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Kapugeekiyana Vs. Hon Janaka Bandara Tennakone, Minister of Land and 6 Others

(Continued from Part 7)

"The minister cannot order the issue of a Section 2 notice unless he has a public purpose in mind. Is there any valid reason why he should withhold this from the owners who may be affected?

Section 2(2) requires the notice to state that one or more acts may be done in order to investigate the suitability of that land for that public purpose: obviously that public purpose cannot be an undisclosed one. This implies that the purpose must be disclosed. From a practical point of view, if an officer acting under Section 2(3) (f) does not know the public purpose, he cannot fulfill his duty of ascertaining whether any particular land is suitable for that purpose"

It is not in dispute that lands are acquired under the provisions of the Land Acquisition Act for the benefit of the public. Yet, in the process of carrying out greater good for the public of the country, one must not unduly neglect the owner of the land. It would be overly harsh to forget the ties a landowner has to his property. Therefore, it is necessary for the Minister and/or any authority acquiring the land, to have a clear and distinct public purpose for which the acquisition is commissioned.

In the event a Minister or any Government official withholds such vital information from the landowner, it must be construed as exercising his powers negligently and unlawfully. Similarly, if the Minister or Government officials are not aware of the true public purpose of acquiring the land then the act of acquiring the property should be viewed through a lens of zealous concern by the Courts. Acquiring properties under deception and pretense or for a potential and nonexis-

tent future public purpose will be unlawful. Importance and necessity in accordance with the provisions of this Act should be given to the existence of the knowledge of the genuine public purpose the land would be put to use and to disclose such purpose to the landowner at the time of acquiring the property.

Having said that, it is apparent to this Court, after a thorough examination of all the documentation produced before us, that on 14th December 1989 (P8) the Petitioner, who by then had admittedly received notice of the acquisition, had only requested the appropriate compensation for the land without knowledge as to any illegality in the acquisition of the land. The objections made by the Petitioner were solely with regard to the value of the compensation. He did not avail himself of the first given opportunity to object to the acquisition but rather in the letter has, upon various grounds enumerated by him [such as the land being close to the main Koswatte Road, having access to electricity etc.]. strongly recommended his land as the more suitable for acquisition. Although the Petitioner was summoned for an inquiry on 09.10.1990 to determine his claims for compensation, he was not granted compensation on the basis of lack of government funds. The Court of Appeal, on 11.10.2001 directed the State to process the Petitioner's claim and to make an award of compensation according to law. Therefore, it is not disputed that in terms of the said order the process for the award of compensation has been completed in terms of the Land Acquisition Act.

The Petitioner's willingness to surrender his property is evident from the contents of the same document, provided that a satisfactory amount of monies are paid to him as compensation. However, the Petitioner has not made any refer-

ence or raised any objections in his communications with the Respondent, with regard to the purported failure of the declaration and/or clarity of the public purpose for which the land was acquired.

This Court has further observed the document issued by the Divisional Secretary of Kaduwela dated 18.09.1998 which clearly states that the land is required for the public purpose of 'urban development'. This Court finds this purpose as a proportionately sufficient explanation for the acquiring of the land under the provisions of the Act. It is not contested that while the war on terrorism was ongoing it had been granted to be utilized for the construction of married quarters for the families of the special task force.

Accordingly, it is the opinion of this Court that the original claim of the Petitioner was not based on the lack of a definite public purpose but generally set out. Nonetheless, it is this Court's view that the requisite public purpose was clearly clarified and informed by the Respondents to the Petitioner as specified in **Section 2** of the Act. Therefore, this Court agrees with the decision made by the Learned Judges of the Court of Appeal, and holds that there was an urgent supervening public purpose for acquiring the Petitioner's land.

The Petitioner further alleges that there was a lack of urgency warranting the acquisition. It is the Petitioner's claim that since the vesting order published in January 1986 and the possession of the land on 08.04.1986, the initial attempt of using the land was in 2002, when the land was handed over to the Special Task Force to build housing units confirmed by a letter issued by the Urban Development Authority dated 28.08.2002. It is vital that this Court identified as to whether any developments have been carried out since acquiring the Petitioner's land.

The intention of reclaiming land is to make the land suitable for a specific public purpose such as for agricultural development or for the purpose of urban development. Although the procedure and specifications may vary depending on the purpose for which the land is to be utilized, a number of steps need to be carried out on the land. These steps have been clearly identified and established in the guidelines entitled "Land Reclamation and Dredging", published by the **Institute for Construction Training and Development, Publication No: SCA/3/3.** such including:

"Drainage Canal System

Before commencing any work at a proposed reclamation site, a study should be done to determine the canals required to drain the run off from the area to be reclaimed as well as to drain the run off from its own catchment area.. . whilst the reclamation work is in progress sufficient drainage paths should be provided for storm water and on completion of the work the required canals, retention areas or lakes should be provided.

The areas to be reclaimed shall be as shown on the drawings. Reclamation shall be carried out with suitable material arising from the dredging operations and approved by the engineer or, if sufficient material is available from this source, the suitable material shall be obtained from approved borrows. All reclamation shall be carried out to the lines and levels shown on the drawings. . ."

"Filling for Urban Development

Where land is to be used for Urban development, the surface layer 150mm thick shall be of material suitable for plant growth. This material shall be borrowed from areas approved by the Engineer."

This Court has carried out comprehensive examination of all the documentation provided before us and it is apparent that this acquired land is not mere marshy land or paddy land it was at the time of acquiring the land; it has been developed in a manner where construction could commence. The photographic evidence tendered to us shows that construction has taken place in this land and it has been brought to our notice by the Counsel of the Respondent in his submissions, that construction was ceased due to the initiation of legal action by the Petitioner.

It is apparent that a large amount of work has been carried out on this land which facilitated the transformation of this acquired paddy land into a land which is ready for construction and development. The filling guidelines, as specified by the Institute for Construction Training and Development referred to above. states as follows:

"Fill material shall be obtained from borrow areas approved by the Engineer. The gravelly earth should consist of hard durable particles free from excess clay, vegetable matter or harmful materials.

The following test shall be carried out on samples taken from the proposed borrow site before and during the filling operation.

(i) In-situ moisture content

(ii) Atterbergs limits

(iii) Sieve analysis and hydrometer analysis

(iv) Proctor compaction

A uniform gradation of material is required to achieve a good compaction of the fill material. The percentage of

gravel and sand so determined by sieve analysis and hydrometer analysis should be over 70%. Stones greater than 150mm in greatest dimension shall not be permitted in any part of the filling. Similarly any stones or rock which will impede the operation of tamping rollers shall be removed. All roots in the fill material shall be handpicked and removed out of the premises.

Before placing any fill the existing surface of areas to be filled shall be stripped of vegetation and other deleterious matters.

Water logged areas shall be dewatered and, as far as practicable, the surface stripped of all the vegetation and deleterious matter prior to placement of fill material. If in any area it is considered by the Engineer to be impracticable to dewater fully, the material used for filling such areas up to 160mm above the water level shall be sand or gravel with not more than 15% passing No. 200 US sieve.

In areas where the terrain is clay or peat the material used for initial filling up to 300mm shall be sand or gravel with not more than 15% passing No 200 US sieve. However, the thickness of the initial fill layer shall be the minimum required for the movement of machinery. The material used for earth filling above the stripped ground or sand or gravel layer shall be gravelly or sandy materials from approved borrow areas.

Two important factors to be considered in filling from borrow is the drainage requirements and the sub-soil conditions. The material used for filling should have a minimum dry density of 1.76 g/ml (110lb/ft) or as decided by the Engineer. A filled site should have the following

(i) A well compacted fill.

(ii) Adequate thickness of fill to avoid ground water and flood problems

(iii) Adequate thickness below proposed foundation to take up the load.

(iv) Sufficient time for settlement leaving only tolerable limits.

(v) Monitoring rate of settlement within acceptable limits.

From the aforesaid guidelines it is evident that time, money and resources have been disbursed for the development of this land. It appears that sustained effort over a period of time is needed to fill marshy and paddy lands to convert them into lands suitable for construction. The matter of urgency has been demonstrated by the letter dated 21.03.2005 (R7) to the Petitioner from Special Task Force confirming that the land is best suited and is in immediate need for the construction of married quarters. The documentation submitted to court (R7 to R16) clearly discloses that the Urban Development Authority has further approved this and it was handed over through a cabinet decision for the building of the aforesaid married quarters.

Thus, it is this Court's observation that the property was not acquired for the purpose of water retention as alleged by the Petitioner. By their letter dated 25.06.1999, the Chairman of the Sri Lanka Land Reclamation and Development Board has further confirmed the same. However. this property was acquired for the public purpose of urban development and as such was ideally suited for the construction of married quarters and as a result the authorities have carried out extensive work on the land by filling the land and preparing it for housing

development. Consequently, it is the belief of this Court that there appears to be an urgency as well as necessity to acquire the land and such does not constitute discrimination against the Petitioner and does not violate his rights. Indeed he himself has recommended and categorically stated in P8, that his land is eminently more suitable to be acquired than the lands that are adjacent to his land.

It is the Petitioner's claim that successively, he discovered that two lots neighboring to his property that has also been acquired at the same time as his property via the same vesting order, had been divested by the Minister of Lands by an order dated 10.06.2005 with a Government Gazette published on 13.06.2005 confirming the order under Section 39A of the Act. Therefore, it was the Petitioner's position that since the land was acquired for the purpose of water retention and not for the purpose of building quarters, his land should also be divested in accordance with the provisions of Section 39A of the Act as the land is not utilized for the public purpose it was acquired.

Section 39 of the Act has to be reviewed when ascertaining whether the Petitioner is entitled to the relief he claims for. The provisions of Section 39 reads as follows:

"39A (1) Notwithstanding that by virtue of an Order under Section 38 (hereafter in this section referred to as a "vesting order") any land has vested absolutely in the State and actual possession of such land has been taken for or on behalf of the State under the provisions of paragraph (a) of section 40, the Minister may, subject to subsection (2) by subsequent Order published in the Gazette (hereafter in this section referred to as a "divesting Order") divest

the State of the land so vested by the aforesaid vesting Order.

(2) The Minister shall prior to making a divesting Order under subsection (10 satisfy himself that –

(a) no compensation has been paid under this Act to any person or persons interested in the land in relation to which the said divesting Order is to be made;

(b) the said land has not been used for a public purpose after possession of such land has been taken by the State under the provisions of paragraph (a) of section 40;

(c) no improvements to the said land have been effected after the Order for possession under paragraph (a) of section 40 had been made, and

(d) the person or persons interested in the said land have consented in writing to take possession of such land immediately after divesting Order is published in the Gazette."

The Petitioner contends that a Government agent informed him that the said land has been acquired for the purpose of water retention, yet it is pertinent to point out that no evidence whatsoever has been adduced by the Petitioner in order to satisfy this Court that the land was required for water retention and that the purpose so specified was subsequently altered by the Urban Development Authority.

This Court does not disagree with Justice Mark Fernando's dictum, in the case of *De Silva Vs. Athukorala Minister of Lands irrigation* [(2)], where he held that the true meaning of

the amended Land Acquisition Act was to allow Ministers to restore the land to its original owner where the original reason for acquisition cannot be fulfilled. However, due to the lack of evidence by the Petitioner to support his claim that the land was acquired for water retention, this Court is unable to accept the Petitioner's purported reasons for the acquisition of the land by the Respondent. As a result, this Court accepts that the purpose of acquiring the Petitioners land was for 'Urban Development' as the land has been transformed and molded in a manner that is suitable for the construction of houses in accordance with the procedure set out in the **Institute for Construction Training and Development.** This Court also cannot, in view of the evidence placed before it, accept that the development of married quarters for the Officers of the Special Task Force was a new purpose that was introduced belatedly to obstruct relief being granted in this case.

It is the assessment of this Court that to grant a divesting order on behalf of the Petitioner as per **Section 39 A** of the Act, the four conditions set out in **Section 39 A (2)** must be satisfied. It is not in dispute that the Respondents have paid compensation to the Petitioner for acquiring his land and furthermore a considerable amount of improvements have been carried out on the land in preparation for building houses. Therefore, it would be unreasonable to divest the land.

Once again this Court is duty bound to follow the dictum held by Justice Mark Fernando, in the case of *De Silva Vs. Atukorale, Minister of Lands, irrigation and Mahaweli Development and Another (Supra)*; *"it would be legitimate for the minister to decline to divest if there is some good reason-for*

instance, that there is now a new public purpose for which the land is required. In such a case it would be unreasonable to divest the land, and then to proceed to acquire it again for such new supervening public purpose. Such a public purpose must be a real and present purpose, not a fancied purpose or one, which may become a reality only in the distant future".

For the reasons aforesaid, the Petitioner's Application is dismissed. I also order costs in a sum of Rs. 50,000/- to be paid by the Petitioner to the Respondent.

MARSOOF. P.C, J – I agree.

DEP. P.C. J – I agree.

Appeal dismised.

ORIENT FINANCIAL SERVICES CORPORATION LTD., VS. RANGE FOREST OFFICER, AMPARA AND HON. ATTORNEY GENERAL

SUPREME COURT
TILAKAWARDANE, J.
EKANAYAKE, J. AND
PRIYASATH DEP, PC., J.
SC APPEAL NO. 120/2011
SC (SPL) LA/92/2011
CA (PHC) APN NO. 26/2011
PHC (AMPARA) REVISION APPLICATION
HC/AMP/REVISION/343/2009
MC AMPARA NO. 31773
OCTOBER 21ST, 2013

Forest Ordinance amended by 13 of 1982, 84 of 1988, 23 of 1995, 05 of 2009 – Section 40(1) – forfeiture of timber, tools, vehicles used in the commission of offences under the Ordinance – Section 25(1) – Penalties, breach of any of the provisions of or regulations made under the Act. – Code of Criminal Procedure – Section 433 (A). – Rule of Audi Alteram Partem Registered owner - Absolute owner

This is an appeal against the judgment of the Court of Appeal which affirmed the judgment of the High Court. The High Court affirmed the order of forfeiture of a vehicle made by the learned Magistrate of Ampara under Section 40 of the Forest Ordinance. The Appellant is a Finance Company which under a lease agreement let the vehicle bearing No. EPLE 3471 to Anura Kumara who became the registered owner of the vehicle. The said Anura Kumara was charged in the Magistrate's Court for transporting timber without a permit under Section 25(1) read with Section 40 of the Forest Ordinance. He pleaded guilty to the charges. After an inquiry the Court made order confiscating the vehicle under section 40 of the Forest Ordinance.

The Appellant who is the absolute owner of the vehicle, appealed against the judgment of the High Court to the Court of Appeal. The Court of Appeal without issuing notice dismissed the petition.

Held:

1. Before an order for forfeiture is made the owner should be given an opportunity to show cause. If the owner on balance 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 was he privy to the commission of the offence, the vehicle has to be released to the owner.

2. When it comes to showing cause as to why the vehicle should not be confiscated, only the person who was 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.

Per Priyasath Dep PC J.:

> 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. Under Section 433A of the Code of Criminal Procedure Act, the absolute owner though entitled to the possession of the vehicle, could obtain the possession of the vehicle only if the Court decides to release the vehicle but not as of right.

APPEAL from the Judgment of the Court of Appeal.

Cases referred to:

1. *Manawadu Vs.Attorney General* – (1987) 2 Sri L.R. 30
2. *Mercantile Investment Ltd. Vs. Mohamed Mauloom and Others* – (1998) 3 Sri L.R. 32
3. *The Finance (Private) Limited Vs.Agampodi Mahapedige Priiyantha Chandana and others* – S.C. Appeal No. 105 A/2008 decided on 30.09.2010

Asthika Devendra for the Appellant

Thusitha Mudalige, S.S.C. for the Attorney General

Cur.adv.vult.

December 10, 2013

PRIYASATH DEP. PC., J.

This is an Appeal against the Judgment of the Court of Appeal dated 28.04.2011 which affirmed the judgment of the

High Court of Ampara. The High Court affirmed the order of forfeiture of a vehicle made by the learned Magistrate of Ampara under Section 40 of the Forest Ordinance as amended by Acts numbers 13 of 1982, 84 of 1988 and 23 of 1995.

The Petitioner – Petitioner – Petitioner – Appellant (hereinafter referred to as the Appellant) is a Finance Company which under a lease agreement let the vehicle bearing No. EPLE 3471 to D.P. Anura Kumara who became the registered owner of the vehicle. The said Anura Kumara was charged in the Magistrate's Court of Ampara bearing Case No. 31773/8 for transporting timber (teak) without a permit, an offence punishable under Section 25(1) read with section 40 of the Forest Ordinance. He pleaded to the charges. Thereafter an Inquiry was held regarding the confiscation of the vehicle under section 40 A of the Forest Ordinance.

The Appellant who is the absolute owner claimed the vehicle on the basis that it has taken necessary precautions to prevent the commission of the offence and the offence was committed without its knowledge. At the inquiry T. S. L. Indika, a senior sales executive gave evidence on behalf of the Appellant. He produced the registration book and the lease agreement. After the inquiry the learned Magistrate by his order dated19.03.2009 confiscated the vehicle. The learned Magistrate was of the view that in terms of the lease agreement the absolute owner can recover the loss from the registered owner and failing that from the guarantors or sureties. Further the learned Magistrate observed that even after the conviction of the registered owner, the Appellant had failed to terminate the lease agreement. In the order it was stated that if the vehicle is given to the appellant there was a possibility that it could give the vehicle back to the accused (registered

owner). This will defeat the object of section 40 of the Forest Ordinance.

The Appellant filed a Revision Application in the High Court of Ampara and the learned High Court Judge by his order dated 02.11.2010 affirmed the order of the learned Magistrate. The Appellant appealed against the judgment of the High Court to the Court of Appeal. The Court of Appeal without issuing notice dismissed the Petition. The Court of Appeal for the reasons set out in its order dated 28.04.2011 held that the owner envisaged in law in not the absolute owner and the owner envisaged in law in a case of this nature is the person who has control over the use of the vehicle. The absolute owner has no control over the use of the vehicle except to retake the possession of the vehicle for non-payment of instalments. If the vehicle is confiscated holding that the absolute owner is not the owner envisaged in law, no injustice will be caused to him as he could recover the amount due from the registered owner by way of action in the District Court on the basis of violation of the agreement'

Being aggrieved by the order of the Court of Appeal the Appellant filed a Special Leave to Appeal Application to this court and obtained leave on the following questions of law:

(A) Did their Lordships of the Court of Appeal misconceive in law when they held that the 'owner contemplated by law' cannot be the absolute owner but the registered owner?

(B) Did their Lordships of the Court of Appeal err when they failed to appreciate that the Respondents had not taken up the position that the Petitioner Company was not the owner of the vehicle concerned either in the Magistrate's Court or the High Court and therefore it was not a matter before the Court of Appeal for consideration.

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 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 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 Vs. Attorney General* [1] 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 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 satisfied 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 Vs. 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 a 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 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. (Section 425 – 433)

(The Forest Ordinance (Amendment) Act No 65 of 2009 deemed Section 433A inapplicable to persons who plead 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. Vs. Mohamed Mauloom*

and others [2] 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.'

This matter was again considered in *The Finance Private Ltd. Vs. Agampodi Mahapedige Priyantha Chandana and others*[8].

This was an appeal against the judgment of the High Court of Hambantota affirming the order of confiscation of a vehicle made by the Magistrate of Tangalle in Case No. 61770. In this case the Magistrate granted an opportunity to the absolute owner (Appellant) to show cause. The registered owner did not take part in the inquiry. An Assistant Manager of the Appellant company gave evidence and stated that the Appellant Company has no knowledge of the use of the vehicle and that the vehicle was not within the control of the appellant. The learned Magistrate held that Appellant had not satisfactorily convinced the courts that he had taken every possible measure to prevent the commission of the offence. The learned Magistrate proceeded to confiscate the vehicle. In the High Court the absolute owner argued that the burden is only on the registered owner to satisfy court that the accused had committed the offence without his knowledge or participation and this will not be applicable to an absolute owner. The Supreme Court rejected the argument and dismissed the appeal.

In this case, Her Ladyship the Chief Justice Shirani Bandaranayake considering the *ratio decidendi* of previous

decisions, held that '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 the afore mentioned decisions also show that the owner has to establish the said matter on a balance of probability. It was further held that " if 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."

In the case before this Court the registered owner was found guilty on his own plea and was convicted. The learned Magistrate provided an opportunity to the absolute owner to participate in the inquiry and a representative of the company gave evidence. After the inquiry, the learned Magistrate confiscated the vehicle. The learned Magistrate was of the view that in terms of the lease agreement the absolute owner can recover the loss from the registered owner and failing that from the guarantors or sureties. Further the learned Magistrate observed that even after the conviction of the registered owner, the Appellant had failed to terminate the lease agreement. In the order it was stated that if the vehicle is given to the appellant the vehicle could be given back to the accused (registered owner). This will defeat the object of Section 40 of the Forest Ordinance.

Aggrieved by the order of the learned Magistrate a Revision Application was filed by the absolute owner. The

learned High Court judge dismissed the Application. Thereafter an Appeal was filed in the Court of Appeal. The Court of Appeal was of the view that the owner contemplated under the Forest Ordinance is the registered owner. It has posed the question "can it be said that the absolute owner (the Finance company) committed the offence or it was committed with the knowledge or participation of the absolute owner. The answer is obviously no. Surely a Finance company cannot participate in the commission of an offence of this nature when the vehicle is not with them. It cannot be said that the Finance company has the knowledge of the commission of the offence. When the vehicle was not with them. The owner envisaged in law cannot be the absolute owner".

The learned Magistrate had taken up the position the confiscation will not cause loss to the absolute owner as it has a remedy in the civil court. The Court of Appeal while affirming the order of the Magistrate went further to hold that the owner contemplated under Section 40 of the Forest Ordinance is the registered owner and not the absolute owner.

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

In cases where the absolute owner repossesses the vehicle or the vehicle was returned by the registered owner to the absolute owner it becomes the possessor and in control of the vehicle. In such a situation if an offence was committed

the absolute owner has to satisfy court that necessary precautions were taken and the offence was committed without its knowledge. The person who is in possession of the vehicle is the best person to satisfy the court that steps were taken to prevent the commission of the offence and the offence was committed without his knowledge.

In answering the first question of law, the owner, contemplated under Section 40 of the Forest Ordinance read with Section 433A of the Code of Criminal Procedure Act includes the registered owner as well as the absolute owner. However 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. According to the Section 433A the absolute owner is deemed to be the person entitled the possession of the vehicle. The absolute owner has a right to be heard at a claim inquiry. In this case the learned Magistrate afforded an opportunity to the absolute owner to show cause and only after such a hearing confiscated the vehicle.

The second question of law refers to the question whether the Court of Appeal erred in law when it considered the question whether the Appellant Company is the owner or not contemplated under Section 40 of the Forest Ordinance when the matter was not raised by the Respondents in the Magistrate Court and in the High Court. The Court of Appeal on its own raised that question. Who is the owner contemplated under Section 40 requires a legal interpretation and is a question of law. Therefore Court of Appeal did not err when it considered this question of law.

It is necessary at this stage to consider whether the order of the Magistrate is in accordance with the law. The Magistrate afforded an opportunity to the absolute owner to show cause and after considering the evidence the order of confiscation was made. The learned Magistrate has followed the proper procedure. The next question is whether the reasons given by the Magistrate to confiscate the vehicle is correct.

It is necessary for this purpose to consider the intention of the legislature when it repealed the previous section 40 of the Forest Ordinance and substituted new Section 40 by Act No. 13 of 1982. 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 instalments 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.

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.

It is relevant 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). Under this chapter when disposing property the Magistrate is not required to determine the ownership of the property. The Magistrate is required to deliver the property to the person who is entitled to possession of the property. Generally the property is released to the person from whose custody or possession of the property was taken. The Registered owner if he was not privy to the commission of the offence on that basis he is entitled to possession of the vehicle. Section 433A changed this position when it stated that the absolute owner is 'deemed to be the person entitled to possession of such vehicle'. 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 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 is 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.

I find that the order of the learned Magistrate confiscating the vehicle is in accordance with the law. Both the High Court and the Court of Appeal has affirmed the order. I affirm the order of the Court of Appeal.

Appeal dismissed. No costs.

TILAKAWARDANA, J. – I agree.

EKANAYAKE, J. – I agree.

Appeal dismissed.

HERATH VS. MORGAN ENGINEERING (PVT) LTD

SUPREME COURT
MOHAN PIERIS, PC, CJ.,
SRI PAVAN, J AND
RATNAYAKE, P.C., J.
S.C. APPEAL NO. 214/12
S. C. SPL.L.A. NO. 19/12
CA/PHC/APN/158/06
HC(REV.) 512/04
MC (FORT) CASE NO. 58439
MAY 13TH, 2013

State Lands (Recovery of Possession) Act No. 7 of 1979 – Section 9 – Scope of inquiry under the Act – Section 18 – Interpretation – State land – Land to which the State is lawfully entitled or which may be disposed by the State – Interpretation of Statutes.

State Lands (Recovery of Possession) Act was enacted in order to make provision for the recovery of possession of "State Lands" from persons in unauthorized possession or occupation of the State Lands.

Held:

(1) If the language of the enactment is clear and unambiguous, it would not be legitimate for the Courts to add words by implication into the language. It is a settled law of interpretation that the words are to be interpreted as they appear in the provision, simple and grammatical meaning is to be given to them, and nothing can be added or subtracted. The Courts must construe the words as they find it and cannot go outside the ambit of the Section and speculate as to what the legislature intended.

(2) In alienating "State Lands" the President of the Republic is mandatorily required to alienate or transfer state ownership in terms of the law.

per Sri pavan, J. –

"Assistance can be taken for purposes of interpretation of the phrase "written law" as found in the Constitution which is the

Supreme Law of the land. Whether it is the Constitution or the Act, the Courts must adopt a construction that will ensure the smooth and harmonious working of the Constitution or the Act as the case may be, considering the cause which induced the legislature in enacting it."

(3) The purpose of the State Lands (Recovery of Possession) Act is to provide an expeditious method of recovery of "State Lands" without the State being forced to go through a cumbersome process of protracted civil action and consequent appeals.

Cases referred to:

1. *Ihalapathirana Vs. Bulankulama, Director General, U.D. A.* (1988) 1 Sri L.R.
2. *Farook Vs. Urban Development Authority* – C.A. Appl. 357/89; CA Minutes of 21.08.1996.
3. *Mohamed Vs. Land Reform Commission and another* – (1996) 2 Sri L.R. 124

APPEAL from the judgment of the Court of Appeal.

Sanjeewa Jayawardene, P.C., with *Sandamali Chandrasekera* for the Complainant – Respondent – Respondent – Petitioner

Viran Corera for the Respondent – Petitioner – Petitioner – Respondent

Cur.adv.vult.

July 27, 2013

SRIPAVAN, J.

The Complainant – Respondent – Respondent – Petitioner (hereinafter referred to as the "Petitioner") sought, inter alia, to set aside the judgment of the Court of Appeal dated 10.01.12 whereby the said Court set aside the judgment of the High Court of Colombo dated 26.09.06 which affirmed the Order of the Magistrate's Court of Colombo dated 14.01.04. The Petitioner and the Respondent – Petitioner – Petitioner

Respondent (hereinafter referred to as the "Respondent") conceded that the land which is the subject matter of the application is a "STATE LAND" falling within the ambit of the provisions of the State Lands (Recovery of Possession) Act No. 7 of 1979 as amended.

This Court granted Special Leave to Appeal on 03-12-12 on the following questions:-

(a) Has the Court of Appeal substantially erred by misinterpreting the provisions of the State Lands (Recovery of Possession) Act and its amendments and the specific definitions contained therein?

(b) Can the document X1 be classified as a lawful permit granted or any other written authority for the purposes of resisting an application for ejectment instituted under the State Lands (Recovery of Possession) Act.

(c) Did the Court of Appeal err by failing to analyze the documents on record which amply demonstrate that the Respondent persistently neglected to execute a formal lease although distinctly called upon to do so?

(d) Did the Court of Appeal fall into substantial error when holding that there existed a monthly tenancy and the same constitutes a written authority given to the Respondent until such time the said authority is legally revoked?

(e) Does the purported relationship that the Court of Appeal states was created between the parties, i.e., monthly tenancy, in any event, one that will suffice for the purposes of resisting an application for ejectment, given the clear and unambiguous provisions of the State Lands (Recovery of Possession) Act?