

**MERCANTILE INVESTMENTS LTD.**  
**v.**  
**MOHAMED MAULOOM AND OTHERS**

COURT OF APPEAL

YAPA, J.,

KULATILAKE, J.

C.A. (PHC) NO. 5/98

H.C. HAMBANTOTA NO. 63/97

M.C. TANGALLE NO. 49038

JULY 14TH, 1998.

*Code of Criminal Procedure Act, No. 15 of 1979 – Amended by 12 of 1990 – S. 443(A)1 – Confiscation of vehicle – Transporting cattle without a permit – Offence of causing cruelty to animals – Right of the absolute owner to be heard – Universal Declaration of Human Rights (1948) Art 17 (1), 17 (2).*

The vehicle was detected when the accused respondents were transporting cattle. The accused pleaded guilty and were convicted. The court thereafter proceeded to hold an inquiry in order to decide the question whether the vehicle should be confiscated.

After inquiry, court was of the view that the claimant-respondent who was the registered owner had failed to take necessary precautions to prevent the said offences being committed. In the Revision application in the High Court, the petitioner the absolute owner sought to intervene but the application was refused, as the court observed that the petitioner had earlier consented to the release of the vehicle, which was in the custody of court to the claimant-respondent. The High Court confirmed the order of the Magistrate Court, on appeal.

**Held:**

1. In view of s. 443 (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 the 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.

Per Yapa, J.,

“The fact that the petitioner at some earlier stage of the proceedings before the Magistrate had given a letter consenting to the release of the vehicle to the claimant-respondent does not absolve the Magistrate of his duty to give notice to the petitioner of the inquiry relating to the confiscation of the vehicle.”

2. As regards the earlier consent of the absolute owner (petitioner) to release the vehicle to the registered owner, it appears that the petitioner was misled, since the letter has been issued by the petitioner before the date of confiscation.

Application in Revision from the Order of the High Court of Hambantota.

**Cases referred to:**

1. *Manawadu v. Attorney-General* 1987 2 SLR 30.

*Mohan Peiris with S. Galapathithi* for respondent-petitioner.

*A. H. M. D. Nawaz* SC for Attorney-General.

*Cur. adv. vult.*

July 14, 1998

**HECTOR YAPA, J.**

In this application, the respondent-petitioner (hereinafter referred to as the petitioner) is seeking to set aside the order of the learned Magistrate dated 01.08.97 and the order of the learned High Court Judge dated 13.11.97. The petitioner is the absolute owner of the lorry bearing No. 48 – 2751. This lorry was detected by the police, when the accused-respondents were transporting cattle. After the detection, the accused-respondents were charged in the Magistrate's Court of Tangalle on two counts. In the 1st count accused-respondents were charged with committing the offence of transporting cattle without a permit. In the 2nd count they were charged with committing the offence of causing cruelty to the animals in terms of the Prevention of Cruelty to the Animals Ordinance. The accused-respondents pleaded guilty to the said charges and were convicted and sentenced. Thereafter, the learned Magistrate proceeded to hold an inquiry in order to decide the question whether the vehicle in question 48 – 2751 should be confiscated. After the inquiry, the Magistrate was of the view that the claimant-respondent who was the registered owner of this vehicle had failed to take necessary precautions to prevent the said offences being committed and therefore by his order dated 01.08.97 decided to confiscate the said lorry.

The claimant-respondent thereafter filed a revision application against the said order of confiscation of the vehicle by the Magistrate, in the High Court of Hambantota. At that stage, the petitioner who had notice

of the case appeared in the High Court and made a claim to the said vehicle as the absolute owner, and moved court to set aside the order of confiscation dated 01.08.97 and release the said vehicle to the petitioner or in the alternative to direct the Magistrate to hold a fresh inquiry, since the petitioner had no notice of the inquiry held before the Magistrate. However, the High Court Judge after having considered the submissions made on behalf of the petitioner, was of the view that the petitioner had notice of the inquiry. This conclusion was reached by the High Court Judge for the reason that the petitioner had earlier on 30.7.97 had issued a letter to the claimant-respondent stating that he had no objection to the release of the said vehicle, which was in the custody of the court to the claimant-respondent. Therefore, the learned High Court Judge by his order dated 13.11.97, refused to set aside the order of the Magistrate confiscating the lorry 48-2751 and dismissed the claim of the petitioner. The present revision application is against the said order of the learned High Court Judge.

At the hearing of this application, the learned counsel for the petitioner referred to section 443 A (1) of the Code of Criminal Procedure Act, No. 15 of 1979 as amended by Act No. 12 of 1990 which 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.”

Therefore, learned counsel contended that in view of the said provision, the petitioner being the absolute owner of the vehicle is entitled to the possession of the said vehicle, even though the claimant-respondent had been given its possession on the lease agreement. In the circumstances, counsel submitted that the Magistrate should have given notice of the inquiry to the petitioner, when he decided to hold an inquiry to decide the issue whether the vehicle in question should be confiscated. Counsel therefore, contended that the petitioner had been denied the right to be heard, at the inquiry where the Magistrate decided to confiscate the said vehicle. It would appear therefore, that having regard to section 443 A (1) of the Code of Criminal Procedure Act as amended, the petitioner being the absolute

owner of the vehicle 48-2751 was entitled to possession of the vehicle. Thus, 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. The fact that the petitioner at some earlier stage of the proceedings before the Magistrate, had given a letter consenting to the release of the vehicle to the claimant-respondent, does not absolve the Magistrate of his duty to give notice to the petitioner of the inquiry relating to the confiscation of the vehicle.

Learned counsel for the petitioner cited several authorities to support the contention that the petitioner had a right to be heard before the Magistrate decided to confiscate the said vehicle. In the case of *Manawadu v. The Attorney-General*<sup>(1)</sup> it was held that: "the owner of a 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". Further, it was stated in the same case that: "Among the important rights which individuals traditionally have enjoyed is the right to own property. This right is recognized in the Universal Declaration of Human Rights (1948). Article 17 (1) of which states that everyone has the right to own property and Article 17 (2) guarantees that no one shall be arbitrarily deprived of his property". In the present case, the petitioner who was the absolute owner of the lorry bearing number 48-2751 had not been heard, a right to which he was entitled to before the order to confiscate the said vehicle was made. In the circumstances, if this order of confiscation is allowed to remain, it would amount to an order made where the petitioner had been denied of his right to be heard, and further it would result in the petitioner being arbitrarily deprived of his right to own property.

The application of the petitioner to set aside the order of confiscation of the vehicle dated 01.08.97, on the basis that he had no opportunity to show cause at the inquiry, was refused by the learned High Court Judge. He refused the application, stating that the petitioner had notice of the inquiry before the Magistrate, in view of the letter issued by the petitioner dated 30.07.97, stating that the petitioner had no objection to the release of the vehicle to the claimant-respondent. High Court Judge therefore, concluded that the petitioner had every opportunity to appear at the inquiry before the Magistrate. However, the important question to be considered here would be, under what circumstances the petitioner issued the said letter to the claimant-

respondent. As submitted by counsel in this case, if this letter was issued to the claimant-respondent, since he had informed the petitioner that the said vehicle had met with an accident and the vehicle was in the custody of court, and therefore the claimant-respondent required such a letter from the petitioner to obtain the release of the vehicle, then it would clearly be a case where the petitioner had been misled. Further, it would appear that the petitioner had been misled, since the said letter had been issued by the petitioner before 01.08.97 which was the date of the order of the Magistrate to confiscate the vehicle. Under these circumstances, it is manifestly clear that the petitioner had no notice of the inquiry held before the Magistrate. In such a case, it would be unreasonable to assume that the petitioner had voluntarily kept away from the inquiry relating to the confiscation of the vehicle. Besides, if the petitioner had notice of an inquiry relating to the confiscation of the vehicle, he would in all probability have appeared in court. Therefore, the learned High Court Judge was in error in assuming that the petitioner having had notice of the inquiry relating to the confiscation of the vehicle, had kept away from court. In cases of this nature, it is necessary that notice should be given to the parties who are likely to be affected by a decision taken regard to the confiscation of a vehicle. Further, in this case having regard to the letter given by the petitioner dated 30.07.97, the Magistrate would have been aware that the petitioner had some interest in the said vehicle. Therefore, in our view it was the duty of the Magistrate to have given notice to the petitioner when he decided to hold an inquiry relating to the confiscation of the said vehicle.

For the above reasons, we set aside the order of the learned Magistrate dated 01.08.97 and the order of the learned High Court Judge dated 13.11.97. Further, we direct the Magistrate to hold a fresh inquiry according to law in relation to the confiscation of the vehicle bearing number 48-2751 with notice to the petitioner and come to an appropriate finding. We order no costs.

**KULATILAKE, J.** – I agree.

*Application allowed.*

*Magistrate ordered to hold a fresh inquiry.*