shall remain the property of the company unless sold to the Government pursuant to Article 10.3 hereunder.*" Pursuant to the franchise agreement GIBC was granted under the Investment Promotions Act total exemption from trade taxes on imports of all capital equipment. The goods, seizure of which led to the action in the Supreme Court were not subject to any trades tax. It is common ground that the invoices in respect of some of the goods seized were not false. It is also common ground that the servants and or agents of the Government have taken over the goods.

More evidence than was necessary for the determination of the action as formulated on the pleadings was admitted and considered at the trial. It is not necessary to rehearse them on this appeal. It suffices to note the salient findings made by the trial judge. The learned judge found that article 8 of the franchise agreement had no application in a case of seizure of goods effected by the Controller of Trades Tax in exercise of powers under the regulations; and, that section 6 of the Investment Promotion Act which provides that - "*The Minister may require an investor to furnish any additional information relevant to the grant of a certificate of approval*" had nothing to do with the Controller of Trades Tax nor with the procedure of seizure of goods under the Regulations. Turning to the exemption of the goods seized from trades tax, the learned judge referred to the certificate of approval given to GIBC which stipulated that "*The Company shall pay Trades Tax on all new imported capital equipment at the rate of 0%*". He held as follows:-

> "This concession given to GIBC against the payment of trade tax is only a monetary benefit, which should not be construed for immunity from tax laws or as an exemption from the applicability of the Trade Tax Regulations".

In regard to motive and falsification of documents, he held that the presence or absence of motive or necessity is no consideration and is totally irrelevant as far as the act of falsification of a document is concerned. On the crucial question of the falsity of the invoices, having noted that by virtue of regulation 208 the burden of proving that the seizure was illegal was on the person alleging the same, that is GIBC, he found after considering the evidence, that GIBC had failed to discharge the statutory burden of proof lying on it. He went out of his way to hold that:-

> "On the contrary, the defendant I find, has proved more than on the balance of probabilities that (1) the invoices in question are false, (2) the goods imported are liable to forfeiture and (3) therefore, the seizure is lawful and valid in law"

The trial judge made other important pronouncements which will be adverted to as occasion arises. It is clear from the findings that he made that he completely rejected the case GIBC sought to make on the pleadings.

On this appeal learned counsel for the appellant GIBC sought to raise fresh points not raised in the court below, namely (i) that Regulation 201 and all other regulations touching on forfeiture of imported goods are ultra vires and have no force and effect, (ii) that for a seizure to be lawful

under regulation 201(i) it must relate to levy, assessment and payment of trades tax and, therefore, if the falsity in the document was on overstatement of price and such would enhance the trade tax payable, such falsity would not be material for the levy of trade tax, and, (iii) that the decision of the judge declaring all the goods forfeited was in contravention of Article 26 of the Constitution in that, as found by the judge, only 65% of the imported goods were liable to seizure and forfeiture.

In raising these points for the first time on this appeal the appellant seeks to put forward a case not raised in the Supreme court. There is no doubt that having regard to Rule 71 of the Seychelles Court of Appeal Rules, by virtue of the nature of appeal to this Court which shall be by way of rehearing, and the powers of this Court to exercise "*all the powers and dates, as to amendment or otherwise, of the Supreme Court*", the court has power to allow fresh points to be raised on appeal though not raised in the Court below. It is however a power to be exercised with utmost circumspection having regard to the circumstances of each case. Where a point of law raised for the first time in this court will involve the court declaring a sub-ordinate legislation invalid and the point is not so straight forward as not to involve serious arguments on both sides, the court would be wary of permitting it to be argued without the benefit of the opinion of the trial court. In this case where the case was tried without reference to the validity of regulation 201 and the court below was not asked to make a pronouncement thereon, it will be inexpedient to permit that question to be argued, for the first time before us. Besides, it does not seem appropriate to declare a regulation invalid when the question is raised perfunctorily and as an incidental issue by a plaintiff. Judicial review of legislative action is not an exercise to be embarked on lightly.

In regard to the constitutional point raised for the first time we agree with the learned Attorney General that since there was no prayer for the release of goods not affected by the over-invoicing, pronouncing on

the unconstitutionality of the seizure of such goods may be of no consequence. Besides, as rightly pointed out by the learned Attorney General in the course of his oral submissions, notwithstanding Rule 71 which has been referred to, this court cannot as a court exercising the powers of the Supreme Court determine a question which the Supreme Court would have been obliged to refer to the Constitutional Court by virtue of section 46(7) of the Constitution. Section 46(1) of the Constitution provided that the Constitutional Court shall be the appropriate venue for seeking remedies for infringement of the Seychellois Charter of Fundamental Human Rights and Freedoms. For these reasons we cannot allow these fresh points to be raised on this appeal.

The issues properly arising on this appeal are:-

(i) Whether in order that goods liable to seizure and forfeiture under regulation 201(1) may be held so liable mens rea on the part of the owner or agent must be proved.

(ii) Whether falsity of the invoices in question was established on admissible evidence.

(iii) Whether there was a misdirection of fact by the judge in regard to several findings he made.

(iv) Whether the notice of seizure was validly issued.

The contention was raised by counsel for GIBC in the Supreme Court that mens rea was required to make goods liable to forfeiture by reason of the falsity of documents referred to in regulation 201(i). The trial judge rejected the contention thus:_

> "On a plain reading of Regulation 201(i) it is evident that when a customs officer had reason to believe that the invoice produced in a particular case, is false he can seize the goods. Nothing more or nothing less is required in law. In seizing the imported goods, he is only exercising the statutory

> powers conferred on him by the Regulations. Once he finds that the goods involved are liable to forfeiture it is his statutory duty to seize them. An officer acting under Regulation 201(i) is only dealing with goods liable to forfeiture but he is not dealing with the offender or maker of the false document for purpose of charging him with an offence or crime."

He held that since the proceedings were not a trial of any charge or taxation offence against any the question of mens rea raised by counsel for GIBC was out of context and so irrelevant.

Without criticising the reasoning of the trial judge, counsel for GIBC repeated before us the argument that "false" in regulation 201(i) must mean more than "incorrect." It was argued that it connoted an "*intention to defraud*" in respect of the levy, assessment and payment of trades tax, and that there "*cannot be an intention when the price of the imported goods was alleged to be overstated.*"

For his part the learned Attorney General argued that the meaning of "goods" in regulation 201 could not be restricted to goods subject to a levy, assessment and payment of trade tax. He submitted that there was no issue of the document referred to in regulation 201(I) being incorrect or wilfully misleading.

"Mens rea" as a term belongs to criminal law. It is a term used to describe the mental element requisite to an offence. Where there is no question of criminal responsibility of a person for an act, the importation of the concept of "mens rea" into a determination of the legal consequences of a fact or set of facts is not apt. Section 201 deals with goods liable to forfeiture and not with persons. When, therefore, regulation 201(i) described such goods in terms of one in respect of which "*any bill of entry, invoice, declaration, answer, statement or representation which is false or wilfully misleading in any particular has been delivered, made or*

produced", no question of mental element in the delivery, making or production of the material is involved. To read into such description "*with intent to defraud*" or "*with intent to deceive*" or "*with intent to mislead*" will amount to reading into the regulation what is not there, expressly or by necessary implication. Notwithstanding what has been said, it does appear that when goods liable to forfeiture as described in regulation 201(i) have been seized, nothing prevents the owner from establishing, on the balance of probabilities, that an honest and reasonable mistake has been made in making the material or that there was an honest belief that the invoices or such other documents were not false or wilfully misleading. If such is established it will be left to the court to decide whether or not sufficient cause has been shown why the goods should not be forfeited.

The purpose of regulation 205 permitting the owner or agent to enter an action is to enable him to show cause why the goods should not be condemned. In this action where the stand taken by GIBC was that the seizure was illegal, GIBC has denied itself of the opportunity of otherwise showing why the goods should not be condemned. The question of wilfulness, or even intent, will not arise in an action such as this, when the goods have been seized because it fell within the description of goods that may be seized by an officer pursuant to regulation 201(i) and the only ground put forward by the owner in his action was that the goods did not fall within the category of goods described in section 201(i). It has to be repeated that GIBC did not claim that an honest and reasonable mistake has been made or that there was a reasonable belief in the genuineness of the invoices.

We now turn to the question whether falsity of the invoices in question was established on admissible evidence. This question need not delay us because the argument of learned counsel for GIBC seems to us based on a misconception. Regulation 208 which provides that "*in any action or proceedings arising out of the seizure of any goods, the burden of*

> "Accordingly, I find more than on the balance of probabilities, that all photocopied documents – so called invoices – the plaintiff produced at the customs, in respect of the goods imported into Seychelles during the relevant period were and are false documents or false invoices. They were evidently fabricated or created by the employees of GIBC using computer..."

Although the learned judge's judgment was criticised by learned counsel for GIBC on the ground that there were contradictions in Mr. Morin's testimony, that aspect of Mr. Morin's testimony in which he gave evidence of fabrication of false invoices by GIBC or the finding of the learned judge that false invoices material to this case were fabricated by GIBC has not been isolated for criticism. Having considered the evidence on record ourselves, guided and assisted by oral submissions of counsel, we cannot hold that the finding of the trial judge, supported by evidence which he believed, was erroneous.

One further point is that the notice of seizure issued under regulation 205 was invalid by reason of lack of power to issue it in Mr. Morin. It was argued by counsel for GIBC that Mr. Morin was never appointed Comptroller of Trades Tax at the material time. There is ample evidence that Mr. Morin was discharging the functions of the office of the Comptroller at the material time. Reference to Comptroller in the Regulation, by virtue of section 37 of the Interpretation and General Provisions Act (Cap. 103), is a reference inter alia to the person, in this case Mr. Morin, discharging the functions of the office. There is thus no substance in the submission that the notice of seizure was not validly issued.

Enough has been said to dispose of this appeal. However the fact is worthy of comment that goods that were seized and liable to forfeiture were inseperably mixed with goods that were not liable to forfeiture in proportions of 65% and 35% respectively. Notwithstanding that GIBC had

proving that the seizure was illegal shall be on the person alleging the same" implies a presumption that in the officer's reasonable opinion the goods fell in the description of goods that may be seized under regulation 201(1) and that the goods have been lawfully seized. The burden is thus shifted on the owner of proving the contrary. The learned trial judge stated his view of the legal position as follows:-

> "... the burden of proving or establishing the following material facts lies on the plaintiff:-
>
> 1. The invoices produced to the Trades Tax Import Division are not false documents but genuine invoices;
>
> 2. Consequently, the goods imported are not liable to forfeiture;
>
> 3. Consequently, the seizure is illegal."

GIBC's counsel had not advanced any argument to the contrary of this statement. We only add that the owner may admit that the goods were lawfully seized and yet show cause why they should not be condemned.

Where the burden is on a party to prove a fact, the responsibility of adducing evidence rests on him. In this case, therefore, the question is whether GIBC had proved that the invoices were not false and not whether the Government had proved that they were false. That being so, the question whether or not the evidence adduced by the Government to prove the falsity of the invoices was inadmissible was irrelevant unless it has been shown that GIBC has discharged the burden on it. After considering the evidence, the learned judge held that "the plaintiff has failed to discharge the statutory burden of proof lying on him (sic)". The judge had before him admissible evidence upon which he could come to that conclusion. The learned judge held as follows:-

on this appeal subsumed this aspect of the case in a wider constitutional issue which we have not permitted to be raised for the first time, in this court, we feel that this aspect of the matter needs to be properly addressed by the Government if only to avoid future litigation. The learned judge rightly held that:-

> "At the same time, justice demands that the benefit of the remaining 35% of the value of the seized goods should revert to the lawful owners" (emphasis ours)

However, he did not give effect to this view, with which we agree, in the final order he made. In the circumstances, we think it is enough for us to draw attention to this aspect of the order.

We have been asked by the Intervener by its appeal to set aside the order. However its ground of appeal is lacking in particulars and is unacceptable for that reason. We need only add that the case of **Commissioner of Customs & Excise v Bradley (Accrington) Ltd 1959 1QB 219** is not relevant as that case was decided on the particular provisions of an English statute applied in that case.

For the reasons which we have given we come to the conclusion that the appeal of GIBC and the appeal of the Intervener should be dismissed. The appeals are dismissed accordingly. The Government is entitled to costs of the appeal against GIBC only.

E. O AYOOLA	**A. M. SILUNGWE**	**G. P. S. DE SILVA**
PRESIDENT	**JUSTICE OF APPEAL**	**JUSTICE OF APPEAL**

Dated at Victoria, Mahe this 12 day of *April* 2001.