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

In the matter of an appeal from the Provincial High Court of Sabaragamuwa holden in Ratnapura preferred in terms of Article 138 to be read with Article 154P (6) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Range Forest Officer
Range Forest Office,
Rakwana

Complainant

CA No: CA (PHC) 183/2016
HC Ratnapura(REV) No: RA 54/14
MC Rakwana: 52522

VS

1. Serasinghe Pathiranage Sanjeewa Sampath Chathuranga
   No.334, Aluthpara,
   Atakalampanna

2. Basnagodage Sumanapala
D.M.D. Stores,
Atakalampanna.

Accused

Udiyawela Hakiringe Pushpa Kumara Jayasinghe,
No.22, Ambalanwatta,
Atakalanpanna.

Registered Owner-Claimant

And then between

Udiyawela Hakiringe Pushpa Kumara Jayasinghe,
No.22, Ambalanwatta,
Atakalanpanna.

Registered Owner-Petitioner

1. Range Forest Officer
Range Forest Office,
Rakwana.

Complainant-Respondent

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

Respondent

3. Serasinghe Pathiranage Sanjeewa Sampath Chathuranga
   No.334, Aluthpara,
   Atakalampanna

4. Basnagodage Sumanapala,
   DMD Stores,
   Atakalanpanna.

Accused-Respondent

And now between

Udiyawela Hakiringe Pushpa Kumara Jayasinghe,
No.22, Ambalanwatta,
Atakalanpanna.

Registered Owner Claimant-Petitioner-Appellant

Vs

1. Range Forest Officer
   Range Forest Office,
   Rakwana.

Complainant-Respondent-Respondent

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

Respondent-Respondent

Before	:	**K.K Wickremasinghe,J** **Devika Abeyratne,J**
Counsel	:	Migara Doss with Dinesh De Silva for the Petitioner-Appellant Chathuri Wijesuriya SC for the AG
Written Submission on	:	14.05.2020(by the Respondent) 30.07.2020(by the Petitioner-Appellant) 02.05.2020(by the Petitioner-Petitioner)
Decided On	:	03.09.2020

Devika Abeyratne, J

The appellant *Udiyawela Hakirinige Pushpa Kumara Jayasinghe* has preferred this appeal seeking to set aside the order of the learned High Court Judge of *Ratnapura* dated 01.12.2016 and the order of the learned Magistrate of *Rakwana* dated 22.01.2014 wherein the vehicle in issue was confiscated.

The two accused respondent- respondents (hereinafter sometimes mentioned as the accused) were charged for committing an offence under section 25 (2) of the Forest Ordinance to be read with section 40 (1) (b) of the said Act for transporting 30 logs of timber without a valid permit.

They were convicted on their own plea and a fine of Rupees 20,000 each was imposed, carrying a default sentence of one month's simple imprisonment.

At the vehicle inquiry in respect of the Lorry bearing registered number, WACA 2859, the registered owner claimant petitioner appellant (hereinafter referred to as the appellant) who claimed the vehicle as the owner of the vehicle, on 09.01.2013 has concluded his evidence. When the case was fixed for further inquiry for 22.01.2014, due to the non-appearance of the appellant on that day, the learned Magistrate has held that it indicated his disinterest in the proceedings and made order to confiscate the lorry.

Aggrieved by the order of the learned Magistrate a Revision Application HCR/RA/54/2014 was preferred to the High Court of *Ratnapura*. The preliminary objection raised on behalf of the State on the maintainability of the application due to the delay in filing the Revision Application was overruled on 5.11.2015 on the basis that the property rights of the petitioner should not be lightly measured and the petitioner was allowed to proceed with the application.

Subsequently, after inquiry the Revision Application was dismissed on 01.12.2016 by the High Court.

Aggrieved by the dismissal of the Revision Application, the appellant has preferred this appeal.

The Appellant has invited this Court to address the following questions of law for determination.

i. Whether the petitioner's application should be dismissed on ground of *laches*;
ii. Whether the Learned magistrate had erred in deciding to confiscate the subject vehicle without considering the evidence already placed on record.

It is noted that the Revision Application to the High Court of *Ratnapura* is submitted on 20.10.2014 approximately 10 months after the order of the learned Magistrate dated 22.01.2014. The Preliminary Objection by the State Counsel was that the applicant

due to the delay in submitting same was guilty of *laches* and the application should be dismissed *in limine.*

However, as stated above, by order dated 15.11.2015 the Preliminary Objection was overruled and that order was not canvassed. Thus, the necessity of re- visiting that issue does not arise.

The question to be determined by this Court is whether the order of the learned Magistrate should be allowed to stand.

The amendment to Section 40 (1)(b) of the Forest Ordinance provides as follows;

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 the offence has been committed, and

(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 where the owner of the vehicle 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.

Thus, it is apparent that there is provision for the owner of a vehicle used in the commission of an offence relating to the Forest Ordinance to satisfy Court that he/she has taken all necessary precautions to prevent the commission of such offence.

Complying with the said provision, the learned Magistrate has given an opportunity to the appellant to show cause why the alleged vehicle should not be confiscated. Accordingly, the appellant has testified and his evidence has been concluded on 9.1.2013 and the inquiry has been postponed for 20.03.2013.

On a perusal of the Journal Entries it appears that on the dates fixed for inquiry, 20.03.2013 and 24.04.2013, the registered owner (the appellant) has not appeared in Court. However, on 21.08.2013 he has been present and the inquiry has been re-fixed for the 22.01.2014 on which day the appellant has again failed to appear in Court and his Attorney has informed he has no instructions from his client and the impugned order has been made forthwith which reads as follows;

පැමිණිල්ල වෙනුවෙන් අතිරේක අඩවි වන නිලධාරී,

බී ඒ කේ බමුණුසිංහ මහතා පෙනී සිටී.

ලියාපදිංචි අයිතිකරු පෙනී නොසිටී.

අද දින වාහනයේ වැඩිදුර විමසීමට නියමිතව ඇත.

පෙර දින ලියාපදිංචි අයිතිකරු වෙනුවෙන් පෙනී සිටියමුත් අද දින උපදෙස් නොමැති බව නීතිඥ චමත් සුරවීර මහතා දන්වයි.

2013.07.24 වන දින වැඩිදුර විමසීම සඳහා ලියාපදිංචි අයිතිකරු ඉදිරිපත් වී නැත 2013 03 20 දිනද ලියාපදිංචි අයිතිකරු පැමිණ නොමැති බව පෙනී යයි 2013. 8.21 වන දින වැඩිදුර සාක්ශි කැඳවීමට දින පතයි. නමුත් අද දින ලියාපදිංචි අයිතිකරු පෙනී නොසිටී.

ඉහත කරුණු අනුව වැඩිදුර විමසීම සම්බන්ධයෙන් ලියාපදිංචි අයිතිකරුගේ උනන්දුවක් නොමැති බව පෙනී යයි. ඒ මත ඩබ්ලිව්. ජී. එල්. ඒ .2859 දරන රථය රාජසන්තක කරමි.

එකී රථය බැදුම්කරයක් මත මුදාහැර ඇති බව පැමිනිල්ලෙන් දන්වයි. ඒ අනුව අභියාචනයකට යටත්ව එකී රථය අධිකරණයට බාරදීමට ලියාපදිංචි අයිතිකරුට නියම කරමි. ඒ සඳහා නොතිසියක් නිකුත් කරන්න.

කැඳවන්න 2014.03.05

The learned Magistrate who made the order of confiscation is not the learned Magistrate before whom the evidence of the registered owner has been recorded.

It is clear from the journal entries that the appellant has not been vigilant about the proceedings before Court and there is slackness, negligence and neglect on his part. This may be due to the fact that the vehicle in question being released to him on a bond.

However, the case record bears testimony to the fact that an inquiry was held according to law and the main claimant in an inquiry of this nature has concluded his evidence.

On a perusal of the order of the learned Magistrate it is patently obvious that the evidence of the appellant has not been considered at all. It is not clear whether the learned Magistrate was

aware that there was existing evidence of the claimant before court, which the Court is bound to consider before making an order of confiscation.

It appears from the order dated 22.01.2014, that confiscation of the said vehicle is based only on the ground of the appellant not being present on the inquiry dates. This clearly is an erroneous order which is a question of law the appellate court has to consider. It is obvious that the failure of the learned judge not considering the evidence before Court can pave way to a grave miscarriage of justice.

It is regrettable that the learned Magistrate who made order on 22.01.2014 has not acted judicially by not considering the evidence recorded before his predecessor before making the order to confiscate the vehicle. There is no evaluation at all of the available evidence. Thus, it is my considered view that the learned judge has erred by ignoring the evidence on record and the failure to evaluate that evidence which is the most important aspect in an inquiry of this nature cannot be accepted.

In the Revision Application before the High Court of *Ratnapura,* in a very short order of 2 pages, the learned High Court Judge has, agreeing with the view of the learned Magistrate affirmed the order of confiscation.

It is trite law that in a revision application the appellant is required to demonstrate the existence of exceptional circumstances.

In *Rasheed Ali Vs Mohomed Ali* (1981) 2 SLR Page 29 it was held;

> *"The powers of revision conferred on the Court of Appeal are very wide and the Court has the discretion to exercise them whether an appeal lies or not or whether an appeal had been taken or not. However, this discretionary remedy can be invoked only where there are "exceptional circumstances" warranting the investigation of the Court. Although the Courts have not attempted to define the expression "exceptional circumstances" the authorities show the guide lines which had been laid down....."*

In *Bank of Ceylon Vs Kaleel and others* 2994 1 SLR 284 , *Wimalchandra,J* has held;

> *"In any event to exercise revisionary jurisdiction the order challenged must have occasioned a failure of justice and manifestly erroneous which go beyond an error or defect or irregularity that an ordinary person would instantly react to it. The order complained of is of such a nature which would have shocked the conscience of court".*

It is apparent that the evidence of the appellant has not been considered by the learned magistrate in the instant case. The learned High Court judge has passingly mentioned about the appellant's submission that his evidence has not been considered by the learned Magistrate, not much consideration or importance has been given to that submission. For easy reference a portion of the order of the learned High Court judge is reproduced below.

මෙම නඩුවේ පෙත්සම්කරු ශ්‍රී ලංකා ප්‍රජාතාන්ත්‍රික සමාජවාදී ජනරජයේ අණ්ඩුක්‍රම ව්‍යවස්ථාවේ 154 (ග) (3) (අ) වැනි ව්‍යවස්ථාවන් සමඟ කියවිය යුතු 1990 අංක 19 දරණ පළාත්බද මහධිකරණ විශේෂ විධිවිධාන පනතේ 5 වන වගන්තිය යටතේ ප්‍රතිශෝධන අධිකරණ බලය ක්‍රියාත්මක කරවා ගැනීම පිණිස ඉල්ලීමක් කරමින් අයැද සිටින්නේ රක්වාන මහේස්ත්‍රාත් අධිකරණ නඩු අංක 52520 නඩුවේ උගත් මහේස්ත්‍රාත්තුමා විසින් 2014.01.22. වන දින අංක ඩබ්.පී.එල්.ඒ 2859 දරණ වාහනය රාජසන්තක කිරීමේ නියෝගය ඉවත් කරන ලෙසය.

පාර්ශවකරුවන් විසින් ලිඛිත දේශන ගොනුකොට මෙම ඉල්ලීම විමසීමට ගත් පසුව පෙත්සම්කරු වෙනුවෙන්ද වගඋත්තරකරු වෙනුවෙන්ද ඉදිරිපත් කර ඇති කරුණු සැළකිල්ලට ගනිමි.

එකී කරුණු සැළකිල්ලට ගැනීමේදී 2014.01.22 වන දින වාහනය රාජසන්තක නොකිරීම පිළිබඳව විමසීම පිළිබඳ අදියරේදී වාහනය ලියාපදිංචි අයිතිකරු අධිකරණයට නොපැමිණීම මත රාජසන්තක කර ඇති බවත් එහිදී ඔහු විසින් දී ඇති සාක්ෂිය සම්බන්ධයෙන් සළකා බැලීමක් කර නොමැති බවත් සඳහන් කර ඇත. එසේම වාහනයේ ලියාපදිංචි අයිතිකරුට නීතිය කාරණයක් විදියට මතුකර හැකි බවත් අභියාචනා අධිකරණ නඩු අංක 108/10 දරණ නඩුවේ තීරණය කර ඇති පරිදි වරදකරු කිරීම දෝශ සහගත නම් වාහනයේ හිමිකම් පාන ලියාපදිංචි අයිතිකරුට බලපෑමක් නොවිය යුතු බවට දක්වා ඇත.

රජයේ අධිනීතිඥ මහතා කරුණු දක්වමින් චූදිත නිරවශේෂ වරද පිළිගැනීමක් කර ඇති අතර වාහනය සම්බන්ධයෙන් විමසීමෙන් පසුව නිවරදි ආකාරයට වාහනය රාජසන්තක කර ඇති බව සඳහන් කර ඇත. වාහනය රාජසන්තක කිරීම වැලැක්වීමට පෙත්සම්කරු විසින් චූදිතයන් කැඳවා සාක්ශි මෙහෙයවීමක් කර නොමැති අතර තමා විසින් පූර්ව ආකර්ශණ ක්‍රියාමාර්ග ගත් බව නිසි ආකාරව තහවුරු කර නොමැති බව සඳහන් කර ඇත. එපමණක් නොව මෙම ප්‍රතිශ්‍රෝධන අයදුම් පත ඉදිරිපත් කොට ඇත්තේ වාහනය රාජසන්තක කර දිනයේ සිට මාස 10 ක් ප්‍රමාදව යන කරුණද පෙන්වා දී ඇත.

මෙම නඩුවේ පෙත්සම්කරුගේ වාහනය සම්බන්ධයෙන් විමසීමේදී ඔහු අධිකරණයට පැමිණීමට උනන්දු නොවීම යන කරුණද වාහනය රාජසන්තක කිරීමට හේතුවක් වශයෙන් දක්වා ඇත. මෙම ප්‍රතිශෝධන ඉල්ලීමේදී මාස 10 ක් වැනි දීර්ඝ කාලයක් ප්‍රමාද වීමට හේතුවක් පිළිගත හැකි ඇයුරින් පෙත්සම්කරු අධිකරණයට ඉදිරිපත් කර නොමැත. එසේ හෙයින් එකී කරුණු සැළකිල්ලට ගෙන ප්‍රතිශෝධන ඉල්ලීම ප්‍රතික්ෂේප කරමි.

It is my considered opinion that the learned High Court judge has not given his mind to the fact that a vehicle confiscation inquiry had commenced and that the registered owner who has to satisfy Court why the vehicle should not be confiscated, has concluded his evidence and that there was a legal duty and an obligation on the learned Magistrate to consider the existing evidence before making the order to confiscate the vehicle.

The learned High Court judge has without considering this most important issue, has gone on to consider the delay in submitting the Revision Application also as a ground to dismiss same. It has been held many authorities that delay alone ought not to be a ground of dismissal of a revision application when important legal issues are to be considered.

As stated earlier in the order, the issue of *laches* was resolved by the order dated 5.11.2015 of the predecessor High Court judge and as that order was not canvassed before a higher forum, the High Court judge was not entitled to revisit same. Therefore, there was no necessity for the learned High Court Judge to consider *'laches'* as a ground to dismiss the revision application.

The appellant has referred the following authorities for consideration of Court.

Caroline Nona and others vs Singho and others (2005) 3 SLR 176 where it held;

> *If the impugned order or part of the judgment is manifestly erroneous and is likely to cause grave injustice the court should not the application on the ground of malice alone.*

Biso Menike Vs Cyril de Alwis (1982) 1 SLR 378

> *"....when the court has examined the record and is satisfied the order complained of manifestly erroneous or without jurisdiction the Court would be loath to allow the mischief of the order to continue and reject to application simply on the ground of delay, unless there are very extraordinary reasons to justify such rejection. Where the authority concerned has been acting altogether without basic jurisdiction, the court may grant relief in spite of the delay unless the conduct of the party shows that he has approbated the usurpation of jurisdiction. In any such event, the explanation of delay should be considered sympathetically."*

In the above circumstances, the questions of law posed by the appellant are answered as follows;

1. The petitioner's application should not be dismissed on the ground of *laches*.

2. The learned Magistrate has erred by not considering the evidence on record when he decided to confiscate the subject matter.

Considering the circumstances of the instant case, I am of the view that the confiscation of the vehicle was not on a legally accepted premise and therefore, the order cannot be allowed to stand. As such the order of the learned High Court judge dated 01.12.2016 and the order of the learned Magistrate dated 22.01.2014 is set aside.

The learned Magistrate is directed to consider the evidence of the appellant recorded at the claim inquiry which is on record and make an appropriate order according to law.

JUDGE OF THE COURT OF APPEAL

K.K.Wickremasinghe,J

I Agree

JUDGE OF THE COURT OF APPEAL