

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

In the matter of Special Leave to Appeal
Application under and in terms of Article
128 of the Constitution of the Democratic
Socialist Republic of Sri Lanka.

SC Appeal No. 120/2011
SC (SPL) Leave to Appeal Application
No. SC (SPL)/LA/92/2011
CA (PHC) APN No. 26/2011
PHC Ampara Revision Application:
HC/AMP/REVISION/343/2009
MC Ampara No. 31773

Orient Financial Services Corporation Ltd.,
No. 100 Hyde Park Corner, Colombo 2.

**Petitioner-Petitioner-Petitioner
Appellant**

Vs.

1. Range Forest Officer
Department of Forest Conservation
Regional Office, Ampara.
2. Hon. Attorney General
Attorney General's Department
Colombo 12.

**Respondent-Respondents-Respondent
Respondents**

Before : Hon. Tilakawardane, J.
Hon. Ekanayake, J.
Hon. Dep, PC, J.

Counsel : Asthika Devendra for the Appellant.
Thusith Mudalige, SSC for Attorney General

Argued on : 21.10.2013

Decided on : 10.12.2013

Priyasath Dep, PC., J.

This is an Appeal against the Judgment of the Court of Appeal dated 28.04.2011 which affirmed the judgment of the High Court of Ampara. The High Court affirmed the order of forfeiture of a vehicle made by the learned Magistrate of Ampara under Section 40 of the Forest Ordinance as amended by Acts numbers 13 of 1982, 84 of 1988 and 23 of 1995.

The Petitioner –Petitioner-Petitioner-Appellant (hereinafter referred to as the Appellant) is a Finance Company which under a lease agreement let the vehicle bearing No. EPLE 3471 to D.P. Anura Kumara who became the registered owner of the vehicle. The said Anura Kumara was charged in the Magistrate Court of Ampara bearing Case No. 31773/8 for transporting timber (teak) without a permit, an offence punishable under Section 25 (1) read with section 40 of the Forest Ordinance. He pleaded guilty to the charges. Thereafter an Inquiry was held regarding the confiscation of the vehicle under section 40A of the Forest Ordinance.

The Appellant who is the absolute owner claimed the vehicle on the basis that it has taken necessary precautions to prevent the commission of offence and the offence was committed without its knowledge. At the inquiry T S.L. Indika, a senior sales executive gave evidence on behalf of the Appellant. He produced the registration book and the lease agreement. After the inquiry the learned Magistrate by his order dated 19.03.2009 confiscated the vehicle. The learned Magistrate was of the view that in terms of the lease agreement the absolute owner can recover the loss from the registered owner and failing that from the guarantors or sureties. Further the learned Magistrate observed that even after the conviction of the registered owner, the Appellant had failed to terminate the lease agreement. In the order it was stated that if the vehicle is given to the appellant there was a possibility that it could give the vehicle back to the accused (registered owner). This will defeat the object of section 40 of the Forest Ordinance.

The Appellant filed a Revision Application in the High Court of Ampara and the learned High Court Judge by his order dated 02.11.2010 affirmed the order of the learned Magistrate. The Appellant appealed against the judgment of the High Court to the Court of Appeal. The Court of Appeal without issuing notice dismissed the Petition. The Court of Appeal for the reasons set out in its order dated 28.4.2011 held that the owner envisaged in law is not the absolute owner and the owner envisaged in law in a case of this nature is the person who has control over the use of the vehicle. The absolute owner has no control over the use of the vehicle except to retake the possession of the vehicle for non-payment of installments. If the vehicle is confiscated holding that the absolute owner is not the owner envisaged in law, no injustice will be caused to him as he could recover the amount due from the registered owner by way of action in the District Court on the basis of violation of the agreement'

Being aggrieved by the order of the Court of Appeal the Appellant filed a Special Leave to Appeal Application to this court and obtained leave on the following questions of law.

- A) Did their Lordships of the Court of Appeal misconceive in law when they held that the ‘owner contemplated by law’ cannot be the absolute owner but the registered owner?
- B) Did their Lordships of the Court of Appeal err when they failed to appreciate that the Respondents had not taken up the position that the Petitioner Company was not the owner of the vehicle concerned either in the Magistrate’s Court or the High Court and therefore it was not a matter before the Court of Appeal for consideration.

At this stage it is relevant to refer to Section 40(1) of the Forest Ordinance as amended by Act No 13 of 1982 which deals with forfeiture of timber, tools, boats, carts, cattle and vehicles used in the commission of offences under the Ordinance. The relevant section reads as follows:

40. (1) Upon the conviction of any person for 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, boats, carts, cattle and motor vehicles used in committing such offence (whether such tools, boats, carts, cattle and motor vehicles are owned by such person or not),

shall by reason of such conviction, be forfeited to the State.

The amendment to section 40 of the Forest Ordinance by Act No. 13 of 1982 substituted the words “shall by reason of such conviction be forfeited to the State” for the words shall be liable by order of the convicting Magistrate to confiscation” According to the plain reading of this section it appears that upon conviction the confiscation is automatic. The strict interpretation of this Section will no doubt cause prejudice to the third parties who are the owners of such vehicles.

The implications of the amended section 40 of the Forest Ordinance was considered by Sharvananda, J. in *Manawadu v. Attorney General* (1987 2 SLR30) It was held that:

“By Section 7 of Act No. 13 of 1982 it was not intended to deprive an owner of his vehicle used by the offender in committing a ‘forest offence’ without his (owner’s) knowledge and without his participation. The word ‘forfeited’ must be given the meaning ‘liable to be forfeited’ so as to avoid the injustice that would flow on the construction that forfeiture of the vehicle is automatic on the conviction of the accused .The amended sub-section 40 does not exclude by necessary implication the rule of ‘*audi alteram partem*’ . The owner of the lorry not a party to the case is entitled to be heard on the question of forfeiture of the lorry, if he

satisfies the court that the accused committed the offence without his knowledge or participation, his lorry will not be liable to forfeiture.

The Magistrate must hear the owner of the lorry on the question of showing cause why the lorry is not liable to be forfeited. If the Magistrate is satisfied with the cause shown, he must restore the lorry to the owner. The Magistrate may consider the question of releasing the lorry to the owner pending inquiry, on his entering into a bond with sufficient security to abide by the order that may ultimately be binding on him”

The Supreme Court has consistently followed the case of Manawadu vs the Attorney General. Therefore it is settled law that before an order for forfeiture is made the owner should be given an opportunity to show cause. If the owner on balance of probability satisfies the court that he had taken precautions to prevent the commission of the offence or the offence was committed without his knowledge nor he was privy to the commission of the offence then the vehicle has to be released to the owner.

The next question that arises is who is the owner as contemplated under Section 40 of the Forest Ordinance. In the case of vehicles let under hire -purchase or lease agreements there are two owners, namely the registered and the absolute owner.

The counsel for the Appellant relied on Section 433A which was introduced by Code of Criminal Procedure (Amendment) Act No. 12 of 1990. Section 433A reads as follows:

433A (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 purpose of this Chapter”.

The Chapter referred to in this section is the Chapter XXXVIII of the Code of Criminal Procedure Act dealing with disposal of property pending trial and after the conclusion of the case. (Sections 425 -433)

(The Forest Ordinance (Amendment) Act No 65 of 2009 deemed Section 433A inapplicable to persons who pleads guilty to or is found guilty of a forest offence. The implications of this amendment will not be considered in this Appeal as the amendment came into force after the order of confiscation was made by the learned Magistrate)

The Learned Counsel for the Appellant relied on the judgment in Mercantile Investment Ltd. Vs. Mohamed Mauloom and others ((1998) 3Sri L.R.32) where it was held that ‘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 a 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.’

This matter was again considered in *The Finance Private Ltd. v Agampodi Mahapedige Priyantha Chandana and others* in Supreme Court Appeal No.105A/2008 decided on 30.09.2010.

This was an appeal against the judgment of the High Court of Hambantota affirming the order of confiscation of a vehicle made by the Magistrate of Tangalle in Case No. 61770. In this case the Magistrate granted an opportunity to the absolute owner (Appellant) to show cause. The registered owner did not take part in the inquiry. An Assistant Manager of the Appellant company gave evidence and stated that the Appellant Company has no knowledge of the use of the vehicle and that the vehicle was not within the control of the appellant. The learned Magistrate held that Appellant had not satisfactorily convinced the courts that had taken every possible measure to prevent the commission of the offence. The learned Magistrate proceeded to confiscate the vehicle. The High Court affirmed the order of confiscation. At the hearing of the Appeal, the counsel for the absolute owner argued that the burden is only on the registered owner to satisfy court that the accused had committed the offence without his knowledge or participation and this will not be applicable to an absolute owner. The Supreme Court rejected the argument and dismissed the appeal.

In this case, Her Ladyship the Chief Justice Shirani Bandaranayake considering the ratio decidendi of previous decisions, held that ‘it is abundantly clear that in terms of section 40 of the Forest Ordinance as amended if the owner of the vehicle in question was a third party, no order of confiscation shall be made if that owner has proved to the satisfaction of the court that he had taken all precautions to prevent the use of the said vehicle for the commission of the offence. The ratio decidendi of all the afore mentioned decisions also show that the owner has to establish the said matter on balance of probability. It was further held that “it is therefore apparent that both the absolute owner and the registered owner should be treated equally and there cannot be any type of privileges offered to an absolute owner, such as a finance company in terms of the applicable law in the country. Accordingly, it would be necessary for the absolute owner to show the steps he had taken to prevent the use of the vehicle for the commission of the offence and that the said offence had been committed without his knowledge.”

In the case before this Court the registered owner was found guilty on his own plea and was convicted. The learned Magistrate provided an opportunity to the absolute owner to participate in the inquiry and a representative of the company gave evidence. After the inquiry, the learned Magistrate confiscated the vehicle. The learned Magistrate was of the view that in terms of the lease agreement the absolute owner can recover the loss from the registered owner and failing that from the guarantors or sureties. Further the learned Magistrate observed that even after the conviction of the registered owner, the Appellant had failed to terminate the lease agreement. In the order it was stated that if the

vehicle is given to the Appellant the vehicle could be given back to the accused (registered owner). This will defeat the object of Section 40 of the Forest Ordinance.

Aggrieved by the order of the learned Magistrate a Revision Application was filed by the absolute owner. The learned High Judge dismissed the Application. Thereafter an Appeal was filed in the Court of Appeal. The Court of Appeal was of the view that the owner contemplated under the Forest Ordinance is the registered owner. It has posed the question "can it be said that the absolute owner (the Finance company) committed the offence or it was committed with the knowledge or participation of the absolute owner. The answer is obviously no. Surely a Finance company cannot participate in the commission of an offence of this nature when the vehicle is not with them. It cannot be said that the Finance company has the knowledge of the commission of the offence. When the vehicle was not with them. The owner envisaged in law cannot be the absolute owner".

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 repossesses 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 be 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

The second question of law refers to the question whether the Court of Appeal erred in law when it considered the question whether the Appellant Company is the owner or not contemplated under Section 40 of the Forest Ordinance when the matter was not raised by the Respondents in the Magistrates Court and in the High Court. The Court of Appeal on its own raised that question. Who is the owner contemplated under Section 40 requires a legal interpretation and is question of law. Therefore Court of Appeal did not err when it considered this question of law.

It is necessary at this stage to consider whether the order of the Magistrate is in accordance with the law. The Magistrate afforded an opportunity to the absolute owner to show cause and after considering the evidence the order of confiscation was made. The learned Magistrate has followed the proper procedure. The next question is whether the reasons given by the Magistrate to confiscate the vehicle is correct.

It is necessary for this purpose to consider the intention of the legislature when it repealed the previous section 40 of the Forest Ordinance and substituted new Section 40 by Act No. 13 of 1982. Illicit felling and removal of timber is considered a serious offence by the State as it result in the depletion of the scarce forest resources. Deforestation has an adverse impact on the environment. Therefore strong preventive and penal measures are taken to prevent such offences. For that reason in addition to punishing the offenders, tools, implements and vehicles used for the commission of the offence are forfeited. This has a deterrent effect on the offenders. If the registered owner is privy to the commission of the offence and the vehicle is released to the absolute owner, this effect is lost. Under the terms of the hire purchase or lease agreement the registered owner is under a duty to indemnify the absolute owner for the loss or damage caused to the vehicle. If the vehicle is returned to the absolute owner the registered owner is absolved of the liability. Further, if the agreement is terminated he will be liable only for the balance installments and other charges. This will remove the deterrent effect on the registered owners and encourage them to use vehicles subject to finance to commit offences.

Further, the Finance company is not without a remedy. When giving a vehicle on lease or hire, the company is aware of the risk when it hands over the full control and possession of the vehicle. Finance companies charge higher interest rates due to this risk factor and also obtain additional security by way of guarantors. Therefore, it could file a civil case to recover the value of the vehicle.

It is relevant to consider the implications of Section 433A of the Code of Criminal Procedure Act. This section refers to the Chapter dealing with the disposal of property pending trial and also after the conclusion of the case (Sections 425-433). Under this chapter when disposing property the Magistrate is not required to determine the ownership of the property. The Magistrate is required to deliver the property to the person who is entitled to possession of the property. 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. Section 433A changed this position when it stated that the absolute owner is 'deemed to be the person entitled to possession of such vehicle'. In

view of section 433A if the Magistrate in his discretion pending trial decides to release the vehicle, the absolute owner and not the registered owner who is entitled to possession. Under Section 425 of the Code of Criminal Procedure Act, 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 or any other claimant. The absolute owner has a right to claim and be heard at a claim inquiry, but as of right could not get possession of the vehicle as it is subject to the discretion and findings of court.

It appears that the intention of the legislature is to give the possession of the vehicle to the absolute owner as it not prudent to release the vehicle to the registered owner when it is proved that the offence was committed whilst the vehicle was in the possession or custody of the registered owner. On the other hand the absolute owner after obtaining the possession of the vehicle could release the vehicle to the registered owner if the registered owner has not violated the terms and conditions of the agreement. Conversely if the registered owner is in breach of the agreement it could terminate the agreement and retain the vehicle.

Under a hire-purchase or lease agreement the absolute owner delivers the possession of the vehicle to the registered owner but retains the ownership and has a proprietary interest in the vehicle. It has a legitimate claim to it. Section 433A of the Code of Criminal Procedure Act recognizes this fact.

I am of the view that the learned magistrate heard the absolute owner and not being satisfied with the evidence confiscated the vehicle. Under section 433A of the Code of Criminal Procedure Act, the absolute owner though entitled to possession of the vehicle, it could obtain the possession of the vehicle only if the court decides to release the vehicle but not as of right .

I find that the order of the learned Magistrate confiscating the vehicle is in accordance with the law. Both the High Court and the Court of Appeal had affirmed the order. I affirm the order of the Court of Appeal.

Appeal dismissed. No costs.

Shiranee Tillakawardana, J.

Judge of the Supreme Court

I agree.

Chandra Ekanayake, J.

Judge of the Supreme Court

I agree.

Judge of the Supreme Court