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

C.A Case No: **CA (PHC) 20/2013**

P.H.C Kalutara Case: **Rev/37/11**

M.C Horana Case: **45246**

Range Forest Officer
Ingiriya

Plaintiff

-Vs-

1. Watukarage Malinda Premarathna,
   Mahagedara Waththa,
   Gavaragiriya.

2. Wathukarage Nimal Amarasekera,
   Wathukaragama, Gavaragiriya.

Accused

And

In the matter of an application in terms,of Chapter XXXVIII of the code of Criminal Procedure Act No.15 of 1979,

Lanka Orix Finance Company Limited,
100/1, Sri Jayawardanapura Mawatha,
Rajagiriya.

Claimant

-Vs-

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Range Forest Officer,
Ingiriya

Plaintiff Respondent

And

In the matter of an application in terms of article 154P(3)(b) of the Constitution read with the High Court of provinces (Special Provisions) Act,

Lanka Orix Finance Company Limited,
100/1 Sri Jayawardanapura Mawatha,
Rajagiriya.

Claimant- Petitioner

-Vs-

Range Forest Officer
Ingiriya

Plaintiff- Respondent- Respondent

Hon Attorney General,
Attorney General's Department,
Colombo12

Respondent

And now

In the matter of an appeal in terms of Section 11(2) of the High Court of the Provinces (Special Provisions) Act No.19 of 1990 read with Article

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138(1) of the Cinstitution of the Democratic Socialist Republic of Sri Lanka.

Lanka Orix Finance Company Limited
100/1 Sri Jayawardanapura Mawatha,
Rajagiriya.

Claimant Petitioner Appellant

-Vs-

Range Forest Officer
Ingiriya

Plaintiff Respondent Respondent Respondent

Hon Attorney General,
Attorney General's Department,
Colombo12

Respondant Respondant

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BEFORE	:	K. K. Wickremasinghe, J. K. Priyantha Fernando, J.
COUNSEL	:	AAL Sumedha Mahawanniarachchi with Indika Bambaradeniya and Kaumadi Galagedara for the Petitioner-Claimant-Appellant N. Wickremasekara, SSC for the Respondent-Respondent
ARGUED ON	:	18.07.2019
WRITTEN SUBMISSIONS	:	The Claimant Petitioner-Appellant On 05.02.2019 The Respondent-Respondent – On 11.11.2019
DECIDED ON	:	13.12.2019

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K.WICKREMASINGHE, J.

The Claimant-Petitioner-Appellant (hereinafter named as the appellant) has 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 14.03.2013 in Case No. Rev 37/2011 and seeking to set aside the confiscation order made by the Learned Magistrate of Horana dated 08.04.2011 in Case No. 45246.

The incident in question is summarized as follows;

The lorry bearing number WPJV- 4694 (hereinafter referred to as the vehicle) had been produced in the Case No. 45246 in the Magistrate Court of Horana and it has

been released on a bond to a person named Hapan Pedige Hemantha Karunaratna by mistake. Thereafter Hapan Pedige Hemantha Karunaratna (hereinafter referred to as the purchaser) has purchased the vehicle on a loan granted by the appellant and the said vehicle had been registered under the name of the Purchaser (Hapan Pedige Hemantha Karunaratna), retaining the absolute ownership with the Appellant. Thereafter the Vehicle had become a production in the Magistrate's Court Rathnapura Case No: 74935 and the Learned Magistrate of Rathnapura had released the same to the Appellant.

Thereafter the Learned Magistrate of Horana held an inquiry after trial in the above action bearing case No: 45246 in order to decide whether the vehicle should be confiscated or not in terms of section 40 of the Forest Ordinance and the vehicle was confiscated for the commission of the offence of transportation of timber without a license on or about 28.02.2009, by the order of the Learned Magistrate of the Magistrate Court of Horana in the light of sections 25(2) and 40 of the Forest Ordinance. Both the accused pleaded guilty for the said charges in the proceedings.

Being aggrieved by the said order dated 08.04.2011 the appellant filed a revision application in the Provincial High Court of Southern Province holden in Kalutara .

The Learned High Court Judge has dismissed the matter upholding the preliminary objection that the absence of Locus Standi for the Petitioner Appellant.

Being aggrieved by the said dismissal order dated 14.03.2013 of the High court Judge of Kalutara the appellant preferred an appeal to this Court.
For the purpose of deciding the matter the relavant legal provisions should be diligently analysed.

Section 40(1) of the Forest ordinance states as follows :

> *"(1) Where any person is convicted of 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*

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(b) all tools, vehicles, implements, cattle and machines used in committing such offence,

shall in addition to any other punishment specified for such offence, be confiscated by Order of the convicting Magistrate:

Provided that in any case where the owner of such tools, vehicles, implements and machines used in the commission of such offence, is a third party, no Order of Confiscation shall be made if such owner proves to the satisfaction of the Court that he had taken all precautions to prevent the use of such tools, vehicles, implements, cattle and machines, as the case may be, for the commission of the offence.".

The Learned Magistrate in his order dated 08.04.2011 has stated as follows,

"නමුත්, ඉසවුගත වරද සිදුකරන ලද දිනය එනම් 2009.02.28 වන දිනයෙහි අංක - WPJV 4694 දරණ ලොරි රථයේ ලියාපදිංචි අයිතිකරු වශයන් සිට ඇත්තේ උඩගම ලියනගේ උපුල් ශාන්ත සහ එවකට පරම අයිතිකරු වශයෙන් කල්බදු පහසුකම් ලබා දී ඇති කළුතර ද හිනෑන්ස් ආයතනය මෙම වාහනය සම්බන්ධයෙන් ඉල්ලීමක් සිදු නොකරන බව අධිකරණයට දන්වා ඇත. ඒ වෙනුවට අදාල වාහනය සම්බන්ධයෙන් ඉල්ලීමක් කර ඇත්තේ , ලංකා ඔරෙක්ස් ලීසිං සමාගම මගිනි. ඒ අනුව ඔවුන්ගෙන් සාක්ෂි කැඳවා ඇති අතර, එම සාක්ෂි වලින් අනාවරණය වී ඇත්තේ ලංකා ඔරෙක්ස් ලීසිං සමාගම විසින් අදාල වාහනය සඳහා මූල්‍ය පහසුකම ලබා දී ඇත්තේ, 2009.09.22 හපන් පේඩිගේ හේමන්ත කරුණාරත්න යන අයට බවයි. ඒ අනුව එම සාක්ෂි තුලින් අධිකරණයට අනාවරණය වී ඇත්තේ, අදාල වරද සිදුකරන ලද දිනයේ අංක WPJV4694 දරණ වාහනය සම්බන්ධයෙන් ලංකා ඔරෙක්ස් ලීසිං සමාගමට හෝ ඔවුන් මූල්‍ය පහසුකම ලබා දී ඇති හේමන්ත කරුණාරත්න නැමත්තා කිසිදු අයිතියක් දර නොමැති බවයි. එබැවින් ඔවුන්ට මෙම නඩුවට අදාළ වාහන විමසීම තුලින් ඉසවුගත වාහනය ඉල්ලා සිටීමට ඔවුන්ට නෛතික ස්ථානීය භාවයක් නොමැති බව තීරණය කරමින් අදාළ වාහනය රාජසන්තක කරමි."

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It is noteworthy to note that at the time the alleged offence was committed on 20.02.2009, the registered owner of the vehicle was one Udagama Liyanage Upul Shantha and the absolute ownership was vested with Kalutara Finance.

In this case The Learned Magistrate provided an opportunity to the current absolute owner to participate in the inquiry and a representative of the company gave evidence. After the inquiry, the learned Magistrate confiscated the vehicle since the Learned Magistrate was of the view that in terms of the lease agreement the absolute owner can recover the loss from the new registered owner and hence, the confiscation of the vehicle would not amount to any unreasonable effect on the finance company.

In order to determine the fact whether the Learned Magistrate's order to confiscate the vehicle and Learned High court Judge's order affirming the Learned Magistrate's order is correct, the intention of the legislature in relation to the section 40 of the Forest Ordnance should be considered.
In the case of **Oriental Finannces Corporation Ltd v. Range Forest Officer (SC Appeal 120/11)** it has been stated that:

> *"Illicit felling and removal of timber is considered a serious offence by the State as it results 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.*

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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."

In the case of **Sharvananda, J. in Manawadu v. Attorney General (1987 2 SLR30)** It was held that:

"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 above case has been followed by the supreme court and 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.

Then it should be determined the owner of the said vehicle. In the case of vehicles let under hire -purchase or lease agreements there are two owners, namely the registered and the absolute owner.

In the landmark case of **The Finance Private Ltd. v Agampodi Mahapedige Priyantha Chandana and others in Supreme Court Appeal No.105A/2008** decided on 30.09.2010 Her Ladyship the Chief Justice Shirani Bandaranayake has stated

"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

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therefore 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."*

It is important 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). 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)

In the case of **Oriental Finances Corporation Ltd v. Range Forest Officer (SC Appeal 120/11)**, it has been stated that:

"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

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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."

Besides, 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. Accordingly, it would be necessary for the 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.

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In the case **of Mary Matilda Silva, V. P.H Dę Silva [CA (PHC) 86/971]**Sisira De Abrew, J has stated that,

> *"For these reasons I hold that giving mere instructions is not sufficient to discharge the said burden. She must establish that genuine instructions were in fact given and that she took every endeavor to implement the instructions..."*

However, Section 40 of the principal enactment has been amended by the repeal of subsection (1) and thereby the petitioner must only prove that she has taken necessary precautions to avert such wrongdoing.

In the case of **W. Jalathge Surasena V. O.I.C, Hikkaduwa and 3 others [CA (PHC) APN100/2014]**, it was held that a mere denial by the registered owner of the fact that he did not have knowledge of the alleged commission is not sufficient. During the cross questioning of the vehicle inquiry the witness who testified, namely, Lahiru Kanishka Subhasinghe, an officer from the appellant's company testified that the absolute owner did not have the knowledge of the case No: 45246, in the Magistrate Court of Horana stating that Hemantha Karunaratne did not disclose regarding the alleged cases pending in courts in relation to the vehicle when he applied for the loan. In the brief (page 88) it is stated that :

> ප්‍ර : ඔබ සමාගමට ලක්ෂ 12 1/2ක් නිකුත් කලේ මේ නඩුව ගරු අධිකරණයේ පවතිද්දී කියල දන්නවාද?
> උ : මුලින් දැන හිටියේ නැහැ. නඩුවට සම්බන්ධ වූ පසුව දැනගත්තා

The facts of the case disclose that, the absolute ownership of the vehicle has been vested with Kalutara Finance PLC and the registered ownership with Udagama Liyanage Upul Shantha. The appellant has granted a loan to Hapan Pedige Hemantha who has subsequently kept the vehicle in question as asequrity with the appellant's company in order to obtain a loan worth of Rs. 1,250,000/=. The Appellant has granted the loan on 22.09.2009 , after 7 months of commission of the offence. Furthermore the witness has not been able to establish the fact that the absolute owner had done a reasonable inquiry as to the vehicle and its whereabouts and uses. The brief (page 87 and 88) state as follows:

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"ප්‍ර : මෙම වාහනයට ණය මුදල නිකුත් කරන්න ඉස්සර වෙලා ඔබ සමාගම මගින් සොයා බැලුව කිව්වොත් වරදකට සම්භන්ද වෙලා තියනවා කියලා?
උ : ඒව සිදු කරන්නේ ශාඛාව මගින් සිදු කරන්නේ
ප්‍ර : ඔබ සමාගම ලබාගෙන තියනවද මෝටර් රථ ප්‍රවාහන දෙපාර්තමේන්තුවෙන් වාර්තාවක්? මේ වාහනය වරදකට සම්බන්ධ නැහැ කියලා.
උ : ඒ පිළිබඳව මම දන්නේ නැහැ. අවශ්‍ය නම් සොයා බල ඉදිරිපත් කරන්න පුළුවන්."

It has been established the fact that the absolute owner had never taken any reasonable precautions in order to prevent the commission of an offence mere denial of the knowledge of the offence does not do not discharge the vehicle owner from taking all possible preventive measures to prevent commission of any offence as per the case **W. Jalathge Surasena V. O.I.C, Hikkaduwa and 3 others [CA (PHC) APN 100/2014]**, it was held that:

"...A mere denial by the of Registered Owner of the fact that he did not have knowledge, of the alleged commission is not sufficient as per the principle laid down in the line of authorities regarding the confiscation, of a vehicle which had been used for a commission of an offence for an unauthorized purpose..."

I observe that it is evident that the petitioner had failed to take all reasonable precautions to ensure the said vehicle was not used in commission of the offence, since merely instructing the accused to refrain from partaking in illegal activities does not suffice in ensuring the proper use of a vehicle.

In this case the Learned Magistrate and the High Court Judge have taken up the positions that the Appellant does not have the Locus Standi to maintain an action. The Learned High Court Judge has stated in the order dated 2013.03.14, as follows

"ඒ අනුව අධිකරණයට අනාවරණය වී ඇත්තේ එකී වාහනය සම්බන්ධයෙන් ලංකා ඔරික්ස් ෆයිනෑන්ස් කම්පනි ලිමිටඩ් සමගම හෝ ඔවුන් මූල්‍ය පහසුකම් ලබා දී ඇති හපන් පේඩිගේ හේමන්ත කරුණාරත්න නැමැත්තා කිසිදු අයිතියක් දරා නොමැති බවයි. එබැවින් ඔවුන් හට මෙම නඩුවට අදාල විමසීමට ඉසවුගත වාහනය ඉල්ලා

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සිටීමට නෛතික ස්ථානීයභාවයක් නොමැති බව තීරණය කොට අදාළ වාහනය රාජසන්තක කොට ඇත."

In the light of the abovementioned reasons it is my conclusion that the Appellant does not have any Locus Standi to cliam as prayed in the petition. I find that the order of the learned Magistrate confiscating the vehicle is in accordance with the law. We affirm both orders by the Learned Magistrate of the Magistrate's Court Horana and the Learned High Court Judge Kalutara dated on 08.04.2011and 14.03.2013.

Accordingly the appeal is dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Priyantha Fernando, J
I agree,

JUDGE OF THE COURT OF APPEAL

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