

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

In the matter of an Appeal

CA (PHC) No. 16 /09

PHC Hambantota HCRA : 8/2008

MC Tangalle No: 92997

Officer In Charge,

Police Station,

Beliatta

Complainant

-Vs-

Ruwan Kumar Abeysiriwardene

Senerath

No 326 Yakgasmulla

Weeraketiya

Accused

L.B.Finance PLC

No 275/ 75 ,

Prof.

Statnley Wijesundara Mawatha

Colombo 7

Absolute Owner Claimant

AND

L.B.Finance PLC

No 275/ 75 ,

Prof

StatnleyWijesundaraMawatha

Colombo 7

Absolute Owner Claimant
Petitioner

Vs.

1. OIC Police Station , Beliata

Plaintiff Respondent

2. Hon. Attorney General,

Attorney General's

Department,

Colombo 12.

Respondent

3. Ruwan Kumar

Abey Siriwardene Senerath

No 326 Yakgasmulla

Weeraketiya

Accused Respondent

AND NOW BETWEEN

L.B.Finance PLC

No 275/ 75 ,

Prof

StatnleyWijesundaraMawatha

Colombo 7

Absolute Owner Claimant

Petitioner Appellant

1. OIC Police Station , Beliata

Plaintiff Respondent

Respondent

2. Hon. Attorney General,

Attorney General's

Department,

Colombo 12.

Respondent Respondent

3. Ruwan Kumar

AbaysiriwardeneSenerath

No 326 Yakgasmulla

Weeraketiya

AccusedRespondent

Respondent

**Before : K.K.Wickremasinghe, J.
P.PadmanSurasena, J.**
**Counsel : AAL WathsalaKeerthisena for the Appellant
DSG VarunikaHettige for the Respondent**
Argued on : 19/06/2017
Written submission of the Appellant submitted on : 28/07/2017
Written submission of the Respondents submitted on : 14/07/2017

Decided on : 29/11/2017

Judgement

K.K.Wickremasinghe

The Absolute Owner Claimant Petitioner Appellant (herein after referred to as the Appellant) in this case has preferred this appeal to this court after being aggrieved by the order dated 18.02.2009 by the Learned High Court Judge of Hambanthota and the order dated 21.02.2008 of the Learned Magistrate Court of Tangalle.

Introduction

TheAppellant filed this appeal claiming the vehicle which was used to commit an offence under the Animals Act. The accused pleaded guilty to the charge forwarded against him at the Magistrate Courts and he was accordingly sentenced. The Registered Owner sought a vehicle inquiry. The Registered Owner gave evidence and thereafter on 22.11. 2007 stated that she would not be claiming the vehicle and that she has no objection for the vehicle being released to the Appellant .At the conclusion of the inquiry, which the vehicle was confiscated. The Appellant filed a revision application to the High Court and the revision application was dismissed.

At the stage of the Argument the appellant submitted that owner is not claiming the vehicle but he was making submissions on behalf of the Registered Owner.

Facts of the Case

The vehicle in question was subject to litigation on two occasions, both under the Animals Act .Both offences were under the Animals Act.

It transpired in evidence that the driver at the time of the second offence which took place in 2005 was still in employment with the registered owner. It was also laid before the Learned Magistrate in evidence that the vehicle in question has holes, which facilitates transporting of cattle. The registered owner took up the position that she was unaware of the changes done to the vehicle.

She has simply stated that she has not told the driver to do anything illegal. The registered owner stated that she has sublet the vehicle. According to the registered owner the vehicle was used for the purpose of transporting vegetables. In such event the registered owner was unable to explain as to how the vehicle had cow don and blood.

The registered owner while giving evidence stated in examination in chief that the driver's services were terminated, however in cross examination, she admitted that the driver (the accused) was still in her services. This demonstrates that the Registered Owner is not a credible witness as she has contradicted herself in giving evidence.

The absolute owner has sent the registered owner a letter of demand, which manifests that the absolute owner has sought refuge in civil law to claim his rights.

Further, the Counsel for the appellant categorically stated, at the argument stage, that the registered owner will not be claiming the vehicle. In view of above, the only claimant is the absolute owner.

The learned counsel for the appellant stated that vehicle could be released to the absolute owner as Sec.443A of the Code of Criminal Procedure Act makes a preference of the absolute owner over the registered owner.

In the case of **Orient Finance Ltd Vs Range Forest Officer Ampara (SC Appeal** No.120/2011-Annexure 6) decided as follows

“ Generally the property is released to the person from whose custody or possession the property was taken. The registered owner if he was not privy to the commission of the offence on that basis he is entitled to possession of the vehicle. Sec.443A changed this position when it stated that the absolute owner is deemed to be the person entitled to possession of such vehicle.... Under section 425 of the Criminal Procedure Ac, after the conclusion of the case, if the vehicle is not confiscated, the vehicle should be released to the absolute owner and not to the registered owner.”

However, in the instant case the conduct of the registered owner manifest that she has not taken precautions to avoid the offence being committed.

The registered owner has also not been made a party to this case. The name of the registered owner is Paragaha Thanthirige Suneetha Malkanthi, is not apparent in the caption. The Registered Owner has stated that she is in agreement to give the vehicle to the absolute owner. The Absolute Owner then went in revision to the High Court against the confiscation order and has now appealed to the Court of Appeal.

It is decided law in our Jurisdiction that in a vehicle inquiry the Registered Owner has to discharge the burden on a balance of probability, on two grounds. The decision in the case of **Mary Matilda v OIC Habarana CA (PHC)86/87** is amply clear that simply telling the driver is insufficient. It was held that *“the owner of the vehicle to discharge the burden that she had taken all precautions to prevent the use of the vehicle for the commission of the offence, mere giving instruction is not sufficient.”*

It was decided in the above case that the owner should take positive steps to prevent the commission of the offence. And it was further decided therein that simply telling the driver/ accused does not amount to a positive step. The registered owner, in this case, has simply told the absolute owner not to use the vehicle for any illegal purpose and has failed to prove on a balance of probability that she took all precautions to prevent the offence taking place.

In the case of **Manawaduvs AG (1987 2 SLR 30)** it was decided that the onus of proof in a vehicle confiscation lies on the Claimant . The Respondents state, that the Claimant in this instance failed to discharge his burden.

The **Orient Finance Services Corporation Ltd case (SC Appeal no 120 / 2011)** held that the owner should on a balance of probability prove that the offence was committed without the knowledge or that all precautions to prevent the offence was taken.

Therefore the registered owner, is not a party to this appeal. The registered owner is estopped from making claim by her own actions, the registered owner has not established on a balance of probability that she took all precautions to prevent the offence taking place.

Considering the above circumstances we are of the view that this court has no basis to interfere with the judgment of the High Court.

Therefore, the Appeal is hereby dismissed.

JUDGE OF THE COURT OF APPEAL

P.Padman Surasena J

I agree,

JUDGE OF THE COURT OF APPEAL