IN THE COURT OF APPEAL OF THE DEMOCRAIC SOCIALIST REPUBLIC OF SRI LANKA.

Court of Appeal Case No.
CA /PHC/AAPN/106/15
High Court Anuradhapura case No.
Revision 11/2013
M.C.Kabethigollawe case No.
64978

Phunchiralage Dhanapala,

Piliyankawala, Kahatagasdigiliya.

Registered Owner Applicant Petitioner, Petioner.

Vs.

1. Officer In Charge,
   Police Station, Horowpathana

Complainant-Respondent-Respondent-Respondent

2. Weerakoonge Premarathne,

   No.93, Sivdisagama, Kahatagasdigiliya.

Accused-Respondent- Respondent

3. Hon. Attorney General,

   Attorney General's Department, Colombo 12

Respondent- Respondent

Before : Malinie Gunarathne J.

L.T.B. Dehideniya J.

Counsel :Widura Ranawake for the Registered Owner Applicant Petitioner, Petioner.

V.Hettige SSC for the 1st and 3rd Respondents.

Argued on : 12.01.2016

Decided on : 19.02.2016

L.T.B. Dehideniya J.

The Accused Respondent, Respondent was convicted for an offence punishable under the Mines and Minerals Act No.33 of 1992 for transporting sand in violation of the conditions in the permit. He was convicted upon his plea of guilt and imposed a fine of Rs. 50000.00. The case was fixed for inquiry in to the matter of forfeiture of the vehicle used to commit the offence. On the final day of inquiry the Registered Owner, Applicant, Petitioner (hereinafter called and referred as to the Petitioner) was absent and the learned Magistrate confiscated the vehicle. Being aggrieved by the said order the Petitioner presented a revision application to the High Court which was dismissed on the ground of delay. The Petitioner tendered this application to this Court to revise the said order of the learned High Court judge.

The Accused Respondent was charged under the section 28 read with section 63(1) of the Mines and Minerals Act No.33 of 1992. This act has been amended by act No. 66 of 2009. Even though the charge sheet was silent on the amendment, by operation of law, the amended section comes in to force and the applicable law of the country is the Mines and Minerals Act as amended. The seizure and the forfeiture of the items specified were introduced by the amendment act. The items that can be confiscated are specified in section 63B. (1) which reads as follows;

> *63B. (1) Where any person is convicted of an offence under this Act, the Magistrate may make order that any mineral, machinery, equipment or material used in, or in connection with, the commission of that offence or the proceeds of the sale of any such*

mineral, or material deposited in court under the proviso to section 63A, be forfeited to the State.

The items that can be confiscated under this section are *mineral, machinery, equipment or material* only. The vehicle used in connection with the commission of the offence is not mentioned in this section as an item that is liable to be confiscated.

In the case of CA(PHC) 120/2012 Abdul Salm J(P/CA) after considering a number of statutes where the forfeiture of vehicle is involved, held that there is no provision in the Mines and Minerals Act to confiscate a vehicle. At page 09 of the judgment it was held that;

"As far as the various confiscatory provisions in several enactments are concerned, Court has to necessarily presume that the Legislature knew well, the confiscatory provisions affecting vehicles contained in the Legislative Enactments prior to the passing of the statute titled Mines and Minerals Act and exact expression used favour confiscation of the vehicles. Hence, I am of the view that it is not without significance that the Legislature vested with the exclusive right to deprive the citizens of their property rights, had clearly though it fit not to use word "vehicle" or any other words of similar meaning in the Mines and Minerals Act"

At the end, at page 13 of the judgment, it has been held that;

"In the circumstances, I set aside the order of confiscation of the vehicle as it is not forfeitable to the state under the Provisions of the Mines and Minerals Act."

If there is no provision to confiscate a vehicle under the Mines and Minerals Act, the order of the learned Magistrate confiscating the vehicle is manifestly erroneous or otherwise it was pronounced without jurisdiction.

Now I will consider whether there is a delay in making application to revise the order and is it fatal. The Petitioner is the registered owner of the vehicle. He has made an application to release the same at the Magistrate Court. On the date of inquiry the Petitioner was absent and only on that reason the vehicle has been confiscated on 17.10.2010.

The Petitioner submitted a revision application to the High Court on 06.03.2013. That is about two and a half years after the order of confiscation. In between the Petitioner has made an unsuccessful attempt by filling a motion in the Magistrate Court on 15.03.2011 seeking for a fresh inquiry. The learned Magistrate has rejected the said application. The Petitioner has explained the delay in paragraph 14 and 15 of the petition to the High Court stating that his daughter was suffering from a cancer and therefore he was unable to come to Court. He has submitted medical reports up to 2011(P7) to substantiate this fact. The learned High Court judge has dismissed the application only on the reason that the Petitioner has failed to submit any document to show the reason for delay

during the period from 2011 to 2013. He has not considered the merits of the case.

The Petitioner submitted this application to this Court on 06.10.2015. With this application, he submitted medical reports to show that his daughter was still suffering from cancer and treated even in the year 2014. In Sri Lankan society, cancer is considered as a terminal illness and when a family member is suffering from it, it is very normal that all the other family members dedicate their time and energy to cure the person. Courts must mindful about the behavioral patterns of the society when the behavioral pattern of a person such as the delay in coming to Court is considered. Delay is fatal for a revision application only when it is not explained.

The revision is a discretionary remedy. When the order complained of is a manifestly erroneous or without jurisdiction, the Court has to use its revisionary power to give relief. It has been held in the case of Gnanapandithen and another V. Balanayagam and another [1998] 1 Sri L R 391 at page 397 that;

> *The question whether delay is fatal to an application in revision depends on the particular facts and circumstances of the case. Dealing with the question of delay in relation to a writ of certiorari, Sharvananda J. (as he then was) in Biso Menika v. Cyril de Alwis (3) stated: "when the court has examined the record and is satisfied the Order complained of is manifestly erroneous or without jurisdiction the court would be loathe to allow the mischief of the order to continue and reject the application simply on the ground of delay, unless there are very extraordinary reasons to*

justify such rejection", (emphasis added). The plea of undue delay relied on strongly by Mr. Premadasa has to be considered in the light of the very special facts and circumstances of this case. As stated earlier, there are several suspicious circumstances strongly indicative of a collusive partition action. The refusal of the application of the Petitioners for intervention in the partition action is manifestly erroneous, considered particularly in the light of the duty imposed by the statute on the court to ensure that the rights of persons claiming title to the land are not placed in jeopardy by the decree sought from court. The claim of the 2nd Petitioner was that the property belonged to the estate of a deceased person. The matter does not rest there. The judgment entered for the partition of the land is clearly contrary to law as there has been a total failure by the court to investigate the title of each party.

On a consideration of the proceedings in this case, I hold that there has been a miscarriage of justice. The object of the power of revision as stated by Sansoni CJ. in Mariam Beebee v. Seyed Mohamed (4) "is the due administration of justice. . .". In the words of Soza, J. in Somawathie v. Madawala and others (5). "The court will not hesitate to use its revisionary powers to give relief where a miscarriage of justice has occurred . . . Indeed the facts of this case cry aloud for the intervention of this court to prevent what otherwise would be a miscarriage of justice." The words underlined above are equally applicable to the present case. I am accordingly of the view that the Court of Appeal was in serious error when it declined to exercise its revisionary powers having regard to the very special and exceptional circumstances of this partition case.

In a situation where the order is ex-facie wrong, the Court can exercise the revisionary power to give relief even the right of appeal is available. It has been held in the case of Mallika De Silva V. Gamini De Silva [1999]1 Sri L R 85 that;

Where the Order of Court is wrong ex facie ii would be quashed by way of revision even though an appeal may lie against such order.

As I pointed out above, the learned Magistrate's order is without jurisdiction and it is ex-facie wrong. It cannot be allowed to stand. I act in revision and set aside the order of the learned Magistrate confiscating the vehicle and order to release the vehicle bearing the No. NC LG 4779 to the Registered Owner Petitioner.

I order no costs.

Judge of the Court of Appeal

Malinie Gunarathne J.

I agree.

Judge of the Court of Appeal