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

In the matter of an Appeal preferred under 138 read with Article 154 P (6) of the Constitution.

Officer in Charge,
Police Station,
Urubokka.

VS.

C A (PHC) 263/2006
HC (Rev.)192/2005
MC MorawakaNo. 87714/B

Dombagagedara Shriyani Jayathissa,
"Sirisethapaya"
Sapathiyadeniya,
Inguruwatta.

Suspect

1. Senkadagala Finance Company Ltd.,
   34, Kandy Road,
   Kurunegala.

   Absolute Owner-Claimant

2. Eshwarage Thilakarathna,
   Indola Bake House,
   Horagasmandiya,
   Urubokka.

   Purchaser-Claimant

AND NOW BETWEEN

Senkadagala Finance Company
Ltd.,
34, Kandy Road,
Kurunegala.

Absolute Owner-Claimant-Petitioner -Appellant

VS.

1. Eashwarage Thilakarathna,
   Indola Bank House,
   Horagasmandiya,
   Urubokka.

   Purchaser – Claimant-Respondent

2. Dombagahagedara Shriyani
   Jayathissa,
   "Sirisethapaya"
   Sapathiyadeniya,
   Inguruwaththa,
   Mawathagama.

   Suspect-Respondent – Respondent

3. Officer in Charge,
   Police Station,
   Urubokka.

   Complainant-Respondent

4. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

   Respondent-Respondent.

BEFORE : **W.M.M. Malini Gunaratne, J.**
P.R. Walgama, J.

COUNSEL : Sisira Herath and S Bulathsinhalage
for the Appellant.

Kapila Suriyaratchchi
for the 1st Respondent.

V. Hettige S.C.C
for the 4th Respondent.

Argued on : 30.09.2015

Written Submissions
Filed on : 03.12.2015 and 08.12.2015

Decided on : 29.02.2016

Malinie Gunaratne, J.

This is an Appeal from the Judgment dated 11.12.2006 of the Provincial High Court of Matara. By that Judgment the learned Judge of the High Court has upheld the Order of the Magistrate by which it was decided that the possession of the Mitsubishi Canter Motor Lorry bearing Registration No. N.W.H.D. 6943, which had been taken into custody by the Police and produced in the Magistrate's Court of Morawaka should be handed over to the 1st Purchaser – Claimant – Respondent (hereinafter referred to as the 1st Respondent). The said order has been made in terms of Section 431 (1) of the Code of Criminal Procedure Act No. 15 of 1979.

The relevant facts briefly are as follows:

On 28.07.2005, a lorry bearing No. N.W.H.D. 6943 was produced by the Officer in Charge of Urubokka Police, before the Magistrate of Morawaka, together with a report stating that, one Moratuwattage Sunil (who is a seizing officer of the Appellant) made a complaint that, one Shriyani Jayatissa entered into a Hire Purchase Agreement with the Senkadagala Finance Company Ltd. (hereinafter referred to as the Appellant) in respect of the vehicle No. N.W.H.D. 6943 and in pursuance of the said agreement, as Shriyani Jayatissa (hereinafter referred to as the 2nd Suspect-Respondent- Respondent) failed to pay the hiring rentals, when he went to seize the vehicle, he came to know that the said vehicle was sold under forged documents.

The said vehicle, subsequently produced at the Urubokka Police Station by one Eshwarage Thilakaratna (hereinafter referred to as the 1st Respondent) who claimed to be the owner of the vehicle, having bought it from the 2nd Suspect – Respondent.

In accordance with an application made on that behalf by the Officer in Charge of Urubokka Police, the Magistrate ordered the vehicle to be released to the 1st Respondent on conditions.

Since the Appellant also claimed the vehicle, the learned Magistrate had held an inquiry before making the aforesaid Order.

Being aggrieved by the said Order the Appellant sought to move in revision against the said Order by Revision Application filed before the High Court of Matara. The learned High Court Judge, after having considered the submissions and the documentary evidence produced before the Magistrate's Court, dismissed the Revision Application.

Being aggrieved by the said Judgment the Appellant has preferred this Appeal seeking to set aside the Judgment of the learned High Court Judge and Order made by the learned Magistrate.

When this Appeal was taken up for argument on 30.09.2015, parties made their oral submissions in support of their respective case and subsequently filed written submissions as well with the permission of the Court.

The Counsel for the Appellant submitted that the Magistrate and the learned High Court Judge were in error, when they failed to order the delivery of the vehicle to the Appellant in terms of Section 431 (1) of the Criminal Procedure Act. It was the stance of the learned Counsel for the Respondent that, in a case of disposing property under Section 431 of the Code of Criminal Procedure, if there is a dispute as to the title of the property it shall be disposed to the person whose possession the property was seized and accordingly, the learned Magistrate has correctly made an order to release the vehicle to the Respondent.

In this instance, it is relevant to note, that the submissions made by both Counsel involve an application of Section 431(1) and (2) of the Code of Criminal Procedure Act. Once a property is produced, which is a subject matter of criminal offence, it is the duty of the Magistrate in terms of Section 431 of the Criminal Procedure Code to make an order with regard to the possession of the property. The Magistrate should decide whether the property should be handed over to the person from whom the property was taken into the custody of the Court, or whether the property should be given to any other party other than from which it was taken into the custody of the

Court, or the Magistrate could decide whether the property should be kept under the custody of the Court.

Section 431 (1) and (2) reads as follows:-

431 (1). The seizure by any Police Officer of property taken under Section 29 or alleged or suspected to have been stolen or found under circumstances which create suspicion of the commission of any offence shall be immediately reported to a Magistrate who shall forthwith make such order as he thinks fit respecting the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained respecting the custody and production of such property.

(2) If the person entitled is known the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit. If such person is unknown the Magistrate may detain it and shall in such case publish a notification in the Court notice – board and two other public places to be decided on by the Magistrate, specifying the articles of which such property consists and requiring any persons who may have a claim thereto to come before him and establish his claim within six months from the date of such public notification.

Sub-section (1) deals with three categories of property siezed by a police officer namely;

(i) Property taken under Section 29 of the Code relating to the search of persons who are arrested;

(ii) property alleged or suspected to have been stolen;

(iii) property found under circumstances which create a suspicion of the Commission of any offence.

The learned Counsel for the Appellant contended that, the main complaint in the present case was, that the 2nd Suspect – Respondent had tendered forged documents and got the Appellant's registration cancelled by forgery. Further contended that, the offence had been committed by using the vehicle and the subject matter of the offence is the vehicle bearing No. N.W.H.D.6943. The Counsel further contended that, though the vehicle in question was taken into custody by the Police from the Respondent, before the offences referred to in B Report were committed, Appellant was the Absolute Owner of the vehicle. It is the stance of the Counsel that as contemplated in Section 433 (a) (1) of the Criminal Procedure Code as amended by Act No. 12 of 1990, the Appellant shall be deemed the person entitled to possession of the vehicle.

The Section 433 (a) (1) reads as follows:

"In the case of a vehicle let under a Hire Purchase or Lease Agreement the person registered as Absolute Owner of such vehicle under Motor Traffic Act (Chapter 203) shall be deemed to be the person entitled to possession of such vehicle for the purpose of this Chapter.

However, the Counsel for the Respondent argued that Section applies only in the cases where a dispute regarding possessing arises between the Lessor and the Lessee. He further argued that in the instant case the Appellant had entered into a lease agreement with Shriyani Jayatissa, not with the Respondent. Therefore, it was the contention of the learned

Counsel that the Appellant has no right to claim the vehicle under Section 433 (a) (1) of the Code of Criminal Procedure.

It has been contended by the Counsel for the Respondent, that although the Appellant claimed the vehicle at the inquiry as the absolute owner, it was revealed that absolute ownership was deleted on 27.05.2003 by a letter sent to the Registrar of Motor Vehicles by an officer of the Appellant Company under a letter head of the Appellant company signed by an officer. Therefore, it is the stance of the Counsel, even though the Appellant denies it, at the time Police seized the vehicle there was no lease agreement between the Appellant and the Respondent. Apart from that since the Appellant's name had been deleted in the purported Certificate of Registration, and although the Appellant has denied it, until it is solved the Appellant cannot claim the Absolute Ownership of the vehicle. Accordingly I am also of the view, since there is an issue in relation to the Certificate of Registration the Appellant cannot claim the vehicle under Section 433 (a) (1) of the Criminal Procedure Code.

It is relevant to note, that the Appellant had not revealed about the existence of such deletion letter in his Petition filed in the High Court and not mentioned in the Magistrate's Court also. It is the stance of the Respondent, after he bought the vehicle he went to the Appellant's Company to obtain finance facilities as the vehicle was financed before with them, and settled thereafter according to the Certificate of Registration. Only then that the Appellant came to know that the vehicle was sold under forged documents.

According to the complaint made to Urubokka Police by Moratu Waduge Sunil Jayantha, who is the seizing officer of the Appellant, has stated that he got to know about such sale when the Respondent came to the Appellant Company as above mentioned. It is important to note, but in Petition filed in the High Court by the Appellant (vide pages 10 and 15 of the brief) in Para 5 of the Petition, and the Para 6 of the Affidavit filed by the Appellant states, that they came to know about such sale when they attempted to seize the vehicle from the 2nd Suspect – Respondent. When the Counsel for the Respondent supported the application on 07.11.2005 (vide Page 24), in the Petition dated 28.07.2005 filed on behalf of the Appellant (vide Page 61) and in the Affidavit dated 25.07.2005 filed by the Appellant, stated, that they came to know about such sale when they attempted to seize the vehicle from the 2nd Suspect – Respondent which is not correct according to the statement made by the seizer to the Urubokka Police.

Accordingly, it is to be noted, when filing the Revision Application, the Appellant has suppressed material facts. The learned High Court Judge also has observed it. The Appellant was under a duty to disclose all material facts to arrive at a correct adjudication on the issues.

In the decision in Alphonso Appuhamy vs. Hettiaratchi 77 N.L.R. 121, Justice Pathirana held that when a party is seeking a relief, he enters into a contractual obligation with the Court when he files an application in the registry and in terms of that contractual obligation he is required to disclose all material facts fully and frankly to the Court.

It is manifestly clear that the Petitioner has failed to carry out its imperative legal duty and obligation to Court. In such circumstances, Justice

Pathirana ruled that the Court is entitled to raise this matter *in limine* and dismiss the application without investigating into the merits of the Application.

In the instant case, the facts that the deletion of the Registration Certificate and the way that the Appellant came to know about the sale of the vehicle, indeed material facts which has an important bearing on the question but had not been disclosed by the Appellant. On this ground too the application must be dismissed for lack of *uberrima fides.*

Be that as it may, now I will turn to consider whether the learned High Court Judge had not considered the relevant law in the correct perspective when he made the Order, as the Counsel for the Appellant has submitted.

It is important to realise, that Section 431 is not a provision which confers jurisdiction to decide disputed claims to possession. Its object is to provide the Magistrate being brought with the least possible delay into official touch with the property seized by the Police. (Binduwa vs. Tyrell 4.C.A.C.1).

It is conceded that Section 431 (1) is the Section under which the learned Magistrate was empowered to make an order in these circumstances. That Section enacts that the "Magistrate .... shall make such order as he thinks fit respecting the delivery of such property to the person entitled to the possession thereof ....".

A further aspect in Section 431 which is significant is, the element of discretion vested in the Magistrate. This element of discretion is manifest from the use of the words "as he thinks fit" in Sub Section (1) and the words

"the Magistrate may order the property to be delivered to him" in Sub Section (2).

On the basis of the aforesaid analysis, Section 431 (1) and (2) give a discretion to the Magistrate to decide with regard to property, the seizure of which is reported to him.

Initially the view of the Court was that property be delivered to the person who had possession of it, at the time of seizure.

Punchinona vs. Hinniappuhami. 60 N.L.R. 518.

K. Piyadasa vs. R.M. Punchi Banda.

In these cases it has been laid down that the Magistrate has no power to deliver Articles taken from the possession of one person to any other person on the ground that he and not the former possessor is entitled to possession.

However, later certain modifications of this principle were evolved. In the case of Sugathapala vs. J.K. Thambirajah 67 N.L.R. 91, it was held, that while, as a rule, property should be delivered to the person in whose possession it was at the time of seizure by the Police, it is open to the Magistrate to order it to be delivered to some other person where there were special circumstances. This decision has been followed in the cases of –

W. Balagalla vs. Somarathne 70 N.L.R. 382

Thirunayagam vs.Inspector of Police Jaffna 74 N.L.R. 161

Frudenberg Industries Ltd. Vs. Dias

Mechanical Engineering Ltd. C.A. Application No.69/79 C.A. Appeal No. 182/82, Court of Appeal Minutes of 14/07/1983.

A principle had been observed in these cases that the property be delivered to the same person who had possession of it at the time of seizure will not apply if there is an "unlawful" or "criminal" element in such possession.

In the case at hand, the learned Magistrate has relied on the case of Silva vs. Officer in Charge. Thambuttegama (1991) 2 S.L.R. 83. In the said case it was held, that Section 431 (1) and (2) give a discretion to the Magistrate to decide the matters with regard to property, the seizure of which is reported to him. The learned Magistrate in exercising his discretionary powers has made the order to release the vehicle to the Respondent on the basis that the Respondent is a bona fide purchaser and at the time of seizure, the possession of the vehicle was with the Respondent.

The Respondent had bought the vehicle in good faith. At the time he bought the vehicle he did not have any knowledge that a criminal offence had been committed in respect of the said vehicle. After he bought the vehicle the Respondent had gone to the Appellant Company to re-finance the vehicle; thus it is evident that the Respondent was a bona fide purchaser. As such he claims the vehicle as his own.

A Magistrate's Court should not be turned into a forum for the settlement of civil disputes, yet, a Magistrate making an order under Section 431 must exercise his judicial discretion in ascertaining the person entitled to possession.

In D. Jayasooriya vs. H. Warna Kulasooriya 61 N.L.R. 189 – H.N.J. Fernando J. held, the Section 419 (the same as section 431 of the Criminal Procedure Code) cannot be utilised by a "complainant" in order to obtain an order of possession from the Magistrate of any article seized from the possession of another as being stolen property, if the other person denies the theft and claims the property as his own.

It seems, the learned Magistrate having taken into consideration the above principles has made the impugned Order and therefore, I see no basis to set it aside. Therefore it is not necessary to interfere with the Judgment of the learned High Court Judge, who affirmed the Order of the learned Magistrate.

Accordingly no ground exists which justifies the intervention of this Court to set aside the Judgment of the learned High Court Judge dated 11/12/2006 and the Order of the learned Magistrate dated 15/09/2005.

For the above reasons I hold that there is no merit in this Appeal and dismiss it.

JUDGE OF THE COURT OF APPEAL

P.R.Walgama, J.

I agree

JUDGE OF THE COURT OF APPEAL

Appeal dismissed.