

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

Supreme Court: SC (SPL)LA 181/11
Court of Appeal:CA(PHC)APN45/11
Provincial High Court of Sabaragamuwa
sitting in Embilipitiya Case No. RA 24/2009
M.C Embilipitiya Case No: 11982
Supreme Court Appeal No.43/2012

M.H.Harison
Officer in Charge
Police Station Kuttigala,
Kuttigala

Complainant

1. Baranaduge Asanka
No.635, Kachchigala
Thunkama
2. Baranaduge Samantha Gunasiri
705, Kachchigala,
Thunkama

Accused

G.Susantha
No.19/A, Siyambalape South
Siyambalape

Claimant Registered Owner

In the matter of a Revision application in
terms of Article 138 of the constitution read
with High Court (Special Provisions) Act
No.19 of 1990

Ceylinco Leasing Corporation Limited
Of No.97, Hyde Park Corner,
Colombo 02
Now Head office at
No.283, R.A.De Mel Mawatha
Colombo 03.

Claimant Absolute Owner

Ceylinco Leasing Corporation Limited
Of No.97, Hyde Park Corner,
Colombo 02
Now Head office at
No.283, R.A.De Mel Mawatha
Colombo 03.

Claimant Absolute Owner Petitioner

Vs

1. M.H.Harison
Officer in Charge
Police Station Kuttigala,
Kuttigala

Complainant Respondent

2. Baranaduge Asanka
No.635, Kachchigala
Thunkama
3. Baranaduge Samantha Gunasiri
705, Kachchigala,
Thunkama

Accused Respondents

4. G.Susantha
No.19/A, Siyambalape South
Siyambalape

Claimant Registered Owner Respondent

5. Hon. Attorney General
Attorney General's Department
Colombo 12.

Respondent

Ceylinco Leasing Corporation Limited
Of No.97, Hyde Park Corner,
Colombo 02
Now Head office at
No.283, R.A.De Mel Mawatha
Colombo 03.

Claimant Absolute Owner Petitioner

Vs

1. M.H.Harison
Officer in Charge
Police Station Kuttigala,
Kuttigala

Complainant Respondent Respondent

2. Baranaduge Asanka
No.635, Kachchigala
Thunkama
3. Baranaduge Samantha Gunasiri
705, Kachchigala,
Thunkama

Accused Respondents Respondent

4. G.Susantha
No.19/A, Siyambalape South
Siyambalape

**Claimant Registered Owner
Respondent- Respondent**

5. Hon. Attorney General
Attorney General's Department
Colombo 12.

Respondent- Respondent

AND NOW BETWEEN

**In the matter of an application for Special Leave to
Appeal under Article 128(2) of the Constitution**

Ceylinco Leasing Corporation Limited
Of No.97, Hyde Park Corner,
Colombo 02
Now Head office at
No.283, R.A.De Mel Mawatha
Colombo 03.

**Claimant Absolute Owner Petitioner
Petitioner- Petitioner**

Vs

1. M.H.Harison
Officer in Charge
Police Station Kuttigala,
Kuttigala

**Complainant Respondent- Respondent
Respondent**

2. Baranaduge Asanka
No.635, Kachchigala
Thunkama

3. Baranaduge Samantha Guanasiri
705, Kachchigala,
Thunkama

Accused Respondent- Respondent[-Respondents

4. G.Susantha
No.19/A, Siyambalape South
Siyambalape

**Claimant Registered Owner Respondent
Respondent - Respondent**

5. Hon. Attorney General
Attorney General's Department
Colombo 12.

Respondent -Respondent -Respondent

BEFORE: Buwaneka.Aluwihare, PC J.
Priyantha Jayawardena, PC, J. &
Anil Gooneratne, J.

COUNSEL: Javed Mansoor for the Claimant-Absolute Owner-Petitioner-Petitioner-
Petitioner instructed by Damayanthi Kasthuriarachchi
A.R.H.Bary, SSC for the Attorney General.

WRITTEN SUBMISSIONS

FILED ON: 30.03.2012, 13.03.2014 (by Claimant-Absolute Owner-Petitioner-
Petitioner-Petitioner)
15.11.2013 (by Respondent-Respondent-Respondent)

ARGUED ON: 08.12.2016

DECIDED ON: 07.12.2017

ALUWIHARE, PC, J:

In this matter Court granted special leave to appeal on the following questions of law:

- (i) Does the word ‘owned’ referred to in Section 40 of the Forest Ordinance (Prior to its amendments) exclude an absolute owner?
- (ii) Is the narrow interpretation given by the Court of Appeal to the word ‘owned’ in Section 40 of the Forest Ordinance (prior to the amendment) directly in conflict with Section 433A of the Criminal Procedure Code?

Background

The Accused-Respondent-Respondent-Respondents (hereinafter referred to as the Accused) were charged before the Magistrate’s Court of Embilipitiya for violating provisions of the Forest Ordinance, allegedly transported timber without a valid permit in the lorry bearing registration number WP LB 9935.

When the matter was taken up before the said Magistrate’s Court on 7.10.2008, both accused pleaded guilty and the Magistrate having proceeded to convict them, had imposed a fine of Rs.10,000 on each of the accused.

As the lorry alleged to have been used in the illicit transportation of timber also had been taken into custody, the Magistrate made further order fixing an inquiry, in order to decide as to whether the lorry concerned should be forfeited under the provisions of the Forest Ordinance.

At the inquiry, an Executive Officer of the Ceylinco Leasing Corporation Ltd, (hereinafter referred to as Ceylinco Leasing) the present claimant- absolute

owner-Petitioner-Petitioner-Petitioner (hereinafter referred to as the absolute owner) giving evidence stated, that the registered owner of the lorry G.Susantha had entered into a hire purchase agreement with Ceylinco Leasing in 2006. The witness made an application to the court to have the vehicle released to the absolute owner, Ceylinco Leasing, stating that the registered owner had gone overseas after the detection of this case and further that he had defaulted in the payment of installments. The application to desist from forfeiture was made on the basis that Ceylinco Leasing, as the absolute owner, had taken all reasonable precautions to prevent the lorry concerned being used for any illegal activity.

The Magistrate while holding, that at the time relevant to the case, it was the registered owner who had possession of the vehicle and it was incumbent on the registered owner to satisfy court that he had taken all reasonable precautions to prevent the lorry being used for any illegal activity, proceeded to make order forfeiting the lorry to the State in terms of Section 40 of the Forest Ordinance. The order of forfeiture by the magistrate had been affirmed by the Provincial High Court of Embilipitiya in exercising its revisionary jurisdiction, mainly on the same grounds averred to by the learned magistrate.

Aggrieved by the order made by the High Court, the Appellant invoked the revisionary jurisdiction of the Court of Appeal and when the matter was supported for notice, by its reasoned-out order, the Court of Appeal refused to issue notice on the Respondents.

The gravamen of Ceylinco Leasing, the present Appellant's complaint is, that the Court of Appeal, did not consider the "absolute owner", in the instant case Ceylinco Leasing, as the 'owner' of the lorry concerned for the purposes of Section 40 of the Forest Ordinance (as it stood before the amendment) .

At the outset I wish to refer to the significance of Section 40 of the Forest Ordinance.

Forest Ordinance No.16 of 1907, is described in its long title as “an Ordinance to consolidate and amend the law relating to forests and felling and transport of timber”. Some of the provisions of the Act reflects the choice of policy, in the instant case it is undoubtedly designed with a view to protect the environment.

Large scale deforestation has resulted in an ecological imbalance and which has impacted adversely on the environment and threatens the very survival of all living beings. It is a known fact that illicit felling of trees in forests has for long been a major threat to the dwindling forest cover in the country. The legislative response has been the extensive provisions enacted to regulate the transit of timber and forest produce under the provisions of the Forest Ordinance.

Section 40 of the Forest Ordinance provides for the confiscation of the conveyance used to transport the illicit timber and the provision to my mind is intended to strike at the means of transportation by providing for the confiscation of the conveyance used to transport the illicit timber, and is both a logical and legal response to the problem of illicit felling. Even in the instant case the two persons who were charged happened to be the driver of the lorry and another person who had been seated next to the driver. Although they were in physical possession of the illicit timber, may have been employees of the “owner” of the lorry. Thus not much deterrence is achieved by imposing punishment on the persons who were in actual physical possession of illicit timber, when in most cases, the owner is behind the illegal operation.

The term “owner” of the conveyance for the purpose of Section 40 of the Forest Ordinance must be interpreted so as to ensure that the objective of the legislature is achieved and not render nugatory.

The plain reading of section 40 gives the impression that forfeiture provided in terms of the said section is by operation of law, contingent upon the court finding the accused guilty. This court however in the case of *Manawadu Vs. The Attorney General* 1987 2 SLR 30 held that the owner of a lorry, who is not a party to the case is entitled to be heard on the question of forfeiture of the vehicle. The jurisprudence created in the case of *Manawadu* (supra) had been followed since then and now it has become trite law that the owner must be afforded an opportunity to be heard before an order of forfeiture is made under section 40 of the Forest Ordinance.

The issue that needs to be considered is whether the “absolute owner” can be considered as the “owner” for the purpose of the section 40 of the Forest Ordinance. At the hearing of this appeal the learned counsel for the Appellant relying on the decision of *Manawadu Vs. Attorney General* (supra) contended, as observed by Justice Sharvananda (as he was then), that section 40 of the Forest Ordinance as amended, was not intended to deprive an owner of his vehicle, used by the offender in committing the forest offence without his (owner’s) knowledge and without his participation. His Lordship did not make a distinction as to the meaning of the word “owner” in the judgment, understandably so as the term “absolute owner” crept in to our law by an amendment to the Criminal Procedure Code only in 1990, three years after the case of *Manawadu*(supra) was decided.

The only definition that was available to the term owner is section 16 of the Motor Traffic Act which states:

*“Any person who for the time being is **the registered owner**, shall for the purpose of any proceedings under this Act, be **deemed to be the owner** of that motor vehicle”
(emphasis added)*

It was further contended on behalf of the Appellant that the word “owner” includes the absolute owner as well, for the purposes of section 40 of the Forest Ordinance.

In this context the learned counsel for the Appellant referred to section 433A of the Code of Criminal Procedure Act no.15 of 1979 as amended.

Section 433A reads as follows:

“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”.

Although not relevant in deciding the issues in this case, reference must be made to the amendment to the Forest Ordinance that was brought in 2009 by Act No.65 of 2009 which made Section 433A of the Criminal Procedure Code non-applicable to instances where the accused is found guilty or the persons accused plead guilty to the charges. The amendment is as follows:

40B. The provisions of subsections (1) and (2) of section 433A of the Code of Criminal Procedure Act, No. 15 of 1979, as amended by Act, No. 12 of 1990, shall not apply to or in relation to any person who pleads guilty to, or is found guilty of a forest offence."

The amendment referred to has no application to the instant case for the reason that the incident germane to the present application is anterior to the amendment and in that context, one could argue, the applicability apart, Section 433A was in force when the inquiry relating to confiscation of the lorry was held.

Two matters of significant relevance have to be taken into consideration in deciding the issue raised on behalf of the Appellant, i.e., application of Section 433A.

One is the applicability of the provisions of the Code of Criminal Procedure Act in relation to a 'forfeiture inquiry' under Section 40 of the Forest Ordinance and the other is, whether Section 433A has an application, when the issue before court is to decide whether an order of forfeiture should be made, as oppose to deciding who is entitled to possession.

Section 5 of the Criminal Procedure Code stipulates that:

All offences -

- (a) Under the Penal Code,
- (b) Under any other law, unless otherwise specially provided for in that law or any other law, Shall be investigated, inquired into, tried and otherwise dealt with according to the provision of this Code (emphasis added).

Thus, the application of the provisions of the Code of Criminal Procedure Act is qualified in that the provisions of the Code of Criminal Procedure would not have any application if a law carries special provision in relation to a particular aspect.

In my view Section 40 of the Forest Ordinance is a stand-alone provision which is triggered when a person accused of an offence under the Forest Ordinance is convicted and can be applied and dealt with, without recourse to the provisions of the Code of Criminal Procedure.

Secondly, Section 433A is a provision applicable when dealing with disposal of property by a Magistrate and a process which does not require the Magistrate to determine the “ownership” of the property. Provisions of Chapter XXXVIII of the Code of Criminal Procedure focuses on delivering the property to the person who is entitled to possession of such property.

It would be pertinent to note that in the instant case the magistrate in fact had acted under section 433A of the Code and had correctly released the possession of the vehicle to the absolute owner the present Appellant on 2.09.2008 on a bond. This order, the magistrate had made, in terms of Chapter XXXVIII of the Code, which deals with disposal of productions.

In contradistinction, Section 40 of the Forest Ordinance requires the Magistrate to decide as to why the vehicle should not be forfeited, once the person accused of the offence is convicted.

Reginald F Dias in his book ‘A commentary on the Ceylon Criminal Procedure Code’ Vol II at page 1166, commenting on the chapter XL of the then Criminal Procedure Code that dealt with disposal of property (the Chapter in the present Code is XXXVIII) states that “the word ‘disposal’ does not include confiscation or forfeiture, and goes on to say a provision of adjective law cannot authorize an encroachment on the legal rights of the owner of the property. As held in the case of ***R v Ran Menika* 28 N.L.R 348.** “forfeiture is a punishment. Apart from section 417 (of the Criminal Procedure Code), which authorizes

destruction of property in certain cases, the provisions of Chapter XL. give powers to **regulate the possession of property**. (emphasis added) Justice Dalton went on to hold that "... the better authority appears to be that "disposal" does not include confiscation or forfeiture, as a provision of adjective law cannot authorize an encroachment on the legal rights of the owner of the property."

As such I hold that the interpretation given by the Court of Appeal to Section 40 of the Forest Ordinance is not in conflict with Section 433A of the Criminal Procedure Code. When the agreement is entered upon between the Leasing Company (the absolute owner) and the Registered owner, the Leasing Company loses not only the possession of the vehicle but also control of the vehicle as well and as to how and when the vehicle is used is entirely in the hands of the registered owner.

The learned counsel for the Appellant contended that under our common law the absolute owner is the real owner of the vehicle and referred to the text, Roman Dutch Law by Professor R.W. Lee where it has defined ownership to be; Dominion or ownership is the relation protected by law in which a man stands to a thing which he may (a) possess (b) use and enjoy (c)alienate.

It is to be noted that the absolute owner neither has possession nor the ability to use and enjoy the vehicle and in a leasing agreement the absolute owner voluntarily parts with the possession and thereby loses control over the vehicle. In my view the word "owner" as it occurs in Section 40 of the Forest Ordinance cannot be considered in isolation applying purely legal definition of the term "owner" but must be given a purposive interpretation taking into account the intention of the legislature.

As referred to earlier the objective the legislature intended to achieve was to increase the severity of punishment in respect of vehicles used for transportation. Justice Siva Selliah in the case of Manawadu v. O.I.C Police Station Udupussellewa 1985 2 S.L.R 261 held that “A consideration of all these enactments and amendments establish the need, found by the legislature to increase the severity of punishment in respect of vehicles used for transport timber and other forest produce without a valid permit”

This issue was considered by Justice Dep (as he then was) in the case of Range Forest Officer Ampara Vs. Orient Financial Services Corporation Ltd. SC Appeal 120/2011 – Supreme Court Minutes of 10.12.2013 and his Lordship held

“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 of transportation.”

By merely having a clause in small print in the (lease) agreement that the registered owner of the vehicle is required to comply with and confirm to all Rules, Regulations and laws, in my view is not adequate to prevent the commission of offences. All what the officer from the leasing company said at the inquiry was that the Company had instructed the lessee to act within the law at all times.

Having considered the foregoing, I hold that, for the purposes of Section 40 of the Forest Ordinance, the owner who has the possession and the control of the vehicle should be considered as the ‘owner’ of the vehicle.

I hold that the Court of Appeal was not in error in holding that the ‘absolute owner’ ought not to be considered as ‘owner’ of the vehicle given the facts and circumstances of this case. I further hold that the interpretation given by the Court Of Appeal to the word ‘owned’ is not in conflict with Section 433A of the Code of Criminal Procedure Act.

Accordingly, I answer both questions of law on which leave was granted in the negative and affirm the order made by the Court of Appeal in this matter.

The Appeal is dismissed and under the circumstances, I order no costs.

JUDGE OF THE SUPREME COURT.

JUSTICE PRIYANTHA JAYAWARDENA P.C

I agree.

JUDGE OF THE SUPREME COURT.

JUSTICE ANIL GOONERATNE

I agree.

JUDGE OF THE SUPREME COURT.

