

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

Officer In Charge,
Minor Offence Branch,
Police Station,
Kandhana.

Complainant

Court of Appeal

Vs.

Case No:CA(PHC) 102/09

Michael Eisec,

76/34

Thotupola Road,

Welisara,

Ragama.

High Court Negombo

Case No:HCRA/99/2009

Accused

AND

In the matter of an application in
terms of Chapter XXXVIII of the
Code of Criminal Procedure Act,

Magistrate's Court Wattala

Case No: 41436

Konganige Kalyani Fernando,

32/17

Jacob Mawatha,

Ragama.

Claimant

Vs.

Officer In Charge,

Minor Offence Branch,

Police Station,

Kandhana.

Complainant Respondent

And

In the matter of on application in terms of Article 154P(3)(b) of the Constitution read with the High Court of the Provinces (Special Provisions) Act No.19 of 1990.

Lanka Orix Leasing Company PLC,

100/1, Sri Jayawardenapura

Mawatha,

Rajagigiya.

Petitioner

Vs.

1. Konganige Kalyani Fernando,
32/17
Jacob Mawatha,
Ragama.

Claimant Respondent

2. Officer In Charge,
Miner Offence Branch,
Police Station,
Kandhana.

**Complainant Respondent -
Respondent**

3. Hon. The Attorney General,
Attorney General's Department,
Colombo 12.

-Respondent-

And now

In the matter of an appeal in terms of section 331(1) of the Code of Criminal Procedure Act read with section 11 of the High Court of the

Provinces (Special Provisions) Act
No. 19 of 1990.

Lanka Orix Leasing Company PLC,
100/1, Sri Jayawardenapura
Mawatha,
Rajagigiya.

Petitioner Appellant

Vs.

1. Officer In Charge,
Minor Offence Branch,
Police Station,
Kandhana.

**Complainant - Respondent -
Respondent**

2. Hon. The Attorney General,
Attorney General's Department,
Colombo 12.

Respondent - Respondent

Before : W.M.M. Malanie Gunarathne, J
: P.R. Walgama, J

**Counsel : Sumeda Mahawanniarachchi for the Petitioner
Appellant.
: Anooa De Silva SC for the A.G.**

Argued on : 13.03.2015

Decided on : 01.09.2015

CASE- NO- CA/(PHC)- 102/2009- JUDGMENT- 31.08.2015

P.R. Walgama, J

The Petitioner- Appellant being the Absolute Owner of the vehicle bearing No. WP HK- 0147 , leased the said vehicle to the Claimant- Respondent on a lease Agreement.

The matter to be resolved, surfaced as a result of the accused having used the alleged vehicle for, transporting 1440 drams of illicit liquor, and possessing the said in contravention of the provisions of the Exercise Ordinance.

The Accused pleaded to the afore said charges and the Learned Magistrate, imposed a fine.

It is apparent from the proceedings of the Magistrate Court of Wattala in the case bearing No. 41436, in which proceedings the Accused was convicted, and the Claimant, being the Registered Owner of the said vehicle made an application for the release of the vehicle, pending the vehicle inquiry, in terms of the

Criminal Procedure Code. Pursuant to the afore said the Learned Magistrate made order, for the Claimant to tender a no objection letter from the Absolute Owner for the release of the said vehicle to the Claimant. But at the request of the Claimant the Absolute Owner, the OREX LEASING COMPANY PLC, was present in Court for the inquiry, and vehicle confiscation proper commenced on 3rd November 2008.

At the conclusion of the inquiry the Learned Magistrate confiscated the said vehicle, by order dated 1st December 2008. Being aggrieved by the said impugned order the Petitioner, invoked the revisionary jurisdiction of the High Court of Negambo, seeking to set aside the said order of the Learned Magistrate dated 01.12.2008.

In the above said revision application of the petitioner was dismissed by the Learned High Court Judge by his order dated 20.08.2009, on the premis, that the Petitioner has failed to adduced any valid reason for the delay in making the application in revision, and besides the fact that the petitioner is relying on the fact that the witness who gave evidence was on the belief that he is supporting the application of the Claimant, and not the confiscation inquiry. But it is ostensible from the evidence adduced by the representative of the Absolute owner, that the absolute owner has agreed for the release of the vehicle to the Claimant. In the above setting the Learned High Court Judge was of the view that no grave

injustice has been caused to the Petitioner, and as such the Learned High Court Judge has dismissed the application of the Petitioner. Being aggrieved by the said order of the Learned High Court Judge, the Petitioner-Appellant has appealed to this Court seeking to set aside the order of the Learned Magistrate, and the order of the Learned High Court Judge dated 20.08.2009. The facts giving rise to the filing of the appeal may be summarized, as follows;

That the Learned High Court Judge has erred in arriving at the conclusion that no miscarriage of justice has been caused to the Appellant,

Further that the order of the Learned Magistrate's order is contrary to law;

That the confiscation of the vehicle is not automatic, but shall be liable for confiscation.

As per proceedings dated 03.11.2008, it is apparent that the Representative of the Appellant, in his testimony to court has consented to the release of the vehicle to the Claimant. There after the Learned Magistrate by his order has stated the fact that the Accused had been engaged in the illicit act of transporting the above. The Learned Magistrate was of the view that the Claimant had knowledge of the said illegal act of the Accused.

The counsel for the Appellant planks his position mainly on Section 433 A of the Act No. 12 of 1990, Civil Procedure Code (Amendment) to succeed in this appeal.

The above section reflects thus;

“ In the case of a vehicle let under a hire purchase or leasing agreement, the person registered as the absolute owner of such vehicle under the Motor Traffic Act, shall be deemed to be the person entitled to possession of such vehicle for the purpose of this Chapter.”

It is to be mentioned that the above section should be understood in the context of the procedure applicable to the confiscation of a vehicle, after a conviction of a charge under the Forest Ordinance, Animals Act and Exercise Ordinance. It is trite law that after a conviction under the above Acts, if the vehicle involved, belongs to a third party, it is mandatory that the Magistrate should hold an inquiry before the confiscation of such vehicle.

The above concept was first recognized in the case of MANAWADU .VS. ATTORNEY GENERAL (1987) 2 Sri L.R- 30, wherein His Lord Ship has observed thus;

“By section 7 of Act No. 13 of 1982 it was not intended to deprive an owner of his vehicle used by the offender in committing a ‘forest offence’ without his (owner’s) knowledge and without his participation. The word forfeited must be

given the meaning 'liable to be forfeited' so as to avoid the injustice that would flow on the construction that forfeiture of the vehicle is automatic on conviction of the accused. The amended sub section 40 does not exclude by necessary implication the rule of 'audi alteram partem.' The owner of the lorry who is not a party to the case is entitled to be heard on the question of forfeiture of the lorry, if he satisfies the court that the accused committed the offence without his knowledge or participation, his lorry will not be liable to forfeiture."(emphasis added)

More over Sharvananda CJ had considered many cases in similar matters in the legal parlor in the above determination. In the case of INSPECTOR FERNANDO .VS. MATHER- (1932) 1 CLW-249- where in it was held thus;

"In construing Section 51 of the Excise Ordinance that corresponds to section 40 of the Forest Ordinance, has expressed thus;

"where an offence has been committed under the Excise Ordinance, no order of confiscation should be made under Section 51 of the Ordinance as regards the conveyance used to commit the offence, e.g. a boat or motor car unless two things occur,

- a. That the owner should be given an opportunity of being heard against it;

AND

- b. Where the owner himself is not convicted of the offence, no order should be made against the owner, unless he is implicated in the offence which render the thing liable to confiscation.

The said concept was endorsed in the case of THE FINANCE COMPANY PLC .VS. AGAMPODI MAHAPEDIGE PRIYANTHA CHANDANA -SC APPEAL -- No. 105 A/ 2008 decided on 30.09.2010. Her Lady Ship Justice Shiranee Bandaranayaka was of the view that on a consideration of the ratio decidendi in the line of cases, if the owner of the vehicle in question was a third party, no order of confiscation shall be made if that owner had proved to the satisfaction of the court that he had taken all precautions to prevent the use of the said vehicle for the commission of the offence. The ratio decidendi of all the decisions also asserts that the owner has to establish the said matter on a balance of probability.

It is apparent from the decisions as stated above that the Appellant should(absolute owner) establish the said conditions, for it to repossess the vehicle concerned.

Therefore it is apparent from the case in hand that the Learned Magistrate, has afforded an opportunity to show cause before he confiscated the alleged vehicle. A representative of the Appellant adduced evidence to the effect that the Appellant has no objection in releasing the alleged vehicle to the Claimant-

Respondent. At the conclusion of the inquiry the Learned Magistrate has confiscated the said vehicle on the basis that the Claimant had knowledge of the commission of illegal act.

Therefore the Appellant cannot be heard to say that the Learned Magistrate did not hear the absolute owner before his determination to confiscate the vehicle. The position of the Appellant is that a Representative of the Company was under the impression that he gave evidence at the inquiry as to the release of the vehicle and not regarding the confiscation, and as such the Learned Magistrate has arrived at a erroneous conclusion by confiscating the said vehicle.

Hence it was held in the above case "that both the absolute owner and the registered owner should be treated equally and there cannot be any type of privileges offered to an absolute owner such as Finance Company in terms of the applicable law in the country. Accordingly, it would be necessary for the absolute owner to show the steps he had taken to prevent the use of the vehicle for the commission of the offence and that the said offence had been committed without his knowledge.

The rights of the absolute owner was decided in the case of ORIENT FINANCIAL SERVICES CORPORATION LTD .VS. HON. ATTORNEY GENERAL - decided on 10.12.2013, which held thus;

"under the Section 433A of the Code of Criminal Procedure Act, the absolute owner though entitled to possession of the

vehicle, it could obtain the possession of the vehicle only if the court decides to release the vehicle but not as of right.”

In the said backdrop I see no reason to interfere with the orders of the Learned Magistrate and the Learned High Court Judge made in respect of the Confiscation, of the vehicle in issue.

Accordingly appeal is dismissed subject to a cost of Rs.10,000/-

Appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

W.M.M.Malinie Gunaratne, J

I agree.

JUDGE OF THE COURT OF APPEAL