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

In the matter of an Appeal under Article 154(P) and 138 of the Constitution of the Democratic Republic of Sri Lanka read with High Court of Special Provisions Act Number 19 of 1990 from the High Court of Negombo No. 222/13.

CA (PHC) 41/14
H.C. Negombo
Case No-RA 222/2013
M.C. Wattala Case No-63301/11

OIC
Police Station,
Wattala

Complainant

Vs.

1. Gihiniarachigey Chanaka Senadira
No. 68/1,Kandaliyadda Paluwa,
Ragama.

Accused

2. Koshiba Finance (Pvt) Ltd,
26 Kanuwa, Kandy Road,
Nittambuwa.

Claimant

And Now

Koshiba Credit Finance (Pvt) Ltd
(Koshiba Finance (Pvt) Ltd)
No. 367 26 Kanuwa, Kandy Road,
Nittambuwa

Claimant-Petitioner

Vs

OIC
Police Station,
Wattala.

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

Complainant-Respondent

Gihiniarachigey Chanaka Senadira
No. 68/1,Kandaliyadda Paluwa,
Ragama.

Accused-Respondent

Weliwita Angoda Liyanage Palitha Perera.
No. 178 Kandaliyadda Paluwa,
Ragama.

Respondent(Registered Owner)

And Now

1. OIC
   Police Station,
   Wattala.

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

Complainant-Respondent-Respondents

Gihiniarachigey Chanaka Senadira
No. 68/1,Kandaliyadda Paluwa,
Ragama.

Accused-Respondent-Respondent

Weliwita Angoda Liyanage Palitha Perera.
No. 178 Kandaliyadda Paluwa,
Ragama.

Respondent-Respondent (Registered Owner)

Before : **H.C.J. Madawala , J**
&
L.T.B. Dehideniya, J

Counsel : Neranjan Jayasinghe for the Petitioner- Appellant
V. Hettige DSG for the Respondent

Argued on : 31/01/2017

Written Submissions on : 14 /02 /2017

Decided On : 02 /05 /2017

H. C. J. Madawala , J

This is an Appeal against the order of the Learned High Court Judge of Negombo dated 13/2/2014 and the Learned Magistrate of Wattala order dated 23/8/2011. The High Court affirmed the order of forfeiture of a vehicle No. WPJC-6572 made by the Learned Magistrate of

Wattala under section 40 of the Forest Ordinance as amended by Acts Numbers 13 of 1982,84 of 1988 and 23 of 1995.

The Claimant-Petitioner Koshiba Credit (Pvt) Ltd (hearin after referred to as the Appellant) is a Finance Company which under a lease agreement let the vehicle bearing No. WPJC-6572 to Weliwita Angoda Liyanage Palitha Perera who became the registered owner of the vehicle. The said Gihini Arachige Chanaka Senadira was charged in the Magistrate Court of Wattala bearing case No 63301/11 for transporting timber without a permit an offence punishable under section 25(1) read with section 40 of the Forest Ordinance. He pleaded guilty to the chargers. Thereafter an inquiry was held regarding the confiscation of the vehicle under section 40 of the Forest Ordinance.

The Appellant who is the absolute owner claimed the vehicle on the basis that it has taken necessary precaution to prevent the commission of an offence and the offence was committed without his knowledge and at the learned Magistrates inquiry S. Gunawardana an agent of the absolute owner gave evidence and testified that when the vehicle was given to the registered owner the company has given written

instructions to the effect that the vehicle should not be used for any illegal activities. To corroborate this evidence he produced a document to the Magistrate Court which was a certified as true copy and the court accepted it and allowed to be marked as a document marked "X3". This was marked without any objections from the Respondents or from court. The said document was not accepted on any condition that it was subjected to proof. In the said document there is clear averment giving specific instructions to the registered owner prohibiting him from using the vehicle for illegal activities. The said witness's evidence was that the company had warned the registered owner not to use the vehicle for illegal activities. This evidence has not been challenged at all.

The Learned Magistrate had not given any reasons as to why he rejected the evidence of the agent of the absolute owner which was given in the Magistrate Court. It was contended that it is highly unreasonable for the Learned Magistrate to refuse to Act on the document marked "X3" at the stage of judgment after accepting, the said document even without subject to proof. It was submitted that the above procedure amounts to an admission of the document marked "X3". In the said document the registered owner had signed and there

is no dispute that the registered owner had not signed the document and he was not aware of the document.

Accordingly it was submitted that the decision in S.C. Appeal No 105A/2008 where the requirement is to show that the absolute owner had taken all possible precautions to prevent the use of vehicle for the commission of the offence. It was submitted a clause to the effect that the vehicle should not be used for illegal activities in an agreement between the parties can be considered as a valid precaution. The registered owner too had given evidence and he had stated that the vehicle had been used without his knowledge and he had taken all the possible precautions to prevent the vehicle being used for any illegal activities.

Accordingly it was submitted that court be pleased to set aside the judgment of the Learned Magistrate and Learned High Court Judge and be pleased to release the vehicle to the absolute owner or send this case back for a fresh inquiry.

The Learned DSG making submissions stated that the appeal made by absolute owner which had been dismissed by the High Court of Negombo for the reason that the Forest Ordinance did not give a right of appeal. However subsequently the absolute owner had made a revision application to the High Court of Negombo. The Learned High Court Judge after going through all material evidence and law dismissed the revision application of the Appellant. Thereafter the Appellant had appealed to this court to set aside the order of the Learned High Court Judge.

It was submitted by the DSG that the main submissions on behalf of the absolute owner was that the absolute owner had a marked a page, of the purported agreement which contained a clause to the effect that the vehicle should not be used for any illegal purpose. The Appellant contended that the said page should be construed as the Appellant owner having taken all precautions to prevent an offence taking place. It transpired at the argument that the absolute owner at the Magistrates Court inquiry in fact marked only just one page of the document and that the Learned Magistrate directed the absolute owner to file the entire document.

It was submitted that the said document was not filed at all in the Magistrates Court. It was filed in the High Court with the revision application. It was contended that the said filling is illegal. As revision is supervisory in nature, and the Learned High Court Judge in exercising the revisionary jurisdiction can only supervise what has already been submitted in the lower court.

The said document had not been tendered in the Lower Court, hence the Learned High Court Judge in exercising revisionary jurisdiction is debarred from supervising the said document. The Learned Magistrate had called for the said document and has given the Appellant opportunity to tender it to the Magistrates Court. The Appellant failed to produce same and the Learned Magistrate made order to confiscate the vehicle on 28/7/2011. The only conclusion that one could arrive at is that there was no such agreement at the time of the commission of the offence and therefore the Appellant did not tender it. Giving evidence the Appellant stated that the registered owner was told verbally not to sell the vehicle. Hence this clearly demonstrates that the Appellant took no precaution to prevent an offence from taking place. It was submitted that in a revision being a discretionary remedy should

only be exercised in limited cases, where the order that is challenged is manifestly illegal or the procedural error appears that would shock the conscious of the court.

The Respondent submitted that the Appellant has not alleged that the order of the Learned Magistrate to be illegal, irregular, capricious or arbitrary. Hence the judgment of the Learned High Court Judge is valid in law and therefore should be allowed to stand. It was submitted that as the Appellant tender a purported agreement only at the revisionary stage, which is prohibited by law and by such tendering of documents illegally, the Appellant not only prevented the prosecution from asking questions about the agreement at the inquiry stage but also misled court in submitting same at the revision stage. The said document was not marked subject to proof and therefore should be accepted as evidence.

The Appellant filed a revision application in the High Court of Negombo and the Learned High Court Judge by his order dated 13/2/2014 affirm the order of the Learned Magistrate. The Appellant's appealed against the judgment of the High Court to the Court of Appeal being aggrieved.

It was contended by the Respondent that this is not the legal basis for the accepting evidence section 64 of the Evidence Ordinance stated that documents must be proved by primary evidence except if it cannot be obtained. The Rule regarding primary evidence being generally necessary applied only to the proof of contents of the document and not to cases involving its existence or position created by it, as to which secondary evidence would be admissible. But the contents of documents cannot be proved, as a general rule, both in English law and our law, by any evidence other that the document itself, which is primary evidence. The Learned Magistrate in fact was not satisfied with just a page of a purported agreement and directed the filing of the whole agreement, which the Appellant failed to do, for reasons best known to himself.

The law as it stands today in Sri Lanka the Claimant of a vehicle should demonstrate that he took,

1) all precautions to prevent the vehicle being used for the unlawful purpose, and
2) that the owner had no knowledge of the vehicle being used for the commission of the offence.

The legal authorities have clearly stated that there should not be made a distinction between the registered owner and the absolute owner.

According to the case Mary Matilda de Silva V. IP Police Station Habarana CA(PHC) APN 86/97 the Claimant has to prove the above ingredients on a balance of probability. The Respondent states that the Appellant made no attempt to discharge the duty cast on him.

In the case of **SC Appeal No. 120/2011** it was held,

> ".....if an offence was committed without it's (absolute owners) knowledge the absolute owner has to satisfy court that necessary precautions were taken and the offence was committed without its knowledge."

It has been clearly held that the Appellant has to demonstrate by evidence that he took all precautions to prevent an offence taking place. Further it has been held that simply informing the registered owner not to do any illegal activity with the vehicle does not suffice. The Appellant has done exactly what the law has prohibited him from doing. The Appellant has led no evidence to demonstrate that he took concrete steps to prevent the offence taking place.

In fact it is the registered owner who can give evidence and convince the Learned Magistrate that he took all precautions to prevent the offence taking place, for the simple reason that he has the vehicle in his physical custody. In this case the Appellant took it upon himself to discharge the above mentioned twofold burden. The Respondents state that the Appellant is not in a position to discharge the burden as the vehicle is not in his custody. Further all the Appellant has done is to tell the registered owner not to sell the vehicle. The humble contention of the Respondents is that the Appellant has failed to place any evidence to discharge his burden.

In the case of **Range Forest Officer Vs. Duwa Pedige Aruna Kumara and between Orient Financial Services Corporation Ltd Vs. The Attorney General, Priyasath Dep, PC, J** it was held;

> " 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 produced 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 SLR 30) 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 partern'*. 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 V. 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 433 A which was introduced by Code of Criminal Procedure (amendment) Act No 12 of 1990 section 433 A 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. (Section 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. V. Mohamed Mauloom and others ((1998) 3 SLR 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."

The registered owner who has a possession and full control of the vehicle is responsible to use of the vehicle. He is the person who is in a possession to take necessary precautions to prevent the commission of an offence. Therefore the registered owner to whom the absolute owner had granted the possession of the vehicle and who has the control of the vehicle is required to satisfy the court that he had taken all precautions to prevent the commission of the offences and that the offence was committed without his knowledge.

In this case I am of the view that the absolute owner has failed to submit the lease agreement marked "X3" which has been tendered to

High Court for perusal as such we are of the view that as absolute owner has failed to Act with due diligence in forwarding the said document to the Magistrate Court when an opportunity has been afforded to him should accept the consequences that arises out of his own actions. However in the present case we find that although the absolute owner had taken all the possible precautions to prevent the vehicle being used for illegal activities which the registered owner giving evidence had accepted. He has failed to produce the said agreement to the Magistrate. However as the said document has been tendered to the High Court in interest of justice been done we set aside the order of the High Court Judge and the Learned Magistrate and we send the case back for fresh inquiry to the Learned Magistrates Court of Wattala.

Judge of the Court of Appeal

L.T.B.Dehideniya, J

I agree.

Judge of the Court of Appeal