1968 *Present :* **T. S. Fernando, J., and Weeramantry, J.**

ADAMJEE LUKMANJEE & SONS LTD., and another,
Petitioners, *and* THE CONTROLLER OF IMPORTS
and another, Respondents

S. C. 242 of 1967—In the matter of an Application for a Mandate in the nature of a Writ of Mandamus on the Controller of Imports and the Principal Collector of Customs

Customs Ordinance (Cap. 235)—Forfeiture of goods imported and penalties imposed on that account—Scope of sections 43 and 164—Import Licensing Regulations, Regulations 2, 4.

The Controller of Imports and Exports issued a licence to the 1st petitioner to import condensed milk, but the relevant documents were not quite clear whether the milk should be of Milona Cow brand or Airship brand. When

the petitioner imported a consignment of Airship brand condensed milk, the imposition of a 5% penalty was effected in terms of section 164, read with section 43, of the Customs Ordinance. It was claimed on behalf of the respondents that the petitioner was permitted to import milk of Milona brand only, and that the importation of Airship brand milk was prohibited by the licence.

Held, that a contravention of section 43 of the Customs Ordinance carried with it penalties of great severity, and before those penalties could be exacted, the importer was right in his contention that the licence should speak without equivocation on the issue of the proper brand of milk permitted to be imported.

APPLICATION for a writ of *mandamus* on the Controller of Imports and the Principal Collector of Customs.

A. H. C. de Silva, Q.C., with *Malcolm Perera* and *Kumar Ameresekere*, for the petitioners.

Ananda de Silva, Crown Counsel, for the respondents.

Cur. adv. vult.

March 15, 1968. T. S. FERNANDO, J.—

By regulation 2 of the Import Licensing Regulations, 1963 made by the Minister of Commerce, Trade, Food and Shipping under section 2 of the Imports and Exports (Control) Act, (Cap. 236), and published in *Gazette* No. 13,477 of January 11, 1963, the importation of goods of any description into Ceylon was prohibited except under the authority of a licence granted by the Controller of Imports and Exports and subject to such conditions as may be specified therein. Regulation 4 empowered the Controller by notice published in the *Gazette* to grant an open general licence authorising the import of goods of any description. It is common ground that till August 25, 1964 the importation of milk and milk products was permitted under open general licence. By Import Control Notice No. 16/64 published in *Gazette* No. 14,149 of August 25, 1964, the Controller of Imports and Exports informed importers that from that date individual import licences are required for the importation of milk, milk products, butter and other dairy products from any source. Importers were requested to furnish the Controller with certified statements of imports of the above-mentioned products. These statements were called for probably to enable the Controller to decide the question of allocation of import quotas to the several importers.

The 1st petitioner is a company that has been importing full cream condensed milk, and, pursuant to the notice mentioned in the paragraph above, submitted on September 11, 1964 a statement (C) of its imports of full cream condensed milk and other products. The Controller by letter (D) of September 21, 1964 in reply to the 1st petitioner's letter forwarding the aforesaid statement requested the latter to furnish a list

describing the goods with brand names. Such a list (D2) was accordingly furnished by the 1st petitioner by its letter D1 of September 23. 1964. In this list it specified that its entire imports of full cream condensed milk for the 3 years 1962, 1963 and 1964 consisted of Airship brand. The Controller thereupon by his letter E1 of October 1, 1964 informed the 1st petitioner that it may send indents for licensing the imports of condensed milk for the period ending December 31, 1964.

On October 7, 1964, the 1st petitioner sent up an indent (E2) for 5635 cartons of Airship brand condensed milk and the Controller duly issued licence E3 of October 16. 1964 to cover the importation of 5635 cartons of Airship brand condensed milk. In 1965 and the first half of the year 1966 the 1st petitioner was granted licences F1, G and H for the importation of the same brand of condensed milk. In the second half of 1966, the Controller issued to the 1st petitioner licence (I.4) of September 22, 1966 valid until the end of that year for importation of full cream condensed milk. This licence contained an endorsement in the following form : " The maximum C.I.F. price per carton of 48 × 14 oz. tins for the brand you import, viz. Milona Cow, should not exceed 49*sh.* 3*d.*" There is nothing to controvert the 1st petitioner's statement that it had never before, except on one occasion when " Milona Cow " Brand condensed milk was imported on an experimental basis, imported Milona Cow brand condensed milk. Indeed, in list D2 the 1st petitioner had specified that it had during the three years for which particulars had been requested by Import Control Notice No. 16/64 imported only Airship Brand. Despite the nature of the endorsement on licence I.4 it is not disputed that on this licence the 1st petitioner imported and was allowed (1) by the Principal Collector of Customs to clear from the ship and (2) by the Controller of Exchange to pay for two consignments of Airship brand condensed milk. The contention of the 1st petitioner is that it understood the endorsement (which contained a misdescription of the brand it habitually imported) to mean that if it did import Milona Cow brand, payment therefor could not exceed the rate of 49*sh.* 3*d.* a carton. It is admitted that Airship brand is a little higher in price than the other brand. The Controller of Exchange whose duty presumably is to ensure the conservation of foreign exchange in the Country did not see anything wrong in the nature of the actual importation effected by the 1st petitioner. The 2nd respondent, the Controller of Imports, has submitted, by affidavit, that these two consignments were inadvertently permitted to be cleared and there has been on the part of his office a failure properly to scrutinise the relevant documents.

The next licences in point of time are licences (J and J1) of November 17, and December 12, 1966 for importation of condensed milk before January 1, 1967. They contained endorsements in terms identical to those set out in the paragraph above. The 1st petitioner imported on these licences too Airship brand condensed milk. The submission before us on its behalf was that, having on the immediately previous two occasions been

permitted to import Airship brand on a similar licence, it had every reason to assume that there was nothing irregular in what it did. This importation was questioned by the 3rd respondent, the Principal Collector of Customs, who acted in the matter, naturally enough, in consultation with the 2nd respondent, the Controller of Imports. The consignment of condensed milk imports on licences J and J1 was allowed to be cleared by the 1st petitioner only on the payment of a penalty of 5% of the value thereof. The penalty was paid under protest and the goods cleared, the 1st petitioner intimating that the matter would be taken up in appeal by it.

The Principal Collector of Customs acts in the matter of forfeiture of goods imported and penalties imposed on that account by reason of certain provisions of the Customs Ordinance (Cap. 235). Section 43 thereof declares forfeit goods enumerated in the Table of Prohibitions and Restrictions Inwards in Schedule B to the Ordinance which are imported into Ceylon contrary to the prohibitions and restrictions therein contained. By that Table goods so declared forfeited include articles imported except in accordance with any enactment, legal order, etc. in force for the time being. Section 164 of the Ordinance enables the Minister to make order for restoration of forfeited goods subject to terms and conditions he may think fit to impose. It is claimed that the imposition of a 5% penalty was effected in terms of the said section 164 read with section 43.

To return to what happened in the year 1967 which is the year of importation we are concerned with on this application. Licence A dated February 21, 1967 was issued by the 2nd respondent to the 1st petitioner to import full cream condensed milk. This licence also carried an endorsement in the earlier form as follows :—" The Maximum C.I.F. price per carton of 48 × 14 oz. tins of the brand you import, viz. Milona Cow should not exceed 49*sh.* 3*d.*" The 1st petitioner, on this licence, imported some 100,160 tins of Airship Brand condensed milk which arrived in Ceylon in June 1967. It is this consignment which the petitioner has alleged it has not been permitted to clear from the Customs premises except on payment of a penalty of 5% of the C.I.F. value of the goods. There is some dispute as to whether the 1st petitioner has presented the necessary documents in respect of this consignment. It would appear that the documents must first be presented at the office of the 2nd respondent before they are taken to the Customs Office. On this question of presentation of the documents there are conflicting affidavits filed on behalf of the respective parties. We have been saved the task of pronouncing on the merits of the affidavits because learned Crown Counsel who appeared for both the 2nd and the 3rd respondents was candid enough to inform us that even if the documents had been presented or are now presented, the action both respondents would have taken or would take, as the case may be, would be to refuse clearance except on payment of the penalty. This candid attitude, which we

commend in the circumstances of this case, enabled us to make an order expeditiously so that the 1st petitioner may clear the goods and. incidentally, help to relieve to a limited extent the acute shortage of condensed milk in the market at the present day.

The correctness or otherwise of the action of the respondents depends ultimately on the interpretation to be placed on the licence A. It recites that " licence is hereby granted for the importation into Ceylon of the goods described above, subject to the conditions set out overleaf". The goods as so described " above " in licence A are " full cream condensed milk ". "The conditions overleaf " referred to in the licence have no relevance to the matter calling for decision on the instant application. We are therefore free to consider the effect of the endorsement reproduced above and contained on the licence. It has been submitted on behalf of the 1st petitioner, and the relevant documents leave us in little doubt. that when the Controller of Imports purported to state on licence A that Milona Cow is the brand you import he was misdescribing the brand habitually imported by it which was indeed nothing but Airship brand. This misdescription notwithstanding, it has been contended on behalf of the respondents that a proper reading of the licence (with the endorsement) means that nothing but Milona Cow brand condensed milk could lawfully have been imported thereon. Counsel for the 1st petitioner contended that the reasonable interpretation of the terms of the licence would be that the licence was granted to import full cream condensed milk, but, if Milona Cow brand was imported, the C.I.F. price thereof should not exceed 49*sh.* 3*d.* per carton of 48 × 14 oz. tins. While we have no reason to doubt the 2nd respondent's averment that two previous consignments of Airship brand on similar licences were permitted by inadvertence on his part, there is no reason to think—and certainly none was suggested—that the 1st petitioner believed that those importations had been permitted through inadvertence or negligence in the office of the Controller of Imports.

In the circumstances detailed above, this application calls to be decided by applying to the interpretation of the terms of the licence A the same rule of construction that is permissible when a court is called upon to interpret a statute or regulation of a penal nature, viz., the rule of strict construction. Tersely put, the competing interpretations are, on the one hand, for the petitioners that the terms of the licence mean that full cream condensed milk of any brand may be imported thereon, but that if Milona Cow brand is imported there is a ceiling placed on the C.I.F. value. On the other, for the respondents it has been argued that the licence stipulated that the licensee may import only the Milona Cow brand. It does seem that to maintain this latter argument one has at least to interpolate the words " are allowed to " before the word " import" in the endorsement in question. Not only is the interpretation contended for on behalf of the petitioners the more reasonable of the two interpretations put forward; but, we are constrained to say, that even if

the two competing interpretations had been equally plausible, we would have had to lean towards the less harsh of the two. A contravention of section 43 of the Customs Ordinance carries with it penalties of great severity, and before those penalties can be exacted, the importer is right in his contention that the licence shall speak without equivocation on the issue. In these circumstances, the refusal (or virtual refusal) on the part of the 2nd and 3rd respondents to permit clearance of the goods except on payment of a penalty was, in our opinion, unwarranted by law. Accordingly, having regard to the perishable nature of the goods, we made order at the conclusion of the argument that a mandate in the nature of a Writ of *Mandamus* shall issue on the 2nd and 3rd respondents directing them to permit the 1st petitioner to remove the consignment of Airship brand full cream condensed milk in question without the imposition of the further rents and dues referred to in paragraph 11 of the petition. It is presumed that all relevant documents will be presented by the 1st petitioner to the proper officers before the goods are removed. The 1st petitioner will be entitled to the costs of this application to be paid by the 2nd and 3rd respondents.

WEERAMANTRY, J.—I agree.

Application allowed.