

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

In the matter of an application for
Revision under Article 138 of the
Constitution of the Democratic
Socialist Republic of Sri Lanka.

CA (PHC) APN No: 122/15
HC Kandy Case No: 87/2013
MC Kandy Case No: 25100

Officer-in-Charge,
District Corruption Prevention Unit,
Kandy.

Complainant

Vs

1. Mohideen Pichchei Mohamadu
Thawfic,
No. 670, Rohana,
Mapakadawewa.
2. Haladeen Mohamed Thazim,
Dambagolla,
Mapakadawewa.
3. Mohamadu Sulthan Mohamed Ali,
No. 93, Rohana,
Mapakadawewa

Accused

AND BETWEEN

Abuthalibu Mujeeba

No. 9, Rohana,

Mapakadawewa,

Mahiyanganaya.

Petitioner

Vs

1. Hon. Attorney General,
Attorney General's Department,
Colombo 12.
2. Officer-in-Charge,
District Corruption Prevention
Unit,
Kandy.
3. Abdul Raheem Pathumma Aneeda,
No. 11B, Madawala Bazaar,
Madawala.
4. Central Finance Company PLC,
Mahiyanganaya Branch,
Mahiyanganaya.
5. Singer Finance (Lanka) PLC,
No. 80, NawamMawatha,
Colombo 02.

Respondents

AND NOW BETWEEN

Abuthalibu Mujeeba

No. 9, Rohana,

Mapakadawewa,

Mahiyanganaya.

Petitioner-Petitioner

Vs

1. Hon. Attorney General,
Attorney General's Department,
Colombo 12.
2. Officer-in-Charge,
District Corruption Prevention
Unit,
Kandy.
3. Abdul Raheem Pathumma Aneeda,
No. 11B, Madawala Bazaar,
Madawala.
4. Central Finance Company PLC,
Mahiyanganaya Branch,
Mahiyanganaya.
5. Singer Finance (Lanka) PLC,
No. 80, NawamMawatha,
Colombo 02.

Respondents-Respondents

BEFORE: P. Padman Surasena, J. P(C/A)

K.K. Wickremasinghe, J.

COUNSELS: AAL Shantha Jayawardena for the Petitioner

DSG Varunika Hettige for the Respondent

ARGUED ON: 08/11/2017

WRITTEN SUBMISSIONS OF THE PETITIONERS FILED ON: 16/01/2018

WRITTEN SUBMISSIONS OF THE RESPONDENTS FILED ON: 05/01/2018

DECIDED ON: 30/01/2018

K.K. Wickremasinghe, J.

The Registered owner Petitioner- Petitioner (hereinafter referred to as the 'Petitioner') in this case has preferred this revision application to this court after being aggrieved by the order dated 13.10.2015 by the Learned Judge of the Provincial High Court of Central Province Holden in Kandy and the order dated 18.06.2013 by the Learned Magistrate of the Magistrate's Court of Kandy.

The Petitioner files this revision application claiming for the vehicle which was used to commit two offences under the Animals Act. For the two offences there were two different cases instituted in the Magistrate's Court, for the offence committed on 06.09.2009 under case No. 25100 and for the offence committed on 05.11.2009 under case No. 25100. The Accused pleaded guilty to the charge forwarded against them at the Magistrate's Court were convicted and imposed with fines and discharged on bail. Subsequently the Learned Magistrate confiscated the Motor lorry on the basis that the absolute owner was not present at the inquiry. On that confiscation order, the Petitioner filed a revision application to the High Court of Kandy and the revision application was dismissed.

Being aggrieved by that order, this revision application is filed in this court. The petitioner claims that the confiscation order was made after the death of the previous registered owner.

The vehicle in question was subjected to litigation on two occasions, both under the Animals Act.

The petitioner states that she is the present registered owner of the Motor Lorry bearing number UP JQ 8581 which was purchased by the Petitioner on or about 10.08.2010 from the 3rd Respondent-Respondent, after entering into a Hire Purchase Agreement with the 4th Respondent-Respondent, Central Finance Company PLC. The Petitioner states that husband was running a retail shop named 'Hakeem stores' and a small rice mill in Mapakadawewa and the said motor lorry was used for the transportation of goods to the retail shop owned by her husband.

Prior to the Petitioner becoming the owner of the motor lorry, in case No. 25100 in the Magistrate's Court Kandy, the previous owner, Mohammdu Sulthan Mohamed Ali (the Accused) had been charged for illegally transporting 12 cattle using the said motor lorry on or about 06.09.2009 under the Animals Act No. 29 of 1958 (as amended) and the Cruelty to Animals Ordinance No. 13 of 1907 (as amended). The Accused pleaded guilty to the offences and was convicted of the offences, imposed with fines and discharged on bail. By an order dated 16.09.2009, the Learned magistrate ordered to release the said motor lorry to its registered owner (Basar Abdul Razak Ahamadu Najimudeen- husband of the 3rd Respondent-Respondent) on a bond for sum of Rs. 2,000,000/- and an inquiry was fixed and the motor lorry was subsequently released to him.

On the 31.10.2009, the registered owner passed away (a copy of the Death Certificate is attached in the brief by the Counsel) and on 05.11.2009, when the said case was taken up for inquiry, there was no representation on behalf of both the registered owner and the absolute owner (Singer Finance (Lanka) PLC- 5th Respondent-Respondent) and summons were issued on the absolute owner. When the case was called on the 24.03.2010, the Learned Magistrate confiscated the said motor lorry on the basis that the absolute owner was not present before the court.

Simultaneous to this case, action was also brought 3 others for illegally transporting cattle on or about 05.11.2009 by the said motor lorry. The Accused

pleaded guilty and upon conviction, they were fined and suspended sentences were imposed on them. On order dated 24.05.2010, the lorry was permanently released to the 5th Respondent- Respondent, holding that the offence was committed after the death of the registered owner and neither the registered owner nor the absolute owner had knowledge of the commission of the offence.

Counsel for the Petitioner's contention is that on the 23.06.2010, the wife of the deceased owner paid the outstanding sums and had got the ownership transferred to her name. Thereafter, without knowledge about the pendency of the case No. 25100 or of the existence of the confiscation order, the petitioner had entered into a hire purchase agreement with the 4th Respondent-Respondent (Central Finance Company PLC). She was then summoned to the Kandy police station alleging that she was in possession of a confiscated vehicle. Counsel for the Petitioner states that, it was only then that the Petitioner became aware of case No. 25100. Her husband appeared on behalf of her in the magistrate's court, where the vehicle was ordered to be confiscated without fixing the matter for inquiry.

Aggrieved by the order of the Learned Magistrate, the petitioner invoked the revisionary jurisdiction of the provincial High Court of Central Province. The provincial high court by its judgment dismissed the petitioner's application with cost of Rs. 10,000/-

Being aggrieved by the above mentioned judgment, the petitioner invokes the revisionary jurisdiction of this court on the following grounds;

1. The Provincial High Court had erred in law by dismissing the Petitioner's application on the grounds that the Petitioner had failed to establish her ownership of the vehicle.
2. The Provincial High Court had erred by holding that the Petitioner had failed to establish the existence of exceptional circumstances warranting the exercise of revisionary jurisdiction
3. The provincial High Court had erred in law by failing to appreciate that the learned magistrate had failed to adhere to the provisions of the Criminal Procedure Code.

4. The Provincial High Court had erred in law by failing to appreciate that the Magistrate's Court had confiscated the motor lorry subsequent to the death of the registered owner.
5. The Provincial High Court had erred in law by failing to appreciate that the Magistrate's Court had permanently released the lorry to the 5th Respondent-Respondent.
6. The Provincial High Court had erred in law by failing to appreciate that the 3rd Respondent-Respondent had duly become the owner of the said motor lorry and thereafter transferred it to the Petitioner.
7. The Provincial High Court had erred in law by failing to appreciate that the Petitioner was a bona fide purchaser of the motor lorry.
8. The Provincial High Court had erred in law by failing to appreciate that the Petitioner had prayed for a fresh inquiry to be held in the Magistrate's Court.

The Learned Counsel for the Petitioner submits that she is paying a monthly rental of Rs. 41,900/- to the 4th Respondent-Respondent under the Hire Purchase Agreement and therefore a severe prejudice will be caused to the Petitioner if the Orders are to be in operation. The Learned Counsel further submits that an irreparable loss and damage will be caused to the Petitioner and the instant application rendered nugatory unless an Interim Order/staying the execution of the Order in the Magistrate's Court Kandy is granted and issued. It is submitted that all of these issues constitute exceptional circumstances to warrant to revoke the Revisionary jurisdiction of this court

The Learned DSG submitted the preliminary objection that the application should be dismissed in limine for want of exceptional circumstances. Further, it has been submitted that the order of the Learned High Court Judge is legal, correct and has no error, hence the exercise of revisionary jurisdiction did not arise.

The fact that in a vehicle inquiry, the Registered owner has to discharge the burden on two grounds and the petitioner not being able to establish either of them since the vehicle was not in her possession at the time of the commission of the offence has also been submitted by the Learned DSG.

It has also been submitted at the argument stage by the Learned DSG that since the petitioner was not a party to the case when the Confiscation order was made and

had not produced any documents to prove her ownership except in the instant application. Thus it is submitted that the petitioner did not have locus standi to maintain this application. The availability of an alternative civil remedy has also been pointed out by the Learned Counsel.

In their further written submissions, the Learned Counsel for the petitioner submitted that the petitioner's right to invoke the revisionary jurisdiction is not denied by the fact that she was not a party to case No. 25100. She had sufficient interest to challenge the order since summons had been served on the petitioner and the petitioner's husband was produced in the Magistrate's court, thus affecting the petitioner.

According to the submission of the Petitioner, she had bought the lorry without knowing the fact that the lorry was confiscated. The Petitioner wouldn't have been aware of the fact that the lorry was already confiscated, but in fact it was so.

The following cases have been submitted by the counsel for the Petitioner;-

(a) Dharmaratne and another Vs Palm Paradise Cabanas Ltd and others (2003) 3 SLR 24, held that,

"There is no question that the revisionary powers of this court are very wide and may be exercised for the correction of all errors of fact and law committed by all inferior courts and sometimes committed by this court itself. Its object is the due administration of justice and the avoidance of miscarriages of justice. Revisionary powers will be exercised when it appears to court that unless the power is exercised, injustice will result. Mariam Beebee Vs Seyed Mohamed. Relief by way of revision may be granted even in a case where there is no right of appeal and also in the absence of a separate application for revision. Ranasinghe Vs Henry. Where a party has a right of appeal and an appeal preferred in the exercise of that right is pending, revisionary powers will be exercised if it appears that the result of the appeal will be rendered nugatory if relief by way of revision is not granted. Atukorale Vs Samynathan. Relief by way of revision may be granted even where an appeal has been rejected on technical grounds. Abdul Cader Vs Sithy Nisa, Soysa Vs Silva. In an appropriate case, relief by way of revision is available even in a case where the appeal has been dismissed after consideration if it later appears to court that a material fact has escaped the attention of the court. Potman Vs

I.P.Dodangoda. Revisionary powers will be exercised even when the application of a person who is not a party to the proceedings. Appuhmy Vs Weeratunga, Meeriam Beebee Vs Seyed Mohamed (supra). Even when the law says that a judgment of a court is final and conclusive, the court may interfere with such judgment by way of revision. Somawthie Vs Madawala. Any uncertainty as to the scope of the courts revisionary jurisdiction must unhesitatingly be resolved in favor of a wider, than narrower jurisdiction. Sirimavo Bandaranayake Vs Times of Ceylon per Fernando J."

(b) Dharmaratne and Another Vs Palm Paradise Cabanas Ltd and others, revisionary powers will be exercised even on the application of a person who is not party to the proceedings.

(c) Appuhamy Vs Weeratunga 23 NLR 467, then Supreme Court held that "*it is open to the court to exercise its powers of revision on the application of an aggrieved person who was not a party to the record. Anyway, by that time, the petitioner has purchased a confiscated lorry. Therefore, at that time it had become public property. Thus the petitioner has a legal barrier to buy the above mentioned confiscated vehicle*".

(d) Mercantile Investments Ltd Vs Mohamed Mauloom and others (1998) 3 SLR 32 and The Finance Company PLC Vs Priyantha Chandana and five others (2010) 2 SLR 220 held that "*both the registered owner and the absolute owner are entitled to claim for the release of the vehicle without confiscation*".

The above mentioned cases cited by the Petitioner have no bearing in the present case. The petitioner has registered the vehicle on her name on 10.08.2010. The confiscation order was made on the 24.03.2010. Therefore she has bought the vehicle only after the confiscation. Therefore, the petitioner has no locus standi to maintain this application".

In the Supreme Court of India, in case of **Adi Pherozhah Gandhi Vs H.M.Seervai, Advocate General 1971 AIR 385, 1971 SCR(2) 863** held that, "*if he is not a person summoned to be bound by the order but a person who is heard in a dispute between others merely to be of assistance in regarding the right conclusion he can hardly have a grievance. Any person who feels disappointed with the result of a case is not a person aggrieved. He must be disappointed of a*

benefit which he would have received if the order had gone the other way. The order must cause him a legal grievance by wrongfully depriving him of something or must have a tendency to injure him. That the order is wrong or that it acquits someone who he thinks ought to be convicted do not by itself give rise to a legal grievance”.

The above mentioned case was favorably cited in the case of **Senatilake Vs AG [98 3 SLR 290]**

Any party seeking to invoke the revisionary jurisdiction of this court should as a precondition has to demonstrate exceptional circumstances.

In Ameen Vs Rasheed [6 CLW 8], Abraham CJ observed;

“It has been represented to us on the part of the petitioner that even if we find the order to be appealable, we still have discretion to act in revision. It has been said in this court often enough that revision of an appealable order is an exceptional proceeding, and in the petition no reason is given why this method of rectification has been sought rather than the ordinary method of appeal. I can see no reason why the petitioner should expect us to exercise our revisional powers in his favor when he might have appealed, and I would allow the preliminary objection and dismiss the application without costs”.

The above judgment of Abraham CJ was cited with approval by his Lordship Justice Ismail in **Rustom Vs Hapangama [SLR 1978-79-80 Vol.1, Page No-352]** and stated thus; *“The trend of authority clearly indicates that where the revisionary powers of the Court of Appeal are invoked, the practice has been that these powers will be exercised if there is an alternative remedy available only if the existence of special circumstances are urged necessitating the indulgence of this court to exercise these powers in revision. If the existence of special circumstances does not exist, then this court will not exercise its powers in revision”.*

An order of the lower court will be revised only if in exercise of supervisory jurisdiction, a higher court finds the order challenged to be illegal, irregular, capricious or arbitrary.

In the case of **Attorney General Vs Gunawardena [(1996) 2 SLR 149 page 156]**, it was held that; *“Revision, like an appeal, is directed towards the correction of*

errors, but it is supervisory in nature and its object is the due administration of justice and not primarily or solely the relieving of grievances of a party. An appeal is a remedy which a party who is entitled to it may claim to have as of right, and its object is the grant of relief to a party aggrieved by an order of court which is tainted by error”.

It is apparent that the Learned High Court Judge has given his mind to all the evidence led at the vehicle inquiry, especially and mainly the absence of evidence of ownership of the vehicle.

The petitioner failed to tender the registration of the vehicle in the Magistrate's Court. The claimant, in the first instance before claiming the production, must establish ownership. In this case the vehicle was claimed by the petitioner. The best evidence and in fact the only evidence that can be led to prove ownership is the vehicle registration form. This was never tendered to the Magistrate's Court. The main item which was looked in and examined in the High Court was the Petitioner though claimed the vehicle, in the Magistrate's Court did not produce the proof to establish the ownership. In the High court while the revision application was being heard, the Petitioner tendered a form which purported to be the vehicle registration form. The High Court at that time was exercising the revisionary jurisdiction which is supervisory in nature. The Learned High Court Judge cannot look into new material which is tendered for the first time in the High Court. Revisionary jurisdiction is to look into all procedural errors in the supervisory capacity. If a document was not available in the lower court when the order was being made, the High Court cannot exercise revisionary jurisdiction by examining the document.

The Petitioner had not explained the reason of not producing this vital document to the Magistrate's Court. The only reasonable conclusion at which one can arrive at the non-tendering of the document is that the Petitioner knew that the vehicle was not under the Petitioner's name and cannot claim it.

In the case of **Kavalahinge Shantha Kumara Vs AG [CA PHC 162/2010]**, it was held, citing **Rodrigo Vs Balasuriya [(2002) 3 SLR 49]** that the certificate of registration of a motor vehicle is regarded as the best evidence to establish the ownership of a vehicle.

The burden cast on the Petitioner is to prove her case on a balance of probability on two ingredients. One is that the registered owner had no knowledge of the offence being committed and that the registered owner took all precautions to prevent the offence from taking place.

In the case of **Mary Matilda Silva Vs I.P. Habarana [CA (PHC) 86/87]**, it was held that "*the order of confiscation cannot be made if the owner proves to the satisfaction of court:*

(1) that he has taken all precautions to prevent the use of the vehicle for the commission of the offence and

(2) that the vehicle has been used for the commission of the offence without his knowledge".

Therefore, the Claimant of the vehicle has to prove on a balance of probability that he has taken all precautions to prevent the offence being committed and he had no knowledge of the offence.

In the case of **Manawadu Vs AG [(1987) 2 SLR 30]** it was decided that the onus of proof in a vehicle confiscation lies on the Appellant-owner. The Petitioner in this case has failed to discharge this burden.

The Orient Finance Services Corporation Ltd Case [SC Appeal No. 120/2011] held, that the registered owner should on a balance of probability must prove that the offence was committed without his knowledge and that he took all precautions to prevent the offence.

The Petitioner is unable to establish anything as the vehicle was not in her possession at the time of the commission of the offence.

According to Amendment No. 65 of 2009 of the Section 40 of the Forest Ordinance amended and the relevant part with regard to confiscation is as follows, "*Provided that in any case where the owner of such vehicles used in the commission of such offence, is a third party, no order of confiscation shall be made if such owner proves to the satisfaction of the court that he has taken all precautions to prevent the use of such.....vehicles.....as the case may be, for the commission of the offence.*"

The intention of the legislature is clear that the amendment of the long title of the principle enactment is as follows, “*An Ordinance to consolidate and amend the law relating to the conservation, protection and sustainable management of the forest resources and utilization of forest produce; to provide for the regulation of the transport of timber and forest produce and other activities related to such transport; and to provide for matters connected therewith or incidental thereto*”.

Therefore the cases are similarly decided with regard to offences committed under the Forest Ordinance and the Animals Act, with regard to the confiscation of vehicles.

If the vehicle is released to the Petitioner, it would certainly defeat the purpose of the legislature.

Considering the above, this court is of the view that the Petitioner has not demonstrated any exceptional circumstances to revoke the revisionary jurisdiction of this court.

Hereby the revision application is dismissed without costs.

Registrar is directed to send a copy of this order to the relevant High Court.

JUDGE OF THE COURT OF APPEAL

P. Padman Surasena J.

I agree,

PRESIDENT OF THE COURT OF APPEAL