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

In the matter of an application for revision in terms of Article 138 read with Article 154P of the Constitution of the Democratic Socialist Republic of Sri Lanka and Act of High Court of Provinces No. 19 of 1990

Officer-in-Charge
Police Station
Pindeniya

Plaintiff

Vs.

Court of Appeal
Revision Application No:
CA/ PHC/APN 139/19

High Court of Kegalle
Case No: 5572/REV

Magistrate's Court Kegalle
Case No: 11151/WL/17

Menik Pedige Dilshan Sangeeth
Jayasinghe
No C49/02 Kussaldeniya
Atugoda
Dambunukola

Accused

Rajapakshe Pedige Sugath
Wimalasuriya
Arandara,
Atala

Claimant

Rajapakshe Pedige Sugath
Wimalasuriya
Arandara,
Atala

Claimant-Petitioner

Vs.

1. Officer-in-Charge
   Police Station
   Pindeniya

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

Respondents

And now between

Rajapakshe Pedige Sugath
Wimalasuriya
Arandara,
Atala

Petitioner-Petitioner

Vs.

1. Officer-in-Charge
   Police Station
   Pindeniya

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

Respondents-Respondents

BEFORE	:	Menaka Wijesundera J Neil Iddawala J
COUNSEL	:	Sunil Abeyrathna with Buddhika Alagiyawanna for the Petitioner-Petitioner. Chathuranga Bandara SC for the Respondents.
Argued on	:	01.11.2021
Decided on	:	09.11.2021

<u>Iddawala – J</u>

This is a revision application against the order of the Learned Provincial High Court Judge of Kegalle dated 18.10.2019, which affirmed the order of forfeiture of a vehicle by the Learned Magistrate of Kegalle under section 40 (1) of the Forest Ordinance (as amended).

The petitioner is the registered owner of the vehicle bearing no. SG LB 0640 which was driven by one Menik Pedige Dilshan Sangeeth Jayasinghe on the day both the vehicle and the driver were taken into custody under the provisions of the Forest Ordinance. The said Menik Pedige Dilshan Sangeeth Jayasinghe was charged in the Magistrate Court of Kegalle in case bearing case no 11151/WL/17 for transporting timber without a permit, an offence punishable under section 25(2) read with section 40 of the Forest Ordinance. He was found guilty on his own plea and thereafter he was imposed a fine.

Subsequently, an inquiry for confiscation of the vehicle ensued, at the end of which the Learned Magistrate delivered his order of confiscation on 24.09.2019. Against the said order, the petitioner preferred a revision application to the High

Court (Case No. 5572/ REV), which affirmed the confiscation without issuing notice on the respondents. Being aggrieved, the petitioner has now come before this Court by way of revision praying for *inter alia* the following:

1. Revise the order dated 18.10.2019 of the Provincial High Court, Kegalle setting aside the same and direct the Learned Judge of the Provincial High Court, Kegalle to issue notice on the respondents and fix case No. 5572/ Revision hearing.
2. Set aside the order of the Learned Magistrate Kegalle on 24.09.2019

As such, this court has been invited to use its revisionary jurisdiction to determine whether the impugned orders are illegal, irregular, arbitrary and/or in contravention of the law.

As enunciated in G. W. Wijeratne v Attorney General CA(PHC) 77/08 CA Minute dated 15.02.2018 *"under the provisions of the Forest Ordinance, the right of appeal is specifically taken away from an aggrieved party after a claim. In this situation, an aggrieved party need not show exceptional circumstances but must show illegality or some form of procedural impropriety to invoke the revisionary jurisdiction of an appellate court as decided by His Lordship Ranjit Silva J, in Ratnayake Mudiyanselage Muthubanda Ratnayake v Gallamanage Titus Jayathillake_CA(PHC) No 82/97".*

At the outset, an examination of the applicable law is warranted. The enactment of the Forest Ordinance (hereinafter referred to as the Ordinance) dates to early 1900. Since then, the ordinance has undergone multiple amendments, the last of which was by Act No. 65 of 2009.

The law relating to conservation, protection and sustainable management of forest resources as contained in the Ordinance, has seen a steady evolution through legislative interventions and judicial interpretations. A considerable body of law has emerged regarding confiscation inquiries under the Ordinance where third parties may submit a claim against such confiscations.

Section 40 of the original Ordinance empowers Magistrate to confiscate all tools, boats carts and cattle used in committing a forest offence. The original Section 40 of the Ordinance (Ordinance No 16 of 1907) as follows;

> "*When any person is convicted of a forest offence, all timber or forest produce which is not the property of the Crown in respect of which such offence has been committed, and all tools, boats carts, and cattle used in committing such offence, shall be liable, by order of the convicting Magistrate to confiscation. Such confiscation may be in addition to any other punishment prescribed for such offence".*

However, the law at the time did not make provisions for instances where the owner of such property was a third party. In response to this, early case law precedent suggests a judicial recognition of the *audi alteram partem* rule where an opportunity was granted to such third party to show cause against an order of confiscation

In Rasiah v Tambirajah 53 NLR 574, Justice Nagalingam made the following observations: *"It is one of the fundamentals of administration of justice that a person should not be deprived either of his liberty or of his property without an opportunity being given to him to show cause against such an order being made…I think if the owner can show that the offence was committed without his knowledge and without his participation in the slightest degree justice would seem to demand that he should be restored his property."*

Similarly, in Manawadu v The Attorney General (1987) 2 SLR 30 Justice Seneviratne observed *"Our Constitution and other laws have provisioned the implementation of which will result in no one being arbitrarily deprived of his private property guaranteed by Human Rights. In my view the relevant section of the Forest Ordinance is not arbitrary deprivation of property, but the deprivation of property by due process of law, to deal with an economic crime."*

Finally, this development in case law precedent received statutory recognition by the enactment of Forest (Amendment) Act No. 65 of 2009 which introduced the present Section 40, which reads:

"(1) Where any person is convicted of a forest offence—

(a) all timber or forest produce which is not the property of the State in respect of which such offence has been committed; and

(b) all tools, vehicles, implements, cattle and machines used in committing such offence, shall in addition to any other punishment specified for such offence, be confiscated by Order of the convicting Magistrate:

***Provided** that in any case where the owner of such tools, vehicles, implements and machines 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 had taken all precautions to prevent the use of such tools, vehicles, implements, cattle and machines, as the case may be, for the commission of the offence**."*

(Emphasis added)

The law as it stands at present affords an opportunity for a third party to submit a claim for his vehicle prior to a confiscation order is granted against it. Thus, the legislature has statutorily incorporated the *audi alteram partem* rule in confiscation inquiries vis-à-vis the Forest (Amendment) Act No. 65 of 2009. Moreover, the legislature has delineated an additional burden on such third party, under which he must satisfy the court that he had taken all precautions to prevent the use his property for the commission of the forest offence.

Hence, any owner whose vehicle has been utilised for a commission of a forest offence, and who holds knowledge, participate, or consent to the commission of such offence would be barred from relying on the proviso of section 40(1). Alternatively, if such owner does not possess knowledge or is unaware of his vehicle being used for the commission of a forest offence, he is required by law to satisfy the court that he had taken all precautions to prevent the use of his vehicle for the commission of the offence.

The present application falls within the latter scenario.

In applying the proviso of the amended Section 40(1) of the Ordinance to the facts and circumstances of the present case, guidance can be taken from judicial pronouncements post 2009 amendment.

In Samarasinghege Dharmasena v W. P. Wanigasinghe and Others CA(PHC) 197/2013 CA Minute dated 22.01.2019, Justice K.K. Wickremasinghe had referred multiple judgements on the application of section 40(1) and had pronounced the following: *"………it is well settled law that in a vehicle inquiry the claimant has to discharge his burden on a balance of probability. According to section 40 of the Forest Ordinance (as amended) it is mandatory to prove on a balance of probability that the owner took every possible precaution to prevent the vehicle being used for an illegal activity"*

Having thus set out the law governing the present application, it is time to refer to the facts of the case.

During the confiscation inquiry, the petitioner himself gave evidence and he was later cross-examined by the first respondent. No other evidence was led by the petitioner to support his claim. In dispensing the burden of satisfying the court that he had taken all precautionary steps to prevent a commission of an offence using his vehicle, the petitioner submitted that he acquired the assistance of several other persons to keep check on the vehicle. This was due to his inability to personally check on the vehicle as he was away for employment purposes and only returned once a week. He further submitted that he gave verbal directions to Menik Pedige Dilshan Sangeeth Jayasinghe to the same effect, prior to entrusting him with the vehicle. Nevertheless, he failed to call any witnesses or produce any other material to corroborate his testimony. His only submission was that he was cross examined on the same day and that the respondents failed to mark any contradictions.

It was contended on behalf of the respondent that the explanation given by the petitioner failed to satisfy the court, on a balance of probability, that he had dispensed his duty of taking all precautionary measures as envisioned by the proviso of section 40(1) of the Ordinance, a determination affirmed by both the Magistrate Court and the High Court.

Both the Magistrate Order in case no. 11151/WL/17 dated 24.09.2019 and the High Court Order in case no. 5572/REV dated 18.10.2019, has considered the evidence of the petitioner and concluded that he failed to satisfy the court as per the proviso to section 40(1) of the Ordinance. This Court observes that the Learned Magistrate and the Learned High Court Judge had carefully evaluated all the evidence placed before them. Both were of the view that even though the petitioner testified that he took precautions to prevent an offence being committed, no evidence was produced in the inquiry to corroborate the same.

In a bid to sustainably manage and conserve forest resources in Sri Lanka, the amendment to the Ordinance in 2009 increased the penalties of forest offences, highlighting the significance of regulating the transport of timber. It is within this context; the conduct of the petitioner be evaluated. As submitted by the petitioner himself, he was away on employment: a context in which the degree of preventive measures ought to be taken is much higher than in normal circumstance. Though the petitioner claimed he utilised the assistance of others to ensure the vehicle was not used for illegal activities, he failed to provide any corroboration to that effect. In dispensing the burden imposed on a claimant under section 40(1) of the ordinance, he cannot merely transfer the said burden to others.

As highlighted in Samarasinghege Dharmasena v W. P. Wanigasinghe and Others (supra), "*it is amply clear that simply giving instructions to the driver is insufficient to discharge the burden cast on a vehicle owner. Therefore, merely giving instructions alone will not fall under the possible preventive measures ought to be taken by a vehicle owner*"

As rightly pointed by the counsel for the respondent, the petitioner could have at least called the persons he enlisted for assistance as witnesses to satisfy the court as to the efficacy of the precautionary measures he took. Moreover, he could have satisfied the court by calling Menik Pedige Dilshan Sangeeth Jayasinghe as a witness.

The Counsel appearing for the petitioner has relied upon the case of Atapattu Mudiyanselage Sadi Banda v OIC Norton Bridge CA (PHC) 03/2013 dated 25.07.2014 and contended that, in determining whether a vehicle should be confiscated, all relevant factors should be considered by the Magistrate.

Yet however it is to be noted that, in the instant case, the petitioner has failed to adduce such evidence before the Learned Magistrate's consideration to prove such factors during the stage of inquiry. Thus, petitioner has failed to attend to the burden of proof that falls upon the claimant under to sec. 40 (1) of the Forest Ordinance

As such, it is pertinent to echo the observations made by Justice K. T. Chithrasisiri in Samarathunga v Range Forest officer Anuradhapura CA-PHC 89/2013.*"the law referred to in the said proviso to section 40(1) of the Forest Ordinance empowers a Magistrate to make an order releasing the vehicle used to commit the offence, to its owner provided that the owner of the vehicle proves to the satisfaction of the Court that he had taken all precautions to prevent committing an offence under the said Ordinance. Nothing is forthcoming to show that he has taken any precautionary measures to prevent an offence being committed by using this vehicle though he was the person who had the power to exercise control over the vehicle on behalf of the owner. Therefore. It is evident that no meaningful step had been taken…"*

Considering the above, this court finds no reason to interfere with either the confiscation order dated 24.09.2019 delivered by the Learned Magistrate of Kegalle or the order affirming the same delivered by the Learned High Court Judge of Kegalle dated 18.10.2019.

Prior to conclusion, an observation must be made regarding an objection raised by the State Counsel appearing for the respondents. It dealt with the duty cast on a petitioner under the Court of Appeal (Appellate Procedure) Rules 1990 in ensuring that the respondent receives the copies of the relevant proceedings of the Court of First Instance under scrutiny. In exercising the jurisdiction bestowed upon this Court, fundamental procedures enshrined in the Supreme Court Rules cannot be dispensed with. Therefore, any petitioner coming before this Court, praying for relief, must follow the duties and obligations imposed upon them with genuine commitment.

The revision application is hereby dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundara J.

I agree.

JUDGE OF THE COURT OF APPEAL