# THE FINANCE COMPANY PLC V. PRIYANTHA CHANDANA AND 5 OTHERS

SUPREME COURT,
DR. SHIRANI A. BANDARANAYAKE, J.
AMARATUNGA, J. AND
EKANAYAKE, J.
S. C. APPEAL NO. 105A/2008
S.C. (SPL.) L. A. NO. 166/2008
H. C. A. NO. 131/2005 - HAMBANTOTA
M. C. NO. 61770
JULY 2ND, 2009

***Forests Ordinance - section 24 (1) b - Prohibit the transport of timber without a permit from a forest officer duly authorized to issue the same - Section 25(2) - transport of timber in Contravention of any regulation made under Section 24(1) . - Section 25(1) - penalties for the breach of any provision of, or regulation made under the Chapter (V) of the Forest Ordinance - Section 40, as amended - power of Court to confiscate timber, forest produce, vehicles used in committing such offences etc. under the Ordinance.***

At the request of the 1st respondent, the appellant, a registered Finance Company, had purchased and provided on lease the vehicle (used by the 1st respondent to transport illicit timber) to the 1st respondent. Unknown to the appellant, the Beliatta Police had arrested the 3rd, 4th, and 5th respondent for transporting timber without a lawful permit, in terms of Section 24(1)(b) and Section 25(2) of the Forest ordinance. The Beliatta Police also seized the said vehicle which had been used by the 3rd, 4th and/or 5th respondents to transport the said illicit timber. The Beliatta Police filed action against the 3rd, 4th and 5th respondents. The 3rd respondent pleaded guilty and the case was fixed for trial against 4th and 5th respondents.

A confiscation inquiry had been held regarding the lorry under the Code of Criminal Procedure Act. After inquiry the learned Magistrate made order to confiscate the said lorry used for the transport of illicit timber. The appellant being the absolute owner of the lorry filed an appeal against the Magistrate's order. The Learned Judge of the High Court after hearing the appeal dismissed the same.

The Supreme Court granted special leave to appeal against the order made by the Provincial High Court in the exercise of its appellate jurisdiction.

**Held:**

(1) It would be necessary for the owner of the vehicle to establish that the vehicle that had been used for the commission of the offence had been so used without his knowledge and that the owner had taken all precautions available to prevent the use of the vehicle for the commission of such offence. The owner has to establish the aforesaid matters on a balance of probability.

(2) 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.
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.

(3) The Learned magistrate had not erred when he held that the appellant had not satisfied Court that he had taken every possible step to prevent the Commission of the offence.

**Cases referred to:**

1. *Manawadu v. Attorney General* – (1987) 2 SLR 30
2. *Inspector Fernando v. Marther* – (1932) 1 CLW 249
3. *Sinnetamby v. Ramalingam* – (1924) 26 NLR 371
4. *Mudunkotuwa v. Attorney General* – (1996) 2 SLR 77
5. *Nizer v. I.P. Wattegama* (1978-79) SLR 304
6. *Faris v. OIC, Police station, Galenbindunuwewa* (1992) 1 SLR 167
7. *Rasiah v. Thambirak* (1951) 53 NLR 574
8. *Mercantile Investments Ltd v. Mohamed Mauloom and others* (1998) 3 SLR 32

**APPEAL** from an Order of the High Court of Hambantota.

*I.S. de Silva* with *Suren de Silva* for Claimant-Appellant-Appellant.

Riyaz Hamza, SSC, for the 6th Respondent.

*Cur.adv.vult.*

September 30th 2010

**DR. SHIRANI A. BANDARANAYAKE, J.**

This is an appeal from the order of the High Court dated 30.06.2008. By that order the High Court had dismissed the appeal instituted by the claimant-appellant-appellant (hereinafter referred to as the appellant) and had affirmed the order of the learned Magistrate dated 25.08.2005.

The appellant came before this Court against the order of the High Court on which special leave to appeal was granted on the following question:

> "Has the learned High Court Judge misdirected himself in fact and in law in failing to appreciate that in view of the fact that there was no dispute between the parties that the appellant was the absolute owner of the vehicle bearing registration No. 227-8130, the scope of the inquiry in terms of Chapter XXXVIII of the Code of Criminal Procedure Act before the Magistrate's Court, was limited to ascertain whether or not the appellant was aware or that the said vehicle has been used in connection with or participated in the commission of the offence."

The facts of this appeal, as submitted by the appellant, *albeit* brief, are as follows:

The appellant is a Registered Finance Company and is *inter alia* involved in providing leasing facilities in connection with motor vehicles at the request of its customers. The appellant is the registered absolute owner of the vehicle bearing

registration No. 227-8130, which forms the subject matter of this appeal.

On 12.06.2000 at the request of the 1st respondent-respondent-respondent (hereinafter referred to as the 1st respondent) the appellant had purchased and provided on lease the vehicle, bearing registration No. 227-8130 to the 1st respondent. Unknown to the appellant, on 20.08.2000, the Beliatta Police had arrested the 3rd and/or 4th and/or 5th respondents-respondents-respondents (hereinafter referred to as the 3rd and/or 4th and/or 5th respondent) for transporting timber without a lawful permit, in terms of section 24(1) (b) and section 25(2) of the Forest Ordinance. The Beliatta Police also seized the said vehicle bearing registration No. 227-8130, which had been used by the 3rd and/or 4th and/ or 5th respondent to transport the said timber. Thereafter the 2nd respondent-respondent-respondent (hereinafter referred to as the 2nd respondent), had filed action in the Magistrate's Court, Tangalle against the 3rd, 4th and 5th respondents in connection with the said offence. The 3rd respondent had pleaded guilty to the charges, where the 4th and 5th respondents had pleaded not guilty and the case was fixed for trial against the 4th and 5th respondents.

On 16.08.2001 the 1st respondent, as the registered owner of the vehicle in question had made an application for the release of the said vehicle to the 1st respondent pending the final determination of the trial. The appellant, being the absolute owner, agreed to the said application of the 1st respondent in view of the undertaking by the 1st respondent to pay a sum of Rs. 150,000/- to the appellant in respect of the rentals outstanding under the Lease Agreement. The said vehicle was released to the 1st respondent on the undertaking given by him to pay the appellant Rs. 150,000/- on or before 25.08.2001.

The 1st respondent had failed to pay the said sum of Rs. 150,000/- and on 22.11.2001, pursuant to the appellant bringing the said matter before the Magistrate's Court, learned Magistrate had directed the 1st respondent to handover possession of the vehicle in question to the appellant, subject to certain terms and conditions. The vehicle in question was accordingly handed over to the appellant and the said vehicle remains in the custody of the appellant.

A confiscation inquiry had been held regarding the lorry bearing registration No. 227-8130 in terms of Chapter XXX-VIII of the Code of Criminal Procedure Act and after inquiry, by his order dated 25.08.2005, learned Magistrate had ordered the confiscation of the said lorry. Aggrieved by this order, the appellant filed an application in revision (HCA /113/2005) in the High Court of the Southern Province, holden in Hambantota. The appellant had also filed an appeal in the High Court of Hambantota (HCA 131/2005). On 30.06.2008, learned Judge of the High Court made order dismissing the revision application (HCA/113/2005) and affirmed the order of the learned Magistrate dated 25.08.2005. The learned Judge of the High Court also made order dismissing the appeal (HCA/131/2005) for the same reasons given in the order made on the Revision application. Being aggrieved by the order made by the learned Judge of the High Court of Hambantota in the appeal (HCA/131/2005), the appellant came before this Court whereas with regard to the revision application he had filed an appeal in the Court of Appeal, simultaneously.

When the application for special leave to appeal came up for support before this Court on 03.12.2008, this Court had taken into consideration that there were two orders made by the High Court of the Provinces, in the exercise of its appellate jurisdiction and its revisionary jurisdiction.

The Court also took notice of the fact that the appellant had filed applications before the Court of Appeal regarding the order made in the revisionary application and before this Court on the basis of the High Court in the exercise of its appellate jurisdiction. At that stage, learned Senior State Counsel had brought to the notice of this Court the necessity to avoid multiplication of proceedings, as the appeal before the Court of Appeal could also come up for consideration in the Supreme Court by way of appeal. Accordingly, learned Counsel for the appellant had given an undertaking to withdraw the application filed in the Court of Appeal regarding the order of the Provincial High Court on the basis of the revision application (HCA/113/2005).

Thereafter special leave to appeal had been granted by this Court on the basis of the order made by the Provincial High Court in the exercise of its appellate jurisdiction (HCA/131/2005).

The facts of this appeal were not disputed and it was common ground that the Beliatta Police had instituted proceedings in the Magistrate's Court of Tangalle against the 3rd, 4th and 5th respondents for transporting 63 logs of satinwood timber *(Burutha)* valued at Rs. 39,691.65 on 05.08.2001 without a lawful permit and thereby committing an offence punishable in terms of section 24(1)b read with sections 25(2) and 40 of the Forest Ordinance, No. 16 of 1907, as amended.

Section 40 of the Forest Ordinance, as amended by Act Nos. 13 of 1966, 56 of 1979, 13 of 1982 and 23 of 1955 states as follows:

*"(1) Upon the conviction of any person for 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*

*(b) all tools, boats, carts, cattle and motor vehicles, trailers, rafts, tugs or any other mode of transport motorised or otherwise and all implements and machines used in committing such offence whether such tools, boats, carts, cattle, motor vehicles, trailers, rafts, tugs, or other modes of transport motorized or otherwise are owned by such person or not.*

*shall, by reason of such conviction be forfeited to the State.*

*(2) Any property forfeited to the State under sub-section (1) shall –*

*(a) if no appeal has been preferred to the Court of Appeal against the relevant conviction, vest absolutely in the State with effect from the date on which the period prescribed for preferring an appeal against such conviction expires;*

*(b) if an appeal has been preferred to the Court of appeal against the relevant conviction, vest absolutely in the State with effect from the date on which such conviction is affirmed on appeal.*

*In this sub-section 'relevant conviction' means the conviction in consequence of which any property is forfeited to the State under sub-section (1)".*

Learned Magistrate had considered the provisions laid down in section 40 of the Forest Ordinance as amended and

had come to the conclusion that the Court has a discretion to confiscate a vehicle after an inquiry, on the basis that the registered owner had given his consent for the offence which had been committed and that the registered owner had the knowledge of such an offence. In considering the provisions of section 40 of the Forest Ordinance and the decided cases, the learned Magistrate had been of the view that the absolute owner had not been able to take every possible step to prevent the committing of the offence in question.

It is common ground that the absolute owner is a Finance Company and that the registered owner had purchased the lorry in question on a Hire Purchase Scheme.

In *Manawadu v. Attorney – General*[1] Sharvananda, CJ., had considered the applicability of sections 24(1)(b), 25(1) and section 40 of the Forest Ordinance, in a matter where a load of rubber timber was transported in a lorry without a permit from an authorized officer. After sentencing the accused, who had pleaded guilty, the learned Magistrate in that matter had ordered the confiscation of the lorry in which the timber was alleged to have been transported. In considering the confiscation of the said lorry used for the transport of illicit timber, in view of section 7 of the Act, No. 13 of 1982, by which section 40 of the Forest Ordinance was amended, Sharvananda, CJ., in *Manawadu v. Attorney-General (supra)* had 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 partem'* 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."

Sharvananda, C.J., in *Manawadu v. Attorney-General (supra)* had considered several decisions pertaining to the matter in question. Reference was made to the decision in *Inspector Fernando v. Marther*[2], where Akbar, J., in construing section 51 of the Excise Ordinance that corresponds to section 40 of the Forest Ordinance had quoted with approval a statement by Schneider, J., in *Sinnetamby v. Ramalingam*[3], which was in the following terms:

"Where an offence has been committed under the Excise Ordinance, no order of confiscation should be made under section 51 of the Ordinance as regards the conveyance used to commit the offence, e.g. a boat or motor car unless two things occur.

(1) That the owner should be given an opportunity of being heard against it; and

(2) Where the owner himself is not covicted of the offence, no order should be made against the owner, unless he is implicated in the offence which render the thing liable to confiscation.

In *Inspector Fernando v. Marther (supra)* the vehicle in question did not belong to the accused, but was a vehicle, which was hired under a Hire Purchase Agreement. It was held by Akbar, J., in *Inspector Fernando v. Marther (supra)* that since the registered owner was not implicated in the commission of the offence, no order confiscating the car could be made.

In *Mudankotuwa v. Attorney-General*[4] the Court of Appeal had referred to the decision in *Manawadu v. Attorney-General (supra)* with approval and had stated that the owner of the vehicle, who is not a party to the case is entitled to be heard on the question of forfeiture of the vehicle and if he satisfies the Court that the accused committed the offence without his knowledge or participation, then his vehicle will not be liable to forfeiture. Refernce was also made in *Mudankotuwa v. Attorney-General (supra)* to the decision in *Nizer v. I.P. Wattegama* [5] and *Faris v. OIC, Police Station, Galenbindunuwewa* [6].

In *Nizer v. I.P. Wattegama (supra)* Vythyalingam, J., considered the implications of the proviso to section 3A of the Animals Act, No. 29 of 1958 as amended. Section 3A of the Animals Act states of follows:

> *"Where any person is convicted of an offence under this Part or any regulations made there under, any vehicle used in the commission of such offence shall, in addition to any other punishment prescribed for such offence, be liable, by order of the convicting Magistrate, to confiscation:*

*Provided however, that in any case where the owner of the vehicle is a third party, no order of confiscation shall be made, if the owner proves to the satisfaction of the Court that he has taken all precautions to prevent the use of such vehicle or that the vehicle has been used without his knowledge for the commission of the offence."*

Vythyalingam, J., had observed that in view of the proviso, an order for confiscation could be made only if the owner was present at the time of the detection or there was evidence suggesting that the owner was privy to the said offence. This decision was referred to with approval in *Faris v. OIC, Police Station, Galenbindunuwewa (supra)*, where it was stated that in terms of the proviso to section 3A of the Animals Act, an order for confiscation cannot be made if the owner establishes one of the following:

(a) that he has taken all precautions to prevent the use of the vehicle for the commission of the offence;

(b) that the vehicle had been used for the commission of the offence without his knowledge.

It is also worthy of note that in **Faris,** it was categorically stated that, in terms of the proviso to section 3A of the Animals Act, if the owner established any one of the above matters on a balance of probability, an order for confiscation should not be made.

In *Rasiah v. Thambiraj*[7], the Court had considered the applicability of section 40 of the Forest Ordinance with regard to an order made by a Magistrate in the confiscation of a cart. Referring to the issue of confiscation, Nagalingam, J., in *Rasiah v. Thambiraj (supra)* had stated thus:

"In these cases where the accused person convicted of the offence is not himself the owner of the property seized, an order of confiscation without the previous inquiry would be tantamount to depriving the person of his property without an opportunity being given to him to show cause against the order being made."

In *Manawadu v. Attorney-General (Supra),* Sharvanda, C.J., referring to the decisions by Justice Akbar and Justice Nagalingam in *Fernando v. Marther (supra)* and *Rasiah v. Thambiraj (supra)* respectively, had come to the conclusion that the owner of the vehicle would only have to show that the offence was committed without his knowledge and without his participation.

"Justice Akbar and Justice Nagalingam founded their decision on fundamental principles of constitutional importance and not on the narrow ground 'shall be liable to confiscation'. **They emphasised that where the owner can show that the offence was committed without his knowledge and without his participation in the slightest degree, justice demanded that he should be restored his property"** (emphasis added).

Sharvananda, C.J., in *Manawadu v Attorney-General (supra)* had finally expressed the view that,

"But if the owner had no role to play in the commission of the offence and is innocent, then forfeiture of his vehicle will not be penalty, but would amount to arbitrary expropriation since he was not a party to the commission of any offence."

The appellant, as referred to earlier, is the absolute owner of the vehicle in question. The appellant had leased it to the 1st respondent on a Hire Purchase Agreement. Section 433A

of the Code of Criminal Procedure Act, as amended, deals with possession of property, which is the subject of a Hire Purchase Agreement. This section reads as follows:

> *"(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 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 sub-section (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 purposes of this Chapter."*

The scope of section 433A of the Code of Criminal Procedure Act was considered in *Mercantile Investments Ltd. v. Mohamed Mauloom and others*[8], where it was stated that in terms of the said section 433A, an absolute owner is entitled to possession of the vehicle, even though the respondent had been given its possession on the Lease Agreement.

On a consideration of the *ratio decidendi* of all the aforementioned decisions, 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 had 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 the aforementioned decisions also show that the owner has to establish the said matter on a balance of probability.

It is common ground that the learned Magistrate had held a confiscation inquiry in respect of the lorry in question in terms of Chapter XXXVIII of the Code of Criminal Procedure Act. It is also common ground that the learned Magistrate had given an opportunity for the representation of the appellant, being the absolute owner, to give evidence at the said inquiry and to tender to Court any relevant documents. At that inquiry, although the representative of the appellant had taken the position that the vehicle in question was given to the 1st respondent on a Hire Purchase Agreement, he had not tendered the said agreement to Court. Accordingly no steps were taken to mark the said document.

Learned Counsel for the appellant contended that the appellant, being the absolute owner had neither participated nor had any knowledge of the commission of the offence in which the vehicle was confiscated. Learned Counsel for the appellant referred to the evidence given by witness Percy Weeraratne, Assistant Manager (Matara Branch) of the appellant Company. The said Assistant Manager had stated that the appellant Company had no knowledge of the use of the vehicle and that the vehicle was in the Urubokka area and not within the control of the appellant.

"මෙම වාහනය නීති විරෝධී ක්‍රියාවකට පාවිච්චි කිරීමට අනුමැතිය දීල තිබුණේ නැහැ.

ප්‍ර. මෙම මූල්‍ය ආයතනයට මෙම නීති විරෝධී දෑව ප්‍රවාහනය සම්බන්ධයෙන් යම්කිසි දැනීමක් තිබුණද?

උ: නැහැ.

මෙම නීති විරෝධී ක්‍රියාවට මෙම මණ්ඩලය අනුමැතිය දුන්නේ නැහැ. මෙම සමාගමෙන් අනුබලයක් දීලා නැහැ. මෙම වාහනය මගේ පාලනය යටතේ තිබුණේ නැහැ. මෙම වාහනය තිබුණේ උඟුරුබොක්ක ප්‍රදේශයේ. එම නිසා මෙම රියදුරු විසින් කරන ක්‍රියාවක් ගැන දන්නේ නැහැ."

Considering the provisions laid down in section 40(a) read with section 25(2) of the Forest Ordinance, would it be sufficient to merely state that the vehicle in question was not under the control of the representative of the appellant? The answer to this question is purely in the negative for several reasons.

As has been clearly illustrated by several decisions referred to above, it would be necessary for the owner of the vehicle to establish that the vehicle that had been used for the commission of the offence had been so used without his knowledge and that the owner had taken all precautions available to prevent the use of the vehicle for the commission of such an offence.

Several measures could have been taken in this regard. For instance, there could have been a clause to that effect in the agreement between the appellant and the 1st respondent. Similarly if the 1st respondent had authorised others to use the said vehicle, he too could have had a written agreement inclusive of specified conditions. It is therefore quite clear that it would be necessary for the owner to show that he has taken all possible precautions to prevent the use of the vehicle for the commission of the offence.

Learned Counsel for the appellant submitted that the burden is only on the registered owner to satisfy Court that the accused has committed the offence without his knowledge or participation and this will not be applicable to an absolute owner.

As stated earlier, in *Mercantile Investments Ltd. v. Mohamed Mauloom and others (supra)*, consideration was given to the rights of the absolute owner as well as the registered owner. In that matter the learned Magistrate had

not given an opportunity to the absolute owner to show cause before he made the order to confiscate the vehicle. On a consideration of the said question, the Court of Appeal had held that it is not only the registered owner, but the absolute owner also should be given notice on the inquiry in relation to the confiscation of the vehicle.

It is therefore apparent that both the absolute owner and the registered owner should be treated equally and there cannot be any type of privilleges 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

On a consideration of the aforementioned it is evident that the learned Magistrate had not erred when he held that the appellant had not satisfied Court that he had taken every possible step to prevent the commission of the offence. As stated earlier, the High Court had affirmed the order made by the learned Magistrate.

For the reasons aforesaid the question on which special leave to appeal was granted is answered in the negative.

The judgement of the High Court dated 30.06.2008 is therefore affirmed. This appeal is accordingly dismissed.

I make no order as to costs.

**AMARATUNGA, J.** - I agree

**EKANAYAKE, J.** - I agree.

*appeal dismised.*