

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

Abdul Cader Mohammed Munsoor
No.23/1, Anula Road
Colombo 06.

Claimant-Petitioner-Appellant

C.A.[PHC] NO.02/2011
PHC.COLOMBO
CASE NO.HCRA 115/08
MAGISTRATE'S COURT
FORT CASE NO.68088/8

Vs

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

2. Officer-In-Charge
Police Station
Fort

Respondent-Respondents

BEFORE : **K.T.CHITRASIRI, J.**

W.M.M.MALINIE GUNARATNE, J.

COUNSEL : N. Kariyapper with M.I.M.Iynullah
for the Claimant-Petitioner-Appellant
Anoop de Silva SSC
for the Respondent-Respondents

ARGUED ON : 17.11.2014

WRITTEN : 23.07.2013 by the claimant-Petitioner-Appellant

SUBMISSIONS : 19.01.2015 by the Respondent-Respondents

DECIDED ON : 24.02.2015

CHITRASIRI, J.

Facts of this case are briefly as follows. Three accused in the case bearing No.68088/8 filed in the Magistrate's Court Fort were charged in terms of the provisions contained in the Excise (Special Provisions) Act No.13 of 1989 as amended, for transporting cardamoms alleged to have been imported without paying the taxes due to the Government. Those three accused were not made parties either in the application filed in the High Court or in the appeal filed in this Court. They pleaded guilty to the charge and were convicted by the learned Magistrate. He then imposed a fine on the accused amounting it to Rupees Three Hundred Thousand (Rs.300,000/-) carrying a default sentence of six months imprisonment. In addition to the sentence mentioned above, the learned Magistrate went on to confiscate the goods subjected to in that case namely the cardamom claimed by the applicant-petitioner-appellant in this appeal (hereinafter referred to as the claimant).

Consequent upon the aforesaid confiscation of the goods, the claimant having filed an affidavit which is dated 11.07.2008 made an application in the Magistrate's Court seeking for an opportunity to show cause with the view of obtaining the cardamoms that were confiscated. Learned Magistrate on 11.07.2008, rejected the said application of the claimant, stating that he is not empowered to interfere with a decision that had already been made by the same Court. Thereafter, the claimant filed a revision application in the High Court of Colombo seeking to set aside the aforesaid order of the learned Magistrate. Learned High Court Judge too has declined to interfere with the decision of the learned Magistrate.

Being aggrieved by the aforesaid decision of the learned High Court Judge, the claimant filed this appeal seeking to set aside the order dated 14.01.2011 of the learned High Court Judge and to have the reliefs prayed for in the revision application filed in that Court.

When this appeal was taken up for argument in this Court, learned Counsel for the claimant submitted that the only issue in this appeal is to ascertain whether it is correct to confiscate the goods subjected to in this case without giving an opportunity for the claimant to show cause as to why those goods should not be confiscated. It is so recorded even on 22.01.2015 when this matter was mentioned in this Court. Hence, the only issue in this appeal is to determine whether it is necessary to give an opportunity for the claimant to show cause before making an order for confiscation of the goods subjected to in this case namely cardamoms.

The three accused had been charged under Section 14 read with Section 24(1) of the Excise (Special Provisions) Act No.13 of 1989 as amended. When a conviction is imposed for that offence on the accused, then the Section 26 of the same Act imposes a duty on Court to forfeit the articles used in connection with the commission of that offence.

The said Section 26 (1) of the Excise (Special Provisions) Act reads as follows:

"Where any person is convicted of an offence under this Act, any boat, vessel, vehicle or article (whether excisable or not) used in, or in connection with, the commission of the offence shall, by virtue of such conviction, be forfeited to the State".

Then the issue is whether or not the articles subjected to in this case, namely the cardamoms could be confiscated in terms of the aforesaid Section 26 of the Excise (Special Provisions) Act, without giving an opportunity for the person who claims the articles to show cause as to why those should not be forfeited to the State. Similar issue had been discussed in length in the case of **Manawadu v. The Attorney General. [1987 (2) S.L.R. at 30]** In that case the subject matter that was confiscated was a vehicle that had been used to transport timber without a permit in violation of the provisions contained in the Forest Ordinance. It was forfeited to the state by the Magistrate under the Forest Ordinance without affording an opportunity for the owner of that vehicle to show cause before the forfeiture.

The provision of law prevailed to forfeit a vehicle used to commit an offence under the Forest Ordinance at the time the order in respect of the said confiscation of the vehicle was made in that case, is similar to the law referred to in Section 26 of the Excise (Special Provisions) Act under which this case had been filed. Therefore, the said decision in **Manawadu v. The Attorney General** (supra) is directly applicable to the case at hand. However, it is necessary to note that the law in respect of the forfeiture of vehicles used to commit an offence under the Forest Ordinance had subsequently been amended. Therefore, the law referred to in the case of Manawadu may not directly applicable now when it comes to the forfeiture of a vehicle or other tool under the Forest Ordinance.

Be that as it may, as mentioned hereinbefore, the decision in the case of **Manawadu v. The Attorney General** (supra) is applicable to the case at hand. In that decision Sharananda, C.J. (as he then was) has stated as follows:

" If the construction contended for by State Counsel is right the consequences of that interpretation are indeed far-reaching; it would follow that if a thief steal a person's vehicle and uses the vehicle to commit a forest offence, the owner of the vehicle will have his car forfeited for no fault of his. That appears to be a strange conclusion because the owner had done no act himself. Further such a construction will render the owner helpless against collusion or conspiracy between the prosecutor and the accused to deprive the owner of his vehicle. The admission of the accused or the finding against the accused that a certain vehicle had been used in connection with the commission of the offence does not bind the owner of the vehicle so as to divest him of the vehicle. The owner is a third party and he should not be precluded from showing that the admission or the finding is contrary to facts and that his vehicle was never used for the illegal purpose. The vehicle will be forfeited only if it was actually used to transport the prohibited timber. The owner should be afforded an opportunity to satisfy court that, in fact, his vehicle was not so used. On State Counsel's submission the owner would have no such opportunity as according to counsel on conviction of the accused, the vehicle vests automatically in the State. These eventualities throw into focus the arbitrariness of the law on the construction contended for by State Counsel".

In the circumstances, this Court is bound to follow the decision referred to above since it had been made having interpreted a similar provision of the law though the said Section in the Forest Ordinance has been amended subsequently. I have looked at the similar provisions contained in other enactments as well. In the Animals Act too the vehicle used in the commission of an offence under that Act

shall be liable to confiscation. In the case of **Faris v. O.I.C. Police Station Galenbinduwewa [1192 (1) S.L.R. at 167]** which had been filed under the Animals Act, it was held that an order for confiscation cannot be made if the owner establishes one of the two matters mentioned below.

- (i) That he has taken all precautions to prevent the use of the vehicle for the commission of the offence;
- (ii) That the vehicle has been used for the commission of the offence without his knowledge.

Hence, it is seen that even under the Animals Act, when a person, not being an accused, claims a vehicle or other tool used to commit an offence under the same Act is entitled to have an opportunity to show cause before an order for the forfeiture is made.

In the circumstances, it is clear that when an application is made to obtain confiscated items, by a person other than the accused who were found guilty, the Courts in this country have always recognized that an opportunity should be afforded to that claimant to show cause, before making an order for confiscation. However, it is necessary to note that an accused who is found guilty is not entitled to make such a claim.

The aforesaid right to have an opportunity to show cause before a confiscation order is made, is being afforded to ensure the property rights of the person concerned. When a person who is not involved in committing a crime, makes an application to exercise his right to property, it is the duty of the Court to ensure that he is given an opportunity to explain, before an order for confiscation is made. This

is to recognize the rule of *audi alteram partem* as well. The said rule has not been excluded by Parliament expressly in the Excise (Special Provisions) Act No.13 of 1989 under which this action has been instituted in the Magistrate's Court.

In the circumstances, I conclude that the learned Magistrate and the learned High Court Judge had misdirected himself when they decided to confiscate the articles namely, cardamoms that was taken into custody at the time the offence was committed, without giving an opportunity for the claimant to show cause as to why it should not be confiscated.

Accordingly, I set aside the orders dated 27.06.2008 and 11.07.2008 of the learned Magistrate and the order dated 14.01.2011 of the learned High Court Judge. The learned Magistrate in the Fort Magistrate's Court in Colombo is directed to hold an inquiry on the application made by the claimant-petitioner-appellant that was mentioned in the affidavit dated 11.7.2008 filed on 16.7.2008 in that Magistrate's Court, enabling the claimant to show cause as to why the cardamoms should not be confiscated.

For the reasons setout hereinbefore, this appeal is allowed without costs.

Appeal Allowed.

JUDGE OF THE COURT OF APPEAL

MALINIE GUNARATNE, J.

I agree

JUDGE OF THE COURT OF APPEAL