

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

In the matter of an application for Revision

Officer In Charge,

Police Station,

Alawathugoda.

COMPLAINANT

CA Revision No. CA (PHC) APN 01/2011

High Court (Kandy) (Rev) 28/2010

Magistrate's Court (Kandy): 29026/10

Vs.

1. Karunarathnage Janaka Ruwan Kumara,
Halmilla Kulam Temple,
Palugama,
Anuradhapura.

ACCUSED

And Now Between

Nazeer Ahamad Mohomed Rizvi,

No. 34, Malgammanna,

Alawathugoda.

PETITIONER

Vs.

1. Officer – In – Charge,
Police Station,
Alawathugoda.
2. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

And Now Between

Nazeer Ahamad Mohomed Rizvi,
No. 34, Malgammanna,
Alawathugoda.

PETITIONER – PETITIONER

Vs.

1. Officer – In – Charge,
Police Station,
Alawathugoda.
2. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENT – RESPONDENT

Before : W.M.M.Malinie Gunarathne, J

: P.R.Walgama, J

Counsel : K. Aziz for the Petitioner.

: Anoopa De Silva S.S.C. for the Respondent.

Argued on : 22.06.2015

Decided on: 23.10.2015

CASE - NO - CA (PHC) APN 01/ 2011 - JUDGMENT 23. 10. 2015

P.R.Walgama, J

The Petitioner - Appellant was the registered owner of the vehicle bearing No. NC LP - 9192, which vehicle was used for transportation of timber without a valid permit. The Petitioner is the Registered owner of the alleged vehicle which was confiscated by the Learned Magistrate after an inquiry, and when an appeal was lodged against the said order in the High Court, the Learned High Court Judge upheld the order of the Learned Magistrate. Being aggrieved by the said order of the High Court Judge, the Petitioner has come before this court by way of an application in revision and sought to have the said order of the Learned High Court Judge and the Learned Magistrate to be set aside or vacated.

The bone of contention of the Petitioner is that the Respondents had failed to make the Absolute owner of the vehicle a party to the confiscation inquiry. Therefore it is contended by the Petitioner

that an opportunity had not been afforded to the Absolute Owner to show cause why the vehicle should not be confiscated. In particular it is said that the Learned Magistrate has failed to observed the Section 433(a) of the Criminal Procedure Code.

Hence in the above setting the Petitioner has adverted this Court to the case of MERCANTILE INVESTMENTS LTD .VS. MOHOMED MOULOOM AND OTHERS - 1998 (3) SLR- 32. Which has dealt with the above Section 433(a)(1) of Act No. 12 of 1990.

“in view of Section 433 (a)(1) of Act No. 12 of 1990, the Petitioner being the absolute owner is entitled to possession of the vehicle, even though the claimant – Respondent had been given its possession on the Lease Agreement. It was incumbent on the part of the Magistrate to have given the Petitioner an opportunity to show cause before he made the order to confiscate the vehicle.” (emphasis added)

It is intensely relevant to note that the introduction of the Section 40 B of the Forest (Amendment ACT) No 65 08 2009, has stated thus.

“40(B) The provisions of subsection (1) and (2) of Section 433 (A) of the Criminal Procedure Code Act No 15 of 1979, as amended by Act, No. 12 of 1990, shall not apply to or in relation to any person who pleads guilty to, or found guilty to, or is found guilty of a forest offence”

The Respondent in limine has raised the objection to the instant application of the Petitioner on the basis that the failure on the part of the Petitioner to exercise the right of Appeal but had invoked the Revisionary jurisdiction of this Court. To buttress the

above said proposition the Respondent has adverted court to the following decisions of the Supreme Court.

In the case of ABEYWARDENA .VS. AJITH DE SILVA 1998(1) SLR 134 it was held that an appeal should be lodged in the Court of Appeal in respect of an order delivered by a Provincial High Court Exercising its revisionary jurisdiction.

Further it is alleged by the Respondent that the Petitioner has failed to established exceptional circumstances which warrant this court to exercise the revisionary jurisdiction. Therefore the Respondent has high lighted the case of DHARMARATNE AND OTHERS .VS. PALM PARADISE CABANAS LTD AND ANOTHERS 2003(3) SLR 25.

Wherein His Lordship held that when the Petitioner had the right of appeal and to come by way of revision will tantamount to another appeal in the garb of a "Revision Application".

This Court will also recognize the case of VANIK INCORPORATION LTD .VS. JAYASEKARA 97 (2) SLR 365 - which was held thus;

"revisionary powers should be exercised where a miscarriage of justice has occurred due to a fundamental rule of procedure being violated, and also that not in all instances where there has been a miscarriage of justice but only when a strong case is made out amounting to a positive miscarriage of justice".

It is intensely relevant to note that the absolute owner of the instant case viz the Bank of Ceylon has not indicated any interest to gain possession of the vehicle and had not attempt to intervene as a interested party to this action.

Therefore it is contended by the Respondent that there is no necessity to order the Magistrate to hold fresh inquiry, and take in to consideration rights of the Absolute owner.

It is contended by the Petitioner that the Learned Magistrate should have noticed the Absolute owner to appear in court. But it is seen from the decided cases which he has drawn the attention of court are cases where the Absolute owner viz the Finance Company it self has claimed the vehicle allegedly involved in the commission of the illegal act. But nevertheless the case in hand is different as the Absolute owner, the Bank of Ceylon had never intervened in the confiscation inquiry. Invariably the Absolute owner would have been privy to the incident of the alleged vehicle been used for transportation of timber without a valid permit. The Registered owner has purchased the said vehicle after obtaining a loan from the Bank of Ceylon. When the Registered owner defaulted the payment of installments the Absolute shall take necessary steps to recover the same. In the instant matter the Absolute owner has not taken any step to recover the amount due to them or to repossess the vehicle in issue.

The Petitioner has relied on the decision of THE FINANCE COMPANY PLC .VS. AGAMPODI MAHAPEDIGE PRIYANTHA CHANDANA- decided on 02.07.2009, which has followed the

judgment of MERCANTILE INVESTMENT LTD. .VS. MOHOMED MAULON AND OTHERS, has held thus;

“consideration was given to the rights of the absolute owner as well as the registered owner. In that matter the Learned Magistrate had not given an opportunity to the absolute owner to show causae before he made the order to confiscate the vehicle. On a consideration of the said question, the Court of Appeal had held that it is not only the registered owner, but the absolute owner should be given notice on the inquiry in relation to the confiscation of the vehicle.”

The above decision was made prior to the said amendment on 02.07.2009. The forest (Amendment) Act No. 65 of 2009 was effective from 16.11.2009. Therefore in the above setting, this Court is of the view, in the terms of the above section, to hear the absolute owner in the confiscation inquiry will not arise.

Further more the counsel for the Respondent has adverted this Court to the Following decision of the Supreme Court ORIENT FINANCIAL SERVICES CORFORATION LTD – VS – RANGE FOREST OFFICER SC APPEAL NO 120/2011 - dated 30.09.2011, which held thus;

“The Registered Owner has the possession and full control of the vehicle and is also responsible for the use of the vehicle. He is the person who is in a position to take necessary precaution 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 all precautions to prevent the commission of the offences that the offence was committed without his knowledge.”

The only exception to the above would be.

“Where the absolute owner repossess the vehicle or the vehicle was returned by the Registered owner to the Absolute owner, in such instances the Absolute owner 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 precaution were taken and the offence committed without its knowledge.”

Therefore it is stated that “the person who is in possession of the vehicle is the best person to satisfy Court that steps were taken to prevent the commission of the offence and the offence was committed without his knowledge.”

In the above stated factual and legal matrix, it is abundantly clear that Section 433(A) of the code of Criminal Procedure Act No. 15 of 1979 ceases to have any application in respect of confiscations.

Therefore in the light of the above this Court is of the view that no positive miscarriage of Justice has been caused to the Petitioner by the afore said unpurged orders.

The Respondent has adverted Court to the document filed by the petitioner along with the petition, which is marked as X. This purported document was not tendered at the inquiry in the

Magistrate Court nor was in the High Court. The said Letter only confirms the fact that the lease Agreement still in force.

It is pertinent to note that the petitioner was carrying on a business of manufacturing and selling furniture. It also transpired that the said timber was transported from his work shop. Further it has been established that the accused had transported illicit timber on an earlier occasion too.

In the above setting it is abundantly clear that the Learned Magistrate had arrived at the above determination to confiscate the alleged vehicle, which decision does not warrants any variation.

Hence the appeal is dismissed subject to a cost of Rs.10,000/-

JUDGE OF THE COURT OF APPEAL

W.M.M.Malinie Gunarathne, J

I agree,

JUDGE OF THE COURT OF APPEAL