

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

In the matter of an Appeal in terms of  
Article 138 read with Article 154P of  
the Constitution of the Democratic  
Socialist Republic of Sri Lanka.

Officer in Charge,  
Police Station,  
Kalutara North.

C.A. Case No: CA (PHC) 181/2014

**Plaintiff**

H.C. Kalutara Case No:  
**HCRA 10/2011**

**Vs.**

M.C. Kalutara Case No: 75844

1. Sunil Bodinayaka
2. Gangodawilage Asanga Deepal
3. P.D. Sunanda Pathiraja

**1, 2, 3 Parties**

4. People's Leasing Company

**Intervenant Party**

**AND BETWEEN**

3. P.D. Sunanda Pathiraja
- No. 209, School Road,  
Dediyawala, Waskaduwa

**3<sup>rd</sup> Party-Petitioner**

**Vs.**

1. Officer in Charge,  
Police Station,  
Kalutara North.

**Plaintiff-Respondent**

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

3. The People's Leasing Company  
PLC,  
Kalutara Branch, Kalutara.

**Respondents**

**AND NOW BETWEEN**

3. P.D. Sunanda Pathiraja  
No. 209, School Road,  
Dediyawala, Waskaduwa

**3<sup>rd</sup> Party-Petitioner-  
Appellant**

**Vs.**

1. Officer in Charge,  
Police Station,  
Kalutara North.

**Plaintiff-Respondent-  
Respondent**

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

3. The People's Leasing Company  
PLC,  
Kalutara Branch, Kalutara.

**Respondents-Respondents**

BEFORE	:	K. K. Wickremasinghe, J.  Janak De Silva, J.
COUNSEL	:	AAL Chandrika Morawaka for the 3 <sup>rd</sup> party- Petitioner-Appellant  AAL Saman Galappaththi for the 3 <sup>rd</sup> Respondent-Respondent  Nayomi Wickremasekara, SSC for the 2 <sup>nd</sup> Respondent-Respondent
ARGUED ON	:	29.10.2018
WRITTEN SUBMISSIONS	:	The 3 <sup>rd</sup> party Petitioner-Appellant – On 21.01.2019  The 2 <sup>nd</sup> Respondent-Respondent – On 28.02.2019  The 3 <sup>rd</sup> -Respondent-Respondent – On 21.01.2019
DECIDED ON	:	31.05.2019

**K.K.WICKREMASINGHE,J.**

The petitioner-appellant filed this appeal seeking to set aside the order of the Learned High Court Judge of the Provincial High Court of Western Province holden in Kalutara dated 16.10.2014 in Case No. REV 10/2011 and seeking to set aside the order of the Learned Magistrate of Kalutara dated 16.12.2010 in Case No. 75844.

**Facts of the case:**

One Sunil Bodinayaka and one Gangodawila Asanga Deepal purchased vehicle bearing No. WPHC-0910 as joint hirers under a hire purchase facility by the agreement dated 26.06.2007. (Page number 116 of the Appeal brief)

The 3<sup>rd</sup> respondent –Respondent (hereafter referred to as the ‘3<sup>rd</sup> respondent’) was the Finance company involved in the said hire-purchase agreement.

Sunil Bodinayake had given the said vehicle to the 3<sup>rd</sup> party petitioner – appellant (hereafter referred to as the ‘appellant’) and made a condition to make regular payments to the 3<sup>rd</sup> respondent.

Later said Bodinayake lodged a complaint at the Police Station, Kalutara North since the appellant seemed to have violated such condition.

Accordingly the Officer in Charge of Police Station of Kalutara North had filed a report in the Magistrate’s Court of Kalutara under section 425 (4) of the Code of Criminal Procedure Act. (Page 22 of the appeal brief)

The 3<sup>rd</sup> respondent intervened to the said matter and pleaded that the contract had gone into arrears and therefore the possession of the vehicle shall be given to the company.

The Learned Magistrate released the vehicle to the 3<sup>rd</sup> respondent by the order dated 16.12.2010.

Being aggrieved by the said order, the appellant preferred a revision application to the Provincial High Court of Kalutara.

The Learned High Court Judge affirmed the order of the Learned Magistrate and dismissed the revision application.

Being aggrieved by the said dismissal, the appellant preferred this appeal.

The Learned Counsel for the appellant submitted following grounds of appeal;

1. The Learned Magistrate erred in facts and law in arriving to his findings when he considered chapter 38 and sections 425 and 431 of the Code of Criminal Procedure Act
2. The Learned Magistrate erred in law when he considered a different matter which the B report was silent and when he assumed that an offence, breach of trust, existed involving the vehicle
3. There was no jurisdiction to decide the matter in absence of commission of a criminal offence involving the vehicle in question.
4. The Learned Magistrate acted in contravention of provisions of the Code of Criminal Procedure Act to assume jurisdiction on his Court in the absence of finding guilt to a criminal charge to consider a disposal of property.
5. The Learned High Court Judge failed to consider that the subject matter of the dispute was the ownership of the bus and a civil dispute over which the Learned Magistrate has no jurisdiction.

The Police had filed B report under section 425 of the Code of Criminal Procedure Act. However the Learned Magistrate had considered that the appellant had acted

“dishonestly in violation of the legal contract which was made touching the discharge of such trust” and thereby committed the offence of “Criminal breach of trust”. Accordingly the Learned Magistrate proceeded to hold an inquiry under section 431 of the Code of Criminal Procedure Act.

I observe that the Learned Magistrate had ordered to get the vehicle into the Custody of the court. Accordingly the registrar seized the bus while it was in the custody of the appellant on execution of a bond for Rs.1.5 million. After the order dated 16.12.2016, the registrar went to hand over the said bus to the 3<sup>rd</sup> respondent since the Learned Magistrate ordered to do so. However it was impossible to move the said vehicle since the parts of the vehicle were removed. Therefore facts were reported to the Magistrate’s Court against the appellant on contempt of Court and she was remanded.

The Learned Counsel for the appellant contended that there was no jurisdiction to decide the matter in absence of commission of a criminal offence involving the vehicle in question. The Learned SSC for the 2<sup>nd</sup> respondent-respondent (hereinafter referred to as the ‘2<sup>nd</sup> respondent’) contended that no objection to jurisdiction has been raised by the appellant before the Leaned Magistrate stating that this matter cannot be decided under a B report filed under section 425 (4) of the Code of Criminal Procedure Act. It is noteworthy that the appellant was a party to the matter from the inception and had even filed written submission and affidavits for this matter.

**Section 39 of the Judicature Act No. 02 of 1978** reads that;

*“Whenever any defendant or accused party shall have pleaded in any action, proceeding or matter brought in any Court of First Instance neither party shall afterwards be entitled to object to the jurisdiction of*

***such court, but such court shall be taken and held to have jurisdiction over such action, proceeding or matter:***

*Provided that where it shall appear in the course of the proceedings that the action, proceeding or matter was brought in a court having no jurisdiction intentionally and with previous knowledge of the want of jurisdiction of such court, the Judge shall be entitled at his discretion to refuse to proceed further with the same, and to declare the proceedings null and void."*

In the case of **Rodrigo V. Raymond [2002] 2 Sri LR 79**, it was held that,

*"Moreover, it should be stated that when the admissions were recorded at the commencement of the trial, the parties have in clear terms admitted the jurisdiction of the Court. Therefore, the defendant cannot be permitted at this late stage after several dates of trial deny jurisdiction of the Court.*

*The defendant had ample opportunity of objecting to the jurisdiction of the Court, if he has chosen or elected to waive such objections, he cannot subsequently be permitted to challenge it. The defendant should not be allowed to blow hot and cold at the same time, in this matter. The defendant is deemed to have submitted to the jurisdiction of the Court..."*

In the case of **Navaratnasingham V. Arumugam and another (1980) 2 S. L. R. 01**, it was held that,

*"In any event, an objection to jurisdiction such as that in the present case must by virtue of section 39 of the Judicature Act No. 02 of 1978, be taken as early as possible, and the failure to take such objection when the matter was*

*being inquired into must be treated as a waiver on the part of the petitioner..."*

In the case of **Perera V. Commissioner of National Housing (1974) 77 N.L.R 361**, it was observed that,

*"Lack of competency in a Court is a circumstance that results in a judgment or order that is void. Lack of competency may arise in one of two ways. A Court may lack jurisdiction over the cause or matter or over the parties; it may also lack competence because of failure to comply with such procedural requirements as are necessary for the exercise of power by the Court. Both are jurisdictional defects ; the first mentioned of these is commonly known in the law as a 'patent' or 'total' want of jurisdiction or a defectus jurisdictionis and the second a 'latent' or 'contingent' want of jurisdiction or a defectus triationis. Both classes of jurisdictional defect result in judgments or orders which are void. But an important difference must also be noted. In that class of case where the want of jurisdiction is patent, no waiver of objection or acquiescence can cure the want of jurisdiction; the reason for this being that to permit parties by their conduct to confer jurisdiction on a tribunal which has none would be to admit a power in the parties to litigation to create new jurisdictions or to extend a jurisdiction beyond its existing limits, both of which are within the exclusive privilege of the legislature; the proceedings in cases within this category are non coram judice and the want of jurisdiction is incurable. In the other class of case, where the want of jurisdiction is contingent only, the judgment or order of the Court will be void only against the party on whom it operates but acquiescence, waiver or inaction on the part of such person may estop him from making or attempting to establish by evidence, any averment to the*



*effect that the Court was lacking in contingent jurisdiction. This distinction is brought out in certain passage which I quote from Shortt on Mandamus (1887) and Spencer Bower on Estoppel by Representation...*”

In the case of **Senarath Pathiranalage Gunathilake V. S.P. Sunil Ekanayake** [SC Appeal No 26/2009 – Decided on 15.12.2010), it was held that,

*“There are certain objections which must be raised at the earliest opportunity available. The objection to the jurisdiction of a Court is one...*

*In my view this is because of the effect of the failure giving rise to the objection, that such promptness is required.*

*If a Court inquires into a matter for which it has no jurisdiction all subsequent acts constitute a nullity. If jurisdictional objections are permitted at the very end of proceedings and upheld, all proceedings would have to be held void thus wasting precious judicial time and resources and causing grave injustices. Therefore jurisdictional objections are required to be taken at the first opportunity, the failure of which would constitute acquiescence to jurisdiction of the Court.”*

In light of above, it is understood that an objection to jurisdiction should be raised as early as possible by any party. Failure to do so would be considered as a waiver on the part of the party who raises such objection at a later stage. Accordingly I am of the view that the appellant is not entitled to raise an objection with regard to the jurisdiction at this stage.

Further I observe that the Learned Magistrate had acted under section 431 and 433 of the Code of Criminal Procedure Act to hand over the possession of the vehicle to the absolute owner.

**Section 433A of the Code of Criminal Procedure Act** reads that;

*“(1) In the case of a vehicle let under a hire purchase or leasing agreement, the person registered as the absolute owner of such vehicle under the Motor Traffic Act (Chapter 203) shall be deemed to be the person entitled to possession of such vehicle for the purpose of this Chapter.*

*(2) In the event of more than one person being registered as the absolute owner of any vehicle referred to in subsection (1), the person who has been so registered first in point of time in respect of such vehicle shall be deemed to be the person entitled to possession of such vehicle for the purposes of this Chapter.”*

It appears that section 433 has applicability for the chapter 38 of the Act.

The Learned Counsel for the appellant contended that the Learned High Court Judge failed to consider that the subject matter of the dispute was the ownership of the bus and a civil dispute over which the Learned Magistrate has no jurisdiction. However it is noteworthy that section 431 allows a Magistrate to deliver a property to the person entitled to the possession of such property which was found under circumstances which create suspicion of the commission of any offence.

I observe that the Learned Magistrate held as follows;

“...මෙවැනි අවස්ථාගත කරුණු අනුව යම් වරදක් සිදු කරන ලදැයි මා විසින් ඉහත තීරණය කර ඇති බැවින් මා හට මෙම අපරාධ නඩු විධාන සංග්‍රහයේ 431 වන වගන්තිය යටතේ මෙම බස් රථය සම්බන්ධයෙන් විමසීමක් පවත්වා එය සුදුසු අයිතිකරු වෙත භාරදීමට අධිකරණයට බලයක් ඇති බවටද මා තීරණය කරමි...”

Further the Learned Magistrate clearly refused to determine the ownership of the vehicle since it was a matter to be considered by a civil Court. The Learned

Magistrate was trying to solve the dispute between parties in order to avoid any breach of peace. Therefore I am of the view that the Learned Magistrate very correctly considered aforesaid two sections to determine the right to possession in the instant case.

Accordingly I see no reason to interfere with the findings of the Learned Magistrate and the order of the Learned High Court Judge. Therefore I affirm the order of the Learned Magistrate dated 16.12.2010 and the order of the Learned High Court Judge dated 16.10.2014.

The appeal is hereby dismissed without costs.

JUDGE OF THE COURT OF APPEAL

**Janak De Silva, J**

I agree,

JUDGE OF THE COURT OF APPEAL