IN THE COURT OF APPEAL

OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Peoples Leasing Company Limited
67, Chittampalam A.Gardiner Mawatha
Colombo 02.

Claimant-Petitioner-Appellant

C.A. Revision No.CA [PHC} APN 106/2013

H.C.Monaragala Case No.RE/11/2011
M.C.Monaragala Case No.47151

Vs.

The Forest Officer
Office of the Forest Department
Monaragala

Complainant-Respondent-Respondent

W. M. Prasanna Pushpakumara
No.38, Bogaha Arawa Road,
Hindikiula, Monaragala.

Accused-Respondent-Respondent

Upul Nishantha Lamahewa
No.623/8, Weerapitiya,
Hulandawa,Monaragala.

Registered Owner-Respondent-Respondent

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

Respondent-Respondent

BEFORE : K.T.CHITRASIRI, J.
MALINIE GUNARATNE, J.

COUNSEL : Saman Galappaththi for the Claimant-Petitioner-Appellant
Anoopa de Silva S.S.C. for the Respondent-Respondent
Accused-Respondent-Respondent absent and Unrepresented
Registered Owner – Respondent-Respondent absent and Unrepresented

ARGUED ON : 12.11.2014

DECIDED ON : 22.01.2015

CHITRASIRI, J.

This is an appeal by which the appellant is seeking to set aside the judgment dated 14.05.2013 of the learned High Court Judge of Monaragala as well as the order dated 06.06.2011 of the learned Magistrate of Monaragala. In those two decisions, learned Judges held that the claimant-petitioner-appellant is not entitled to obtain the vehicle bearing No.UPHC 8291 that had been used by the accused-respondent-respondent, to commit an offence under the Forest Ordinance. Admittedly, the said vehicle had been used to commit an offence under the Forest Ordinance as amended by Act No.13 of 1982, Act No.84 of 1988, Act No.23 of 1995 and the Act No.651 of 2009. Learned Magistrate by his decision dated 06.06.2011 made order in terms of Section 40 of the Forest Ordinance confiscating the

aforesaid vehicle which bears the number UPHC 8291 that was used to commit the said offence.

Aforesaid Section 40 in the Act No.65 of 2009 reads thus:-

> "40(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."*

The aforesaid proviso to Section 40 enables an owner of a vehicle which had been used to commit an offence under the Forest Ordinance, to make an application to Court in order to have the said vehicle released to him. However, such an application can be allowed only upon establishing that the owner who made the application, had taken all precautions in order to prevent his vehicle being used to commit the offence.

In the circumstances, it is necessary to ascertain whether the learned judges in the courts below have properly looked at the criteria referred to in the proviso to Section 40 in the Forest Ordinance when they decided to disallow the application made by the claimant-petitioner-appellant. It is seen that both the learned Magistrate and the learned High Court Judge have carefully looked at the evidence of Chaminda Kumarapperuma, who gave evidence on behalf of the appellant before making the order refusing the application made by the petitioner-appellant. He is the only witness called to give evidence on behalf of the claimant-appellant.

There is no dispute as to the ownership of the vehicle UPHC 8291. Appellant is the absolute owner of the vehicle and the person who gave evidence namely Chaminda Kumarapperuma is an official of the same company. Then the question arises as to the person entitled, to make the application in terms of the proviso to Section 40 in the Forest ordinance since a different person, namely Upul Nishantha Lamahewa (Registered owner-Respondent-Respondent) stands as the registered owner of the vehicle.

This issue has now been clearly settled with the pronouncement of the decision in **Orient Financial Services Corporation Ltd. vs. Range Forest Officer [S.C.Appeal No.120/2011] S.C. Minutes dated 10.12.2013]** In that decision Priyasath Dep J., having looked at the decision in **The Finance Private Ltd. vs. A.M.Priyantha Chandana and others [S.C.Appeal No.105A/2008, S.C.Minutes dated 30.09.2010]** as well, has held that both the absolute owner and the registered owner should be treated equally and there cannot be any type of privilege

offered to an absolute owner. In that decision, having taken up a view different to the decisions made in the cases of **Ceylinco Leasing Corporation Ltd vs. M.H.Harrison [C.A.(PHC) APN No.45/2011 C.A.Minutes 25.8.2011]** and **Kaluthota Financial Services Private Ltd. vs. The Attorney General [C.A.(PHC) No.91/2011 C.A.Minutes 7.6.2011] [Criminal Law, Bar Association of Sri Lanka, Unreported cases at page 106]** Priyasath Dep J. has held thus:

> *"The learned Magistrate had taken up the position that confiscation will not cause loss to the absolute owner as it has a remedy in the civil court. The Court of Appeal while affirming the order of the Magistrate went further to hold that the owner contemplated under Section 40 of the Forest Ordinance is the registered owner and not the absolute owner.*
>
> *The registered owner who has the possession and full control of the vehicle is responsible for the use of the vehicle. He is the person who is in a position to take necessary precautions to prevent the commission of an offence. Therefore the registered owner to whom the absolute owner has granted possession of the vehicle and who has the control over the vehicle is required to satisfy court that he had taken precautions to prevent the commission of the offences and that the offence was committed without his knowledge.*
>
> *In cases where the absolute owner repossess the vehicle or the vehicle was returned by the registered owner to the absolute owner it becomes the possessor and in control of the vehicle. In such a situation if an offence was committed the absolute owner has to satisfy court that necessary precautions were taken and the offence was committed without its knowledge. The person who is in possession of the vehicle is the best person to satisfy the court that steps were taken to prevent*

the commission of the offence and the offence was committed without his knowledge.

In answering the first question of law, the owner, contemplated under Section 40 of the Forest Ordinance read with Section 433A of the Code of Criminal Procedure Act includes the registered owner as well as the absolute owner. However, when it comes to showing cause as to why the vehicle should not he confiscated, only the person who is in possession and control of the vehicle could give evidence to the effect that the offence was committed without his knowledge and he had taken necessary steps to prevent the commission of the offence. According to the Section 433A the absolute owner is deemed to be the person entitled the possession of the vehicle. The absolute owner has a right to be heard at a claim inquiry. In this case the learned Magistrate afforded an opportunity to the absolute owner to show cause and only after such a hearing confiscated the vehicle".

Hence, it is clear that the appellant in this case, he being the absolute owner of the vehicle has every right to make an application to have his vehicle released making use of the proviso to Section 40 in the Forest Ordinance.

I will now turn to consider the reasons assigned by the two judges to ascertain whether they were misdirected or not when they decided to refuse the application of the claimant-appellant. Reasons assigned by the learned Magistrate in this regard are as follows:

" එම සාක්ෂිකරුගේ සාක්ෂි දීර්ඝ වශයෙන් හරස් ප්‍රශ්න වලට ලක්කොට ඇති අතර, හරස් ප්‍රශ්න වල දී එම සාක්ෂි අභියෝගයට ලක් කොට ඇති අතර, එහිදී සාක්ෂිකරු පිළිගෙන ඇත්තේ මෙම ලොරී රථය අත් අඩංගුවට ගෙන ඇත්තේ රාත්‍රී කාළයේ දැව ප්‍රවාහනය කිරීමේ දී

බවයි. එසේම රාත්‍රී කාලයේදී අදාල වාහන පිළිබඳව සොයා නොබලන බව ද සාක්ෂිකරු පිළිගෙන ඇත. එසේම එවැනි වාහන රාත්‍රී කාලයේ කරන දේවල් සම්බන්ධයෙන් සොයා බැලීමේ හැකියාවක් නොමැති බව ද සාක්ෂිකරු පිළිගෙන ඇත. (2011.02.15 සාක්ෂි සටහන් 8, 9 පිටු).

මෙහි තවත් වැදගත් කරුණක් වන්නේ මෙම වරදට හසුවන අවස්ථාවේ දී ලොරී රථයේ රියදුරු වශයෙන් කටයුතු කොට ඇත්තේ ලියාපදිංචි අයිතිකරු නොවන බවත් අදාල වරද සිදුකරන අවස්ථාවේදී ලියා පදිංචි අයිතිකරු වාහනයේ නොසිටි බවත්ය. ඒ අනුව අත් අඩංගුවට පත් වන අවස්ථාව වන විට ලොරී රථයේ සන්තකය ලියා පදිංචි අයිතිකරු භාරයේ නොතිබී ඇති බව පෙනී යයි. ලියා පදිංචි අයිතිකරුගේ සන්තකයේ තිබූ බව සනාථ කිරීමට ලියාපදිංචි අයිතිකරු සාක්ෂියට කැඳවීමට හෝ පියවර ගෙන නොමැති බව පෙනී යයි.

ලියා පදිංචි අයිතිකරු සමග පරම අයිතිකාර සමාගමේ ඇත්තේ ඊ.04 දරණ ලේඛණය අනුව ගිවිසුම්ගත සම්බන්ධතාවයකි. ඒ අනුව එවැනි අවස්ථාවකදී ලියා පදිංචි අයිතිකරු මුදල් නොගෙවන අවස්ථාවක දී සාමාගමට අයවිය යුතු මුදල් කුමන ආකාරයෙන් ලබා ගත්තේ ද යන්න පිළිබඳව අධිකරණයෙන් විමසූ පැනයට පිළිතුරු වශයෙන් ලබා දී ඇත්තේ වාහනය අත්පත් කරගෙන වාහනය විකුණා සමාගමට අයවිය යුතු මුදල් ලබා ගන්නා බවත් යම් හෙයකින් එය අත්පත් කර ගැනීමට නොහැකි වන අවස්ථාවකදී රක්ෂණ මුදල් ලබාගෙන එකී පාඩුව පියවා ගන්නා බවයි. එසේම සිවිල් නඩුවක් පවරා මුදල් අයකර ගැනීමට ද හැකි බවයි.

එම සාක්ෂි අනුව පෙනී යන්නේ සමාගමේ මුඛ්‍ය පරමාර්ථය වන්නේ ඔවුන් විසින් ලබා දී ඇති මූල්‍ය පහසුකම මත එම මුදල සහ පොලි මුදල් අයකර ගැනීමේ පරමාර්ථය බවයි. ඒ අනුව පරම අයිතිකාර සමාගමට අදාල වාහනය නීති විරෝධී කටයුතු වල යෙදවීමක් හෝ නොයෙදවීමමෙන් පරම අයිතිකාර සමාගමට අප්‍රතිකාරී හානියක් සිදු නොවන බැව් පෙනී යන අතර, එම මුදල් අයකර ගැනීමට සමාගමට විකල්ප නෛතික ප්‍රතිපාදන බවයි. එසේම පැනවූ කොන්දේසි ක්‍රියාත්මක කිරීම පරීක්ෂා කළ බවට සනාථ කළ හැකි කිසිදු ලේඛණගත සාක්ෂියක් ද නැත."

Learned High Court Judge, when he disallowed the claim of the appellant has decided as follows:

"මා දැන් මෙම නඩුවේදී ඉදිරිපත් වූ සාක්ෂි උගත් මහේස්ත්‍රාත්තුමාගේ නියෝගය නිවැරදිද යන්න සලකා බැලීමට විශ්ලේෂණය කර බලමි. මෙම නඩුවට පාදක වන වාහනයේ පරම අයිතිකාර සමාගම වන මෙම නඩුවේ ඉල්ලුම්කරු වේ. පරම අයිතිකරු වෙනුවෙන් සාක්ෂියට කැඳවා ඇත්තේ, එම ආයතනයේ විධායක නිලධාරී කෙනෙකු වන අතර, ඔහු විසින් මෙම වාහනයට අදාල ලියාපදිංචි පොත ඊ 2 ලෙසත් වාහනය භාරදුනා ගැනීමේ පත්‍රය ඊ 3 ලෙසත්, ලියාපදිංචි අයිතිකරු සමග ඇති කර ගන්නා ලද කල්බදු ගිවිසුම ඊ 4 ලෙසත් ලකුණු කොට ඉදිරිපත් කර ඇත. මෙම සාක්ෂිකරු ප්‍රකාශකර ඇත්තේ, වාහනය සම්බන්ධයෙන් සොයා බැලීම අය කිරීමේ නිලධාරියා විසින් සිදු කරන බවය. එසේ වුවද එම සොයා බැලුවේ යැයි කියන අය කිරීමේ නිලධාරියෙකු සාක්ෂියට කැඳවා නැත. කලින් කලට එවැනි සොයා බැලීමක් සිදු කළ බව සනාථ වන ආකාරයට පවත්වාගෙන ගිය කිසිදු ලේඛනයක් හෝ සටහනක් ඉදිරිපත් කර නැත. මේ අනුව මෙම සාක්ෂිකරු වෙනත් අයෙකු විසින් කරන ලදැයි කියන දෙයක් සම්බන්ධයෙන් ඉදිරිපත් කරන ලද මෙම සාක්ෂිය සෘජු සාක්ෂියක් නොවන අතර, එය පිළිගත නොහැකි ප්‍රවාදක සාක්ෂියක් වේ. ඒ අනුව ගත්තා යැයි කියන පුර්වාරක්ෂක ක්‍රියා සම්බන්ධයෙන් සිවිල් මට්ටමින් ඔප්පු කිරීමට වුවද පිළිගත හැකි සාක්ෂියක් ඉදිරිපත් වී නැත බව පෙනේ. "

Upon perusal of the reasons assigned by the learned Judges in the Courts below, it is seen that they were of the view that the appellant has failed to establish that he has taken all precautionary measures to prevent the offence being committed by the accused-respondent. Accordingly, they have concluded that the appellant is not entitled to have his vehicle released in terms of the proviso to Section 40 in the Forest Ordinance.

At this stage, it is necessary to note that the trial Judge is the best person to decide an issue that has arisen purely on facts. Appellate Courts are generally reluctant to interfere with a decision that had been arrived at by a trial judge upon considering the facts of the case unless it is perverse and/or irrational.

This proposition in law had been upheld in many decisions including that of:

- **Frad vs. Brown & Co. 20/28 NLR at page 282**
- **Mahawithana Vs. Commissioner of Inland Revenue 64 NLR 217**
- **De Silva vs. Seneviratne (1981) (2) SLR at page 8.**
- **Alwis vs. Piyasena Fernando (1993) (1) SLR at page 119.**

In the decision mentioned last, G.P.S.de.Silva, J (as he then was) has held thus:

"It is well established that findings of primary facts by a Trial Judge who hears and sees witnesses are not to be lightly disturbed on appeal"

The matters that are to be established when claiming a vehicle under the proviso to Section 40 in the Forest Ordinance depend on the type of measures taken by the claimant to prevent the commission of the offence. Hence, the issue to be decided in this instance depends basically on the facts of the case. Therefore, relying upon the decisions referred to above, this Court is not inclined to interfere with the decision of the trial Judge since the matters that are to be considered in

deciding the issue depends basically on the facts, namely the manner in which the precautionary measures were taken.

Moreover, it is necessary to note that the registered owner of a vehicle is the person who has the physical control over a vehicle of which another person stands as an absolute owner. Therefore, the registered owner is the best person to explain the precautionary measures that had been taken to prevent the commission of the offence. In this instance, the registered owner has not given evidence at all. Only person who gave evidence at the claim inquiry is one of the officials of the absolute owner. However, in the agreement entered between the absolute owner and the registered owner, a condition is found as to the manner in which the vehicle is to be used by the registered owner. When the control of the vehicle is in the hands of the registered owner those conditions found in a written agreement may not be strictly adhered to by the registered owner. Therefore on one hand, it is not advisable to rely upon any direction given by the absolute owner in the agreement directing the registered owner as to the manner in which the vehicle is to be used. On the other hand, in such an instance, the absolute owner has the right to claim damages from the registered owner for violation of the terms in the agreement that they have entered into.

Handing over the vehicle to the registered owner itself shows that the power of the absolute owner to have the control over the vehicle is diminished. Moreover, control over the vehicle exercised by the absolute owner becomes very remote after handing it over to the registered owner. Notably, the registered owner of the vehicle

has not given evidence in this instance, at least to show the attitude taken by the registered owner at the time the offence was committed. In the circumstances, it is correct to conclude that the evidence given by an official of the absolute owner of the vehicle is not capable of establishing that the absolute owner has taken all the precautions to prevent the use of the vehicle to commit the alleged offence under the Forest Ordinance.

Accordingly, it is my considered view that the learned Magistrate as well as the learned High Court Judge are correct when they decided that the appellant namely, the absolute owner of the vehicle has failed to establish that it has taken all the precautions to prevent the use of the vehicle being used to commit the offence committed under the Forest Ordinance.

For the aforesaid reasons this appeal is dismissed with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

MALINIE GUNARATNE, J.

I agree

JUDGE OF THE COURT OF APPEAL