

Judgment 20, 1970
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UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED LEGAL STUDIES
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25 RUSSELL SQUARE
LONDON W.C.1

IN THE PRIVY COUNCIL

No. 2 of 1970

ON APPEAL
FROM THE SUPREME COURT OF CEYLON

BETWEEN :

DON LEONARD JAYAWARDANE of
"The Anchor" Kandana
Petitioner -
Appellant

- and -

- 10 1. V. P. SILVA, Assistant
Collector of Customs,
H.M. Customs, Colombo
- 2. V. P. VITTACHI, Principal
Collector of Customs,
H. M. Customs, Colombo
- 3. G. CUMARANATUNGE Acting
Principal Collector of
Customs, H.M. Customs,
Colombo
Respondents -
Respondents

CASE FOR THE APPELLANT

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20 1. This is an appeal by the above named
Appellant from the Judgment and Decree of the
Supreme Court dated March 30, 1969, whereby the
Supreme Court, upholding a preliminary objection
taken on behalf of the Respondents, refused,
without costs, the Appellant's application for
a mandate in the nature of a Writ of Certiorari
to quash the order of the 1st Respondent dated
September 30, 1968, whereby the 1st Respondent
found the Appellant guilty of an offence under
30 Section 130 of the Customs Ordinance (Cap.325,
Vol.viii of the Legislative Enactments of Ceylon
1956 Edition) and imposed upon him a penalty of
Rs.5,010,504. The said preliminary objection
was that the Writ did not lie because the order
of the 1st Respondent was not a judicial order

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p. 1
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2. The 1st Respondent above-named at all material times was an Assistant Collector of H. M. Customs, Ceylon. The 2nd Respondent above-named at all material times was the Principal Collector of H. M. Customs Ceylon, and the 3rd Respondent above-named performed the functions of Acting Principal Collector of H. M. Customs, Ceylon.

3. The circumstances leading to the said order under Section 130 of the Customs Ordinance may be summarised as follows :- 10

(a) 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; and pursuant to contracts which it had entered into with J. H. Vavasseur & Co. Ltd., London (the parent Company registered in U.K.) the Ceylon Company exported 3 consignments of desiccated coconut by 3 shipments dated March 14, 1968, April 5, 1968 and April 22, 1968. In each case the sale to the English Company was on F.O.B. terms, which was in accordance with law. 20

pp.77-78,
81-82,87,
95,115,
138-139,
147,150,
167-168,
171-175,
193-194,
204-206,
211,217.
pp.65-66,
70-71,76,
78-80,
88-89,113-
114,123-
137,162-164
169-170,
179-191,
215-216.

(b) In respect of the said consignments, the Ceylon Company obtained export Licences issued by the Manager of the Ceylon Coconut Board. In the form of application for the Licences (which is not a form prescribed by statute) the Port of destination was stated to be the Canadian Port of Halifax, but the consignee, being free so to do under the contract of affreightment, allegedly diverted the goods to the Port of New York. 30

(c) Section 20(A) of the Coconut Products Ordinance (added by an amending Act, No. 20 of 1962, the relevant provisions of which are reproduced in Annexure 'A' hereof) prohibited the export of desiccated coconut without a licence issued by the Ceylon Coconut Board, and the prohibition was expressly stated to operate on and after such date as might be fixed in that behalf by the Minister by notification in the 40

10 Gazette. It is not in issue that no such notification was ever given. Section 20 (B) of the Ordinance (added retrospectively by the same amending Act) empowered the Minister to make regulations in regard to the manufacture and export of desiccated coconut, and the Minister, acting under this Section, made and tabled before Parliament a new Regulation 7, which, having been approved by the two Houses, was gazetted under Section 30 (3) of the Coconut Products Ordinance on April 4 1963 and was intended to be part of the Desiccated Coconut (Manufacture and Export) Regulations 1961. These regulations had been made, and the Minister had purported by notification published in the Gazette to bring them into operation (as required by Regulation 1) before the amending Act, 20 No. 20 of 1962, was passed. The new Section 20 (B) thereby enacted provided that the regulations should be "valid and effectual for all the purposes for which they were made". There was however no fresh notification in the Gazette bringing the Regulations into operation after their purported validation by the amending Act, No. 20 of 1962.

30 (d) The Regulation referred to in (c) above did not give the Board, or the Manager of the Coconut Board, the power to restrict the Port to which desiccated coconut might be exported, but the form of General Export Licence adopted by the Manager of the Coconut Board contained a cage to be filled in stating the Port to which desiccated coconut was being exported, and the form of application contained a query with regard to the same matter. Neither of 40 these two forms was prescribed as required by Sections 20B (e) and 30 (2) (c) of the Ordinance.

(e) In regard to the said shipments, it was alleged that the Ceylon Company had knowledge, prior to the sailings, that the goods might be diverted by the London Company to New York.

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(f) On September 17, 1968, the 1st Respondent, presumably acting upon the view that the prohibition against export contemplated by Section 20A of the Ordinance had begun to operate and also that the Manager of the Coconut Board had the power to restrict the exportation of dessicated coconut to the Port specified in the licence issued by him, wrote to the Appellant and three other persons connected with the Ceylon Company (two of them being Directors and the third being the Office Manager of the Company) in the following terms :- 10

"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. 20

(i) 'Jeppessen Maersk' sailed on 22.4.68
742,900 lbs. D.C.nuts valued at Rs 713,553/-.

(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." 30 40

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When the enquiry took place, the 1st Respondent 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.

pp. 83-84,
90-92,151-
161,165-166,
195-200,207
-210.

10 Sections 43, 44, 57, 58, 130, 144, 145, 146
154, 163 and 165 of the Customs Ordinance
and the "Table of Prohibitions and
Restrictions - Outwards" contained in
Schedule B thereto are reproduced in
Annexure "B" hereof.

20 (g) At the said Inquiry, held before the 1st
Respondent, the Customs officer who led
evidence called the Appellant as his first
witness. The 1st Respondent stated that
he was holding the Inquiry under Section 8
of the Customs Ordinance and was proceeding
to take evidence on an oath which he was
administering in terms of Section 7 of the
Customs Ordinance. A number of documents
were put to the Appellant and marked, on
behalf of the Customs, during the course
of the Inquiry. The 1st Respondent
maintained a written record of the evidence
led before him. The Petitioner was in a
sense represented by Counsel. Although
Counsel were present, it was made clear
that they were there on sufferance and not
as of right and Counsel were not permitted
30 to cross-examine the witnesses called on
behalf of the Customs, although the
Appellant was permitted to cross-examine
them.

(h) The 1st Respondent by a letter dated
September 30, 1968, informed the Appellant
as follows :-

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40 "I have carefully considered the evidence
that was led before me at this Inquiry and
I hold that Mr. D. L. Jayawardena is guilty
of the charges made against him and conveyed
to him by my notice No. EXP.470 of September
17, 1968.

I elect in terms of Section 130 of the

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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 above with this difference; that in the case of the Office Manager of Vavasseur Trading Co. Ltd., the 1st Respondent 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. 10

p.247 4. The 1st Respondent, by a letter dated October 4, 1968, required the Appellant to pay the aforesaid forfeitures totalling Rs 5,010,504 within two weeks therefrom. 20

p.1 5. On October 16, 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 and/or decision of the 1st Respondent dated September 30, 1968. The grounds urged in the application were :-

(a) That the 1st Respondent had no power and/or jurisdiction to make the order of forfeiture under Section 130 of the Customs Ordinance because it had not been established that the Appellant was a person concerned in the exportation of goods contrary to restriction; and that the Appellant was not such a person because :- 30

(i) there was no valid or lawful restriction on the exportation of desiccated coconut from Ceylon;

- (ii) There was no contravention by the Appellant or by the Ceylon Company of any lawful restriction on the exportation of desiccated coconut from Ceylon; and
- (iii) there was no exportation contrary to the provisions of the Coconut Products Ordinance (Cap.160) or contrary to the provisions of the Customs Ordinance (Cap.235) because the intended place of destination or discharge appearing on the face of the export licences did not constitute a valid or lawful condition or restriction of the licence.
- 10
- (b) That there was an error of law on the face of the record in that the 1st Respondent, having held that the desiccated coconut was shipped to the Port of New York instead of to the Port of Halifax, as stated in the intend-to-ship applications made by Vavasseur Trading Co. Ltd., has erred in law in deciding that upon such determination the Petitioner Appellant was guilty of an offence under Section 130 of the Customs Ordinance
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- (c) That there was a violation of the principles of natural justice in that the Appellant was not properly and/or adequately informed of the charge of which he was ultimately found guilty by the 1st Respondent
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- (d) That the 1st Respondent had not been lawfully appointed under the Constitution to act under the provisions of Section 130 of the Customs Ordinance.
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- This ground was not pressed before the Supreme Court and does not form part of the Appellant's case before the Board.

6. On November 30, 1968, the Respondents filed

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p.13
p. 15
pp.63-243,
244,246-7,
248-258.

a statement of preliminary objections to the Appellant's application and moved for a ruling thereon before the Respondents were called upon to file their counter-affidavits. This motion having been refused, the 1st Respondent filed his Affidavit dated January 9, 1969, together with its annexures, marked R.1 to R.120

pp. 22,78

7. On January 27, 1969, the Appellant above-named filed his counter-affidavit together with an annexure, marked 'D'. 10

8. On February 17, 1969, the Appellant's application came up for hearing before the Supreme Court (H.N.G. Fernando, Chief Justice, Samerawickreme, J., and Weeramantry, J.) and was argued over a period of nine days.

9. Since the parties to the Application expected that in any event there would be an Appeal to the Board from the decision of the Supreme Court, the Supreme Court was invited to hear arguments on the preliminary question whether the Writ lay as well as on the merits of the case, so that the Board might have the views of the Supreme Court on all the questions involved. 20

10. On the preliminary question whether the Writ lay, it was argued, inter alia, on behalf of the Appellant

(a) That in (1959) Tennekoon v. Principal Collector of Customs (61 New Law Reports 232) 30

and in (1963) Omar v Caspersz (65 New Law Reports 494)

the Supreme Court had correctly held that Customs officers conducting enquiries under Sections of the Customs Ordinance closely corresponding to Section 130 were under a duty to act judicially, and that there was no decision of the Supreme Court to the contrary.

(b) A Customs officer acting under Section 130 has a twofold duty, namely :- 40

- (i) to decide, in the first place, whether the suspect person is guilty of being concerned in exporting desiccated coconut contrary to restrictions, and
- (ii) to decide which of the two penalties indicated by the Section should be imposed on the person if the Customs officer should find him guilty; and each of these two duties has to be performed judicially. The second involves subordinate decisions, judicial in nature, viz: the degree of complicity of the person concerned, whether the offence was of a technical nature or not, and whether there were other factors relevant to punishment
- (c) When a Statute gives an official power to make a decision affecting rights of persons, it is an implied condition that such a power should be exercised judicially, and a decision under Section 130 of the Customs Ordinance is a judicial decision because it affects directly, indirectly and contingently the rights of persons against whom a decision is made for the following reasons :-
- (i) The decision creates a debt to the Crown and becomes a statutory basis for an action under Section 145 for its recovery;
- (ii) In any case, the decision contingently affects property rights because it determines the quantum of the money decree that the Attorney-General may obtain under Section 145 of the Ordinance;
- (iii) Sections 58 and 144 of the Customs Ordinance provide for certain disabilities on persons who fail to pay penalties imposed on them by decisions under Section 130 of the Ordinance;
- (iv) By reason of the proviso to Section

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146, a penalty imposed would operate to put pressure upon a person to pay the amount of a penalty imposed on him so as to avoid criminal prosecution;

- (v) The imposition of a penalty for being concerned in illegal exportation must ordinarily affect the reputation and credit of any businessman, particularly because secrecy is not enjoined by the Ordinance.

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11. On the preliminary issue of whether the Writ lay, it was submitted on behalf of the Respondents:-

- (a) That the two earlier decisions of the Supreme Court referred to in paragraph 10 (a) hereof were wrongly decided;
- (b) Both the election and the antecedent decision as to the facts are administrative and do not give rise to a duty to act judicially or quasi-judicially;
- (c) The determination of facts allegedly constituting the contravention of Section 130 of the Customs Ordinance and the election of the punishment did NOT affect the Appellant's rights in any way as neither was binding on the Appellant until there was an adjudication of the facts by a Court of Law;
- (d) The penalty under Section 130 arose automatically by operation of law once the contravention of the provisions of Section 130 took place

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12. The decision of the Supreme Court that the Writ did not lie was based upon the following reasons :-

p.29, 1.26
- p.40,
1.16.

- (a) That it could see no distinction between the language in Section 130 of the Customs Ordinance and the language in the present Section 44 (former Section 46) of the Customs Ordinance; and since it was held in the case of Palasamy Nadar v Lanktree (51) New Law Reports 520), of which decision the Supreme Court approved, that the words "shall be forfeited" in Section 44 meant that there was

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an automatic forfeiture of restricted goods themselves at the moment that they were exported contrary to restriction; similarly, there was an automatic forfeiture of one of the two penalties provided in Section 130 at the moment of the exportation of restricted goods contrary to restriction; and that the election of the 1st Respondent as to which of the two penalties the Petitioner Respondent was to suffer was a purely administrative decision imposing no duty to act judicially.

10 (b) Since the incurring of one of the two punishments provided by Section 130 was automatic, and the Appellant had no "right" to have the lesser of the two punishments imposed upon him, it could not be said that there was any duty upon the 1st Respondent to act judicially or quasi-judicially in
20 determining which particular punishment to impose on the Appellant

(c) That although the Collector's election to impose a forfeiture of treble the value of the goods on the Appellant may, in a provisional manner and to a limited extent, affect the rights of the Appellant, there was nevertheless no duty upon the 1st Respondent to act judicially or quasi-judicially, as his election of the
30 punishment was made in circumstances which did not require the Collector to give the other side a hearing

13. It is respectfully submitted that the decision of the Supreme Court on the preliminary question is erroneous for the reasons set out in paragraph 10 above and also for the following further reasons :-

40 (a) There is a distinction, vitally relevant to the question at issue, between Section 130 and Section 44 (formerly Section 46) which latter section was interpreted in Palasamy Nadar v Lanktree (1949, 51 New Law Report, 520) and upon which, as so interpreted, the Supreme Court based its view. Section 44 is concerned with the

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consequence of a Customs offence in relation to goods, while Section 130 is concerned with the possible consequences of a Customs offence in relation to the offender. In Nadar's case it was held that the words "shall be forfeited" in Section 44 meant that there was an automatic forfeiture of the goods in question in the sense that the property in the goods passed from the owner to the Crown at the moment of the contravention of the Section without the necessity of an order of forfeiture. Quite apart from the difference between the vital words used in the two Sections ("shall be forfeited" in Section 44 and "shall forfeit either treble the value of the goods or be liable to a penalty" in Section 130) the question of an automatic forfeiture in the sense those words were used in Nadar's case cannot possibly arise in the context of Section 130.

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(b) Nadar's case, it is respectfully submitted, cannot be considered as an authority for the proposition that a Customs officer who decides to seize goods as a forfeit under Section 44 of the Customs Ordinance is not required to act judicially. In every case a decision to seize must precede actual seizure. Nadar's case was an illustration of the fact that seizure after a decision to seize as a forfeit must be distinguished from detention of the goods for the purpose of deciding whether or not the goods should be seized.

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(c) Even if Nadar's case can be regarded as supporting the contention of the Crown, its authority for that purpose is of very little weight because :-

(i) It is clear that it was unnecessary in that case to decide the question whether the officer of Customs was under a duty to act judicially at any stage, and no argument appears to have been addressed to Court on it; and

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(ii) In any event, the scheme of the

Ordinance is such that special considerations apply to a decision to seize goods as distinct from a decision to impose penalties on persons. Where goods are seized as a forfeit, the owner of the goods can, under the provisions of Section 154 of the Customs Ordinance, recover possession of the goods on payment of a security and have the question whether the seizure was justified or not decided by the District Court in an action to be instituted by him. The owner is thereby given an opportunity to initiate action to vindicate his right to the goods and, incidentally, his good name. This statutory scheme may well be regarded as excluding the rule of construction that the duty to act judicially is implied in a Statute when power is given to any person to make an order affecting rights of persons. There is no comparable provision in the Ordinance in the case of a person against whom penalties are imposed.

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(iii) The Supreme Court has relied on dicta in cases decided early in the development of the Writ but which do not represent the law as it stands today. Once the Supreme Court concluded, as it did, that the "Collector's election may, in a provisional manner and to a limited extent, affect a 'right' of the Appellant, it is respectfully submitted that in the light of current authority there arose a duty to act judicially or quasi-judicially.

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14. On the merits, one of the principal grounds argued for the Appellant was that there was an error of law going to jurisdiction and to the root of the matter which the 1st Respondent had to decide. The error lay in the view that at the relevant time the Manager of the Coconut Board had the power to restrict exportation of desiccated coconut to a

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designated port. The Appellant's submissions to the Supreme Court upon this question, which it is respectfully submitted were well founded, may be briefly summarised as follows :-

- (a) The export control scheme for desiccated coconut provided by the Coconut Products (Amendment) Act No. 20 of 1962 (the relevant provisions of which are reproduced as Annexure 'A' hereto and which is hereinafter called the "Amending Act") was intended by Parliament to operate only after a date to be fixed by the Minister as required by Section 20A; and no date having been fixed, no licence was legally necessary to export desiccated coconut 10
- (b) Section 20B, in so far as its provisions related to the export of desiccated coconut, was ancillary to Section 20A; and the provisions of the Amending Act, giving the Minister power to make regulations for the purposes of the export control scheme for desiccated coconut and for validation of the Desiccated Coconut (Manufacture & Export) Regulations 1961 must, upon a true construction of the Amending Act, be taken to have been designed to get ready a set of valid regulations relating to the export of desiccated coconut in anticipation of the scheme of export control for that product to be brought into operation by the Minister in accordance with Section 20A. 20 30
- (c) The words "valid and effectual for all purposes for which they were made" (in section 3 (2) of the amending Act) in their application to such of the regulations as are relevant to the export control of desiccated coconut mean that the regulations must be deemed to be valid and effectual for the purposes of the Amending Act, that is to say, for the purposes of the export control scheme to be brought into operation by the Amending Act. To interpret the word "effectual" in the context of the Amending Act or of Section 30 (4) of the Principal Ordinance as meaning "come into operation" would be to do violence to the plain meaning of Section 20A. 40

- 10 (d) That a regulation ultra vires for inconsistency with a provision in the enabling statute is not saved by the statutory provision that a regulation shall be as "valid and effectual" as if it were enacted in the Ordinance. Any doubts that may exist in English law on this point are resolved by the Ceylon Constitution (Cap. 379 Vol. XI of the Legislative Enactments of Ceylon 1956 Revision) whereunder the Queen in Parliament alone has the power to amend any statutory provision. Parties were not at issue on this point before the Supreme Court. The decision of Weeramantry, J., in Ran Banda v The River Valleys Development Board 71 New Law Reports, 25, was conceded to be right.
- 20 (e) Sections 18 and 20 of the Coconut Products Ordinance (which expressly provide for the export control of Copra and Coconut Oil respectively) and the necessity to validate the Desiccated Coconut (Manufacture & Export) Regulations 1961 (which had been made prior to statutory provision for the export control of desiccated coconut) indicated that, in the contemplation of the Legislature, the export of desiccated coconut was free of control until the control scheme envisaged in the Amending Act was brought into operation. /The Desiccated Coconut (Manufacture & Export) Regulations 1961 were amended by regulations gazetted on April 4, 1963. The amending regulations introduced the vital Regulation 7 which is set out in Annexure 'C' hereof/
- 30
- 40 (f) Even if the regulations made under Section 20B were assumed to be in operation at the relevant date, they did not, directly or by implication, empower the Coconut Board or the Manager to restrict the exportation of desiccated coconut to any named port or country designated in the licence to be issued under the control scheme. Nor did they empower the Board or the Manager to set special standards of quality in regard

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to desiccated coconut intended for export to the United States of America

- (g) Neither the Board nor the Manager had the power to lay down conditions for sampling that would have the effect of making the export of desiccated coconut practically or commercially speaking impossible.
- (h) The provision in the new Regulation 7 (1) which authorised the Manager to issue export licences was ultra vires because it was inconsistent with Section 20A, which provided that they should be issued by the Coconut Board; and in any event the form of the licence (which contains the purported restrictive condition regarding the port to which the goods might be sent) used by the Manager was not a form prescribed as required by Section 30 (2) (c) of the Coconut Products Ordinance; nor have any regulations been made under Section 20B (e) providing for terms and conditions, subject to which export licences are to be issued. 10 20
- (i) Even if such restrictive condition is regarded as valid, it would, properly interpreted, operate in the case of sales on F.O.B. terms, in relation only to the person who puts the goods on board ship and to the extent that he is obliged to take out bills of lading for carriage of the goods to the designated port, but not in relation to a foreign buyer on a F.O.B. contract, who would be free to cause the goods to be diverted to any port of his choice. 30
- (j) The word "export" in Section 130 of the Customs Ordinance means the carrying of goods out of port and does not, without more, connote the further idea of taking them thereafter to a specified place.
- (k) Quite apart from the submission in (i) above, the licence, properly interpreted, does not prohibit the carriage of the goods to any port other than that mentioned in the licence. 40

15. Upon the matters submitted in paragraph 14 above, the arguments presented on behalf of the Respondents included the following :-

- 10 (a) That although the export control scheme for desiccated coconut contemplated by Section 20A of the Amending Act had not been inaugurated, the Minister had power under Section 20B to operate an export control scheme for the product, either as a parallel scheme or as an interim scheme, pending the date to be fixed by the Minister under Section 20A.
- (b) That in regard to the scheme so operated under Section 20B, no question of ultra vires for inconsistency with Section 20A arose.
- 20 (c) That the word "export" carries with it a connotation of "sending" out to another specific country", citing an American decision dealing with drawback upon duties - the case of Swan and Finch Company v United States 190 US 144.
- (d) That implicit in the scheme was a power in the licencing authority to control destination by the very terms of the licence.
- 30 (e) That the Manager had power to refrain from issuing licences for shipment to American ports until he was satisfied, after 100% sampling, that the material reached the standard required by the Board or by him for the American market.

40 16. The Supreme Court adverted to the vital question as to whether the restriction as to the destination is valid, but declined to rule on it because they had failed to reach unanimity; but it expressed the view that the Manager's power to control the destination of a shipment, if it existed at all, could arise only by implication from his power to issue a licence. The Court, however, expressed its views on some of the matters referred to in paragraphs 14 and 15 hereof as follows :-

p.49, 1.8

p.48, 1.33

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p.44 1.33

(a) That the making and publication of the new Regulation 7 in accordance with the procedure indicated in Section 30 of the Coconut Products Ordinance was tantamount to fixing a date for bringing into operation the export control scheme for desiccated coconut contemplated by Section 20A (This was not the basis on which it was argued on behalf of the Respondents that the regulations were in force; nor was it a position in law on which Counsel for the Appellant was asked to address the Court). 10

p.45, 1.1

(b) That the regulation empowering the Manager to issue licences was not ultra vires or inconsistent with Section 20A because the Manager, being a subordinate appointed by the Board, was under the control of the Board and also because the Manager's refusal to issue a licence was subject to an appeal to the Board. 20

p.47, 1.21

(c) That "export" means "sending out to another country"

p.46, 1.40

(d) That the licence, interpreted in the light of the circumstances that the Vavasseur Trading Co. Ltd. knew that the licence was not intended to authorise exportation to the U.S.A., must be regarded as a licence giving authority to export "to Halifax and not to any U.S. Port". 30

p.44, 1.15

(e) That the submission made on behalf of the Respondents that Section 20B of the Amending Act authorised the Minister to organise a parallel or interim scheme of export control was unacceptable.

p.48, 1.26

(f) There is no provision of law which requires a shipper to give notice to the Board at the stage when he enters into a contract with any foreign buyer or with a buyer in any foreign country. 40

p.47 1.29
- p.48, 1.
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(g) There is no provision of law which empowers the Manager to refuse a licence for export to any particular country on the ground that special precautions could not be taken to supervise the manufacture of the product

intended to be exported

17. It is respectfully submitted that the conclusions of the Supreme Court, referred to in sub-paragraphs (a), (b) and (d) of the above paragraph, are erroneous for the following reasons, in addition to those set out in paragraph 14 above.

- 10 (a) In regard to the view that the making and publication of the new Regulation 7 was tantamount to the Minister fixing a date under Section 20A, it is respectfully submitted that :-
- (i) The view is directly contrary to the clear and express words of Section 20A;
- 20 (ii) Apart from the vital reason in (i) above, the procedure under Section 30(3) of the Coconut Products Ordinance (although this must be gone through before the regulations can become, in the words of sub-section 4, "valid and effectual") does not give the Minister, directly or indirectly, the power or the opportunity to determine the date when this is to happen.
- 30 (iii) The words "valid and effectual" in Section 20B (2) of the Amending Act and Section 30(4) of the Coconut Products Ordinance do not, in the context, mean "valid and shall come into operation".
- (b) In regard to the view that the regulation empowering the Manager to issue licences is not ultra vires for inconsistency with Section 20A, it is respectfully submitted that :-
- 40 (i) If the power to issue export licences carries with it the far reaching implied powers suggested by the Respondents, that power must be construed as one that must be

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exercised by the Board and by no one else;

(ii) If, on the other hand, delegation is permissible, the Board as the person designated by Section 20A, should be the authority to delegate its powers; and consequently, the regulation made by the Minister assigning the Board's power to the Manager is ultra-vires;

(iii) Neither the fact that the Manager is, generally speaking, amenable to control by the Board, nor the right of appeal to the Board saves the regulation. The Manager, despite his relationship to the Board, would be bound to exercise the discretion given to him by the regulations independently of the Board 10

(iv) The power given by Section 20A to the Board to grant licences is an essential provision of Section 20A and not a matter of procedural detail intended to be taken care of by regulations. 20

18. In regard to the grounds stated in paragraphs 5 (b) and 5 (c) hereof, it is respectfully submitted that :-

(a) At the Inquiry before the 1st Respondent, the 1st Respondent informed the Appellant (and it was so recorded) that the "Applications" referred to in his letter of September 17, 1968 (set out in paragraph 3 (f) hereof) were the "Intend-to-Ship" Applications made under Section 58 of the Customs Ordinance. 30

(b) At the Inquiry before the 1st Respondent, no reference was made to the applications to the Coconut Board for export licences, marked in these proceedings as R.5 to R.9; R.30 to R.41; and R.77 to R.83; nor were the circulars sent by the Coconut Board, R.1 to R.4, referred to, nor were any of these documents even produced or shown to the Appellant. 40

p. 243
pp.83-84,
90-92,
151-161,
165-166,
195-200,
207-210

pp.65-66,
70-71, 76,
78-80,88-
89,113-114
123-137,
162-164,
169-170,
179-191,
215-216
pp.63-64,
108,144-
146.

10 (c) The facts specified in the charge conveyed by the 1st Respondent's letter of September 17, 1968, namely that the desiccated coconuts were shipped to the Port of New York instead of to the Port of Halifax, as stated in the intend to ship applications in respect of the shipments only constituted a charge under Section 58 of the Customs Ordinance, and could, if the Petitioner Appellant was guilty of the said charge, only have rendered him liable to a maximum penalty of Rs 1,000/- and not a forfeiture of treble the value of the goods.

p.243

20 (d) The 1st Respondent, by his letter of September 30, 1968, informed the Appellant that he had found the Appellant guilty "of the charges made against him and conveyed to him" by the 1st Respondent's letter of September 17, 1968. The purported punishment was for a different offence, against which the Appellant was not given an adequate opportunity to defend himself. In fact, the statement of the 1st Respondent, referred to in (a) above, was positively misleading for the reason that the statement varied the charge originally made.

p. 245

p. 243

30 19. Counsel for the Respondents, in response to the above arguments, contended that the "charge sheet" conveyed the charge under Section 130 adequately, and that the submissions of Counsel for the Petitioner Appellant to the 1st Respondent at the end of the Inquiry clearly showed that Counsel for the Petitioner Appellant had clear knowledge that the Petitioner Appellant was charged with a contravention of Section 130 of the Customs Ordinance.

40 20. The Supreme Court in dealing with the above submissions accepted the submissions of Counsel for the Respondents and held that there had been no denial of any principle of natural justice in relation to the Petitioner Appellant.

p.50, 1.40

21. It is respectfully submitted that the decision of the Supreme Court was erroneous for

RECORD

the reasons urged in paragraph 18 hereof and for the following further reason, namely, that the submissions of Counsel for the Petitioner Appellant do not in any way establish that either Counsel or the Petitioner Appellant was aware of the charge with which the Appellant was confronted.

22. It is respectfully submitted that this Appeal should be allowed, with costs both here and below, and a direction be given to the Supreme Court to quash by way of Certiorari the order of the 1st Respondent dated September 30, 1968 for the following among other

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R E A S O N S

1. BECAUSE the 1st Respondent was under a duty to act judicially in making the order sought to be quashed
2. BECAUSE a remedy by way of a mandate in the nature of a Writ of Certiorari lay to quash the said order
3. BECAUSE the 1st Respondent erred in law in finding the jurisdictional fact that the Appellant had been concerned in the illegal exportation of the goods in question.
4. BECAUSE there was an error of law on the face of the Record
5. BECAUSE the said order was based on a patent and vital error of law in that it was made on the basis that Regulation 7 was in operation at the relevant time
6. BECAUSE Regulation 7 (i) is ultra vires and of no effect
7. BECAUSE Section 20A of the Coconut Products Ordinance was never brought into effect
8. BECAUSE until Section 20A of the Coconut Products Ordinance is brought into effect it is permissible to export desiccated coconut from Ceylon without a licence.

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30

9. BECAUSE Section 20B of the Coconut Products Ordinance does not prohibit the unlicensed export of desiccated coconut.
10. BECAUSE the Manager of the Coconut Board had no power to make a valid condition designating or restricting the place or places to which the goods in question might be exported
- 10 11. BECAUSE there is no regulation in force which provides for the issue of a licence to export desiccated coconut subject to a term or condition
12. BECAUSE there was no statutory provision in force which authorised the designation or the restriction by any authority of the place or places to which desiccated coconut might be exported
- 20 13. BECAUSE the form of application and the form of licence, and the terms and conditions subject to which the licence may be issued, were not prescribed as required by Statute
14. BECAUSE neither the Coconut Board nor the Manager had power to set down special standards different from the single standard of quality provided for by the regulations.
- 30 15. BECAUSE in any event the licence, properly construed, did not restrict the places to which the goods in question might be carried, or prohibit any diversion of the ship carrying the goods by a foreign buyer to whom the property in the goods had passed.
16. BECAUSE no term or condition as to the destination of the goods to be exported was imposed by the licences allowing their export.
17. BECAUSE the Appellant did not contravene any term or condition of the licences.

RECORD

18. BECAUSE the Appellant was not concerned in the doing of anything that was not authorised by the licences.
19. BECAUSE the Appellant was not given an adequate opportunity of defending himself in view of the failure of the officers of H. M. Customs to give him adequate notice of the case against him.

E. F. N. GRATIAEN

MONTAGUE SOLOMON

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A N N E X U R E "A"

Coconut Products (Amendment) Act No. 20
of 1962

An Act To Amend the Coconut Products Ordinance
[Date of Assent: June 16, 1962]

1. This Act may be cited as the Coconut Products (Amendment) Act, No. 20 of 1962.
3. (1) The following new sections are hereby inserted immediately after section 20 of the principal enactment, and shall have effect as section 20A and section 20B of that enactment:-
 - 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.
 - 20 20B. Regulations may be made for or in respect of all or any of the following matters :-
 - (a) the regulation, inspection, supervision, and control of the manufacture, packing, transport, storing, and export of desiccated coconut;
 - (b) prescribing standards of quality to which all desiccated coconut manufactured shall conform;
 - 30 (c) ensuring that desiccated coconut exported from Ceylon is free from impurities or foreign matter, and is of good quality;
 - (d) the inspection, supervision, regulation and control of factories, stores, buildings, equipment, and machinery used or to be used for the manufacture, packing, or storing 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; 10
- (f) the registration of manufacturers or shippers of desiccated coconut, the terms and conditions subject to which such registration shall be effected, and the circumstances in which the registration of any such manufacturer or shipper may be renewed, suspended, or cancelled;
- (g) the prohibition of the manufacture or shipment of desiccated coconut except by registered manufacturers or shippers; 20
- (h) applications for registration as manufacturers or shippers of desiccated coconut, and prescribing forms for such applications;
- (i) the fees to be paid for the registration of manufacturers or shippers of desiccated coconut and for the issue of desiccated coconut general or special export licences, and the time and mode of payment of such fees; 30
- (j) appeals to the Minister against the refusal to register, or to renew the registration of, any person as a manufacturer or shipper of desiccated coconut, or against the suspension or cancellation of the registration of any manufacturer or shipper, or against the refusal, suspension, or cancellation of desiccated coconut general or special export licences; 40
- (k) the manner in which such appeals to the Minister shall be preferred and

disposed of, and the procedure to be followed at the hearing of such appeals;

(1) the fees to be paid by persons preferring appeals to the Minister, and the time and mode or [sic] payment of such fees;

10

(m) the investigation of complaints made by importers regarding any desiccated coconut which has been exported from Ceylon; and

(n) All matters incidental to or connected with the matters referred to in this subsection"

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(2) Section 20B, inserted in the principal enactment by sub-section (1) of this section, shall be deemed to have come into force on the date of commencement of the principal enactment and accordingly, the Desiccated Coconut (Manufacture and Export) Regulations, 1961, published in Gazette No. 12,400 of May 5, 1961 shall be deemed to have been duly made under the said section 20B, and to have been valid and effectual for all the purposes for which they were made.

A N N E X U R E "B"

Customs Ordinance /Cap. 2357

43. If any goods enumerated in the table of prohibitions and restrictions in Schedule B shall be imported or brought into Ceylon contrary to the prohibitions and restrictions contained in such table in respect thereof, such goods shall be forfeited, and shall be destroyed or disposed of as the Principal Collector of Customs may direct: 10

Provided that if any dangerous substance be imported or brought into Ceylon without the licence of the Minister, or contrary to any of the regulations which may be made from time to time by the Minister, for the safe landing and deposit of such substance, the person importing or bringing the same to Ceylon, and any person concerned in such importation or bringing of the same, shall, in addition to the forfeiture above provided, be guilty of an offence and be liable to a fine not exceeding one thousand rupees. 20

44. If any person exports or attempts to export or take out of Ceylon any goods enumerated in the table of prohibitions and restrictions in Schedule B, in contravention of the prohibitions and restrictions contained in such table in respect thereof, such goods shall be forfeited, and shall be destroyed or disposed of as the Principal Collector of Customs may direct.

57. The person exporting any goods whether liable to the payment of duty or free of duty shall deliver to the Collector a bill of entry of such goods, on a form of such size and colour as may be specified in that behalf by the Collector by notification published in the Gazette, and fairly written in words at length expressing the name of the ship in which the goods are to be exported and of the port to which they are to be taken, and containing an accurate specification of the quantity, quality, and value of such goods, and the number, denomination, dimensions, and description of the respective packages containing the goods and such other particulars as the Collector by that or a 30 40

subsequent notification may require him to furnish, and in the margin of such bill of entry shall delineate the respective marks and numbers of such packages. If such person fails to deliver a bill of entry prepared as aforesaid, he shall be liable to a penalty of fifty rupees. Such person shall pay any duties and dues which may be payable on the goods mentioned in such entry, and such person shall also deliver at the
10 same time two or more duplicates of such bill in which all sums and numbers shall be expressed in figures, and the particulars to be contained in such bill shall be legibly written and arranged in such form and manner and the number of such duplicates shall be such as the Collector shall require, and such bill of entry when signed by the Collector or person authorized by him and transmitted to the proper
20 officer shall be the warrant to him for the examination of and delivery for shipment of such goods, and if such goods shall not agree with the particulars in the bill of entry, or if such goods are removed from the warehouse or other place appointed for shipment before such entry is passed and all duties and dues paid, and in the absence of any explanation to the satisfaction of the Collector the same shall be forfeited, and such forfeiture shall include all
30 other goods which shall be entered or packed with them as well as the packages in which they are contained.

58. Notwithstanding anything contained in section 75, it shall be lawful for the Collector, on application made in that behalf by an exporter of goods and subject to such conditions as may be imposed by the Principal Collector and notified in the Gazette, to permit the exportation of such goods prior to the presentation of the bill of entry for such goods:

40 Provided that -

- (a) any misdescription or under-valuation appearing in the application shall render the exporter liable to the penalties imposed by this Ordinance for misdescription or under-valuation in the bill of entry;
- (b) such permission to export shall not in any

way be construed as a waiver of the Collector's right to order forfeiture of the goods, if the goods have not already been shipped out of Ceylon, for any breach of this Ordinance committed in respect of the goods by the exporter, or shall not relieve the exporter from any penalty or liability to which he would have been subject had the goods been exported after the presentation of the bill of entry; and 10

(c) if any sum of money imposed as a penalty be not duly paid, it shall be lawful for the officers of customs to refuse to pass any other goods brought for exportation by the exporter until the said sum of money is paid.

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. 20 30

144. If any person fails to pay any sum of money which he, under this Ordinance, has forfeited, or becomes liable to forfeit or to pay as a penalty, the officers of customs may refuse to pass any goods which that person imports or brings into or is seeking to export or take out of Ceylon until that sum is paid: 40

Provided that nothing in the preceding provisions of this section shall be deemed to prohibit the recovery of such sum by the Collector under any other provision of law.

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.

10 146. If any person by reason of any act or omission becomes liable, under the provisions of any section of this Ordinance to forfeit any goods or any sum of money, or to any penalty other than a fine, such person shall, in addition, be guilty of an offence and shall be liable on conviction after summary trial before a Magistrate -

- (a) for a first offence, to a fine not exceeding one thousand rupees or to imprisonment of either description for a term not exceeding six months or to both such fine and imprisonment;
- 20 (b) for a second or subsequent offence, to a fine not exceeding two thousand rupees or to imprisonment of either description for a term not exceeding one year or to both such fine and imprisonment:

Provided, however, that no prosecution shall be instituted against any person under this section, unless the Principal Collector of Customs is of opinion that the forfeiture or penalty, as the case may be, whether imposed or not, cannot or is not likely to be recovered from such person.

30 154. All ships, boats, goods, and other things which shall have been or shall hereafter be seized as forfeited under this Ordinance, shall be deemed and taken to be condemned, and may be dealt with in the manner directed by law in respect to ships, boats, goods, and other things seized and condemned for breach of such Ordinance, unless the person from whom such ships, boats, goods and other things shall have been seized, or the owner of them, or some person
40 authorised by him, shall, within one month from the date of seizure of the same, give notice in writing to the Collector or other chief officer of customs at the nearest port that he intends to enter a claim to the ship, boat, goods, or other things seized as aforesaid, and shall further give security to prosecute such claim before the court having jurisdiction to entertain

the same, and to restore the things seized or their value, and otherwise to satisfy the judgment of the court and to pay costs. On such notice and security being given in such sum as the Collector or proper officer of customs at the port where or nearest to which the seizure was made shall consider sufficient, the ship, boat, goods, or other things seized shall, if required, be delivered up to the claimant; but if proceedings for the recovery of the ship, boat, goods, or other things so claimed be not instituted in the proper court within thirty days from the date of notice and security as aforesaid, the ship, boat, goods, or other things seized shall be deemed to be forfeited, and shall be dealt with accordingly by the Collector or other proper officer of customs. 10

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. 20

165. The Minister may, by any order made for that purpose, direct any ship, boat, goods or other commodities whatever, seized under this Ordinance, to be delivered to the proprietor thereof, whether condemnation shall have taken place or not, and may also mitigate or remit any penalty or fine or any part of any penalty or fine incurred under this Ordinance, or may release from confinement any person committed under this Ordinance, on such terms and conditions as to him shall appear to be proper: 30

Provided always that no person shall be entitled to the benefit of any order for such delivery, mitigation, remission, or release, unless such terms and conditions are fully and effectually complied with. 40

SCHEDULE B

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Table of Prohibitions and Restrictions-
Outwards

Cinchona bark in any form, including cinchona bark powder or any other part of the cinchona tree.

10 No tea shall be exported which is declared by the Principal Collector of Customs or by any officer authorized by him to be, in the opinion of the officer making such declaration, unfit for export as being adulterated and therefore likely to damage the reputation of Ceylon tea in foreign markets:

20 Provided that this prohibition shall not operate against any tea on account of its cheapness or inferiority in quality. The exportation of tea shall be subject to the condition that the Principal Collector of Customs or any officer authorized by him may take samples thereof for the purpose of examination.

Wild cinnamon, that is to say, any cinnamon other than that cultivated in plantations for commercial purposes.

30 Articles the exportation of which is prohibited by any enactment or any legal order now in force or hereafter to be enacted, or any rules, regulations, notifications, proclamations, or orders made or issued thereunder.

Articles the exportation of which is restricted by any enactment or any legal order now in force or hereafter to be enacted, or any rules, regulations, notifications, proclamations, or orders made or issued thereunder, except in accordance with such enactment, rules regulations, notifications, proclamations, or orders.

A N N E X U R E "C"

Desiccated Coconut (Manufacture & Export)
Regulations 1961.

Regulation 7 (introduced by amending
Regulations gazetted on April 4, 1963)

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. 10

(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.

(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 on or about the date or dates of manufacture have consistently been satisfactory up to the date of application in that they do not indicate contamination with pathogenic organisms or other organisms to a harmful extent, the Manager shall issue a Desiccated Coconut General Export Licence to the applicant. 20

(4) If the bacteriological reports relating to the production of the mill on or about the date or dates of manufacture have not been consistently satisfactory, the Manager shall await the reports on the samples drawn from the desiccated coconut manufactured on the date or dates of manufacture as given in the application, and if those reports are satisfactory shall issue a Desiccated Coconut General Export Licence. 30

(5) If the bacteriological reports on the samples drawn from the desiccated coconut manufactured on the date or dates given in the application are not satisfactory, the applicant shall be entitled to request the Manager to cause 40

fresh samples to be drawn for bacteriological examination which the Manager shall do after notifying the manufacturer and the applicant. If the reports on these samples are satisfactory the Manager shall issue a Desiccated Coconut General Export Licence to the applicant.

10 (6) If the bacteriological reports indicate contamination with pathogenic organisms or other organisms to a harmful extent, the Manager shall after notifying the manufacturer or shipper of the date and time of sampling cause fresh samples to be drawn and if such reports confirm that the consignment is contaminated, forthwith direct the manufacturer to arrange for the disposal of the entire consignment to an approved oil miller for the extraction or expelling of oil.

20 The Manager shall not entertain any further applications for general export licences from or on behalf of the registered miller until proof of such disposal is received by him.

30 (7) If the manufacturer is dissatisfied with an order made by the Manager under paragraph (6) above, the Manager shall after notifying the applicant and the manufacturer cause the consignment to be sampled again by an authorised officer which sample may be submitted to an independent laboratory approved by the Board, for report if so desired by the applicant and on payment by the applicant of the cost. If the bacteriological report is satisfactory, the Manager shall issue a Desiccated Coconut General Export Licence to the applicant.

(8) In the event of a refusal by the 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 export licence.

40 (9) The Manager shall issue a general export licence only if he is satisfied that each package bears a label issued by him. Each such label shall be serially numbered and carry the registered number of the manufacturer.

(10) No package to which such label has been affixed shall be reopened for any purpose whatsoever. If such package is reopened it shall not be exported.

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
DCN LEONARD JAYAWARDANE
Petitioner-Appellant

- and -

V. P. SILVA
V. P. VITTACHI
G. CUMARANATUNGE

Respondents - Respondents

CASE FOR THE APPELLANT

MESSRS. CLIFFORD-TURNER & CO.
11, Old Jewry,
London E.C.2.