LAW OF CONFISCATION: A COMPARATIVE ANALYSIS WITH REGARD TO RECENT JUDICIAL DECISIONS AND THE CODE OF CRIMINAL PROCEDURE OF SRI LANKA

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Introduction

Right to property is enshrined in Article 17 of the "Universal Declaration of Human Rights (UDHR)". It enshrines it as follows:

1. "Everyone has the right to own property alone as well as in association with others."[1]
2. "No one shall be arbitrarily deprived of his property."[2]

Therefore, it must be noted that one can possess, use and enjoy of his property until such is used to commit offences which lead to confiscation or forfeiture of his property.

This article is intended to be written to discuss the development of the recent pronouncements of Appellate Courts of Sri Lanka with regard to concept of confiscation and to assess the current trend of the Courts of Sri Lanka.

Confiscation of property

The term "Confiscation or forfeiture" is derived from the Latin term '*Confiscaio' "*joining to the *fiscus*, i.e. transfer to the treasury*"*. It's a legal seizure by a government authority.

In a case[3] it was stated as "Forfeiture is a punishment"[4]. In the case of Police ***Sergeant v. Kandasamy***[5], MacDonell, CJ observed that forfeiture or confiscation is

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[1] Universal Declaration of Human rights 1948, Article 17(1)

[2] Ibid.,Article 17(2)

[3] 28 N.L.R.348

[4] 28 N.L.R.348 (349)

[5] 3 C.L.W 45

penal provision and the power to confiscate should be clearly be given by law."[6]

Therefore, it must be noted that use of a property is a right which cannot be taken away unless there is a specific statutory provision.

In Sri Lanka, substantial provisions regarding confiscations are found in some specific statutes and procedures of the same are found in Code of Criminal Procedure Act No.15 of 1979 amended subsequently.

Procedure to conduct the inquiry

Inquiry in connection with disposal of property is conducted in terms of chapter XXXVIII of Code of Criminal Procedure. Through inquiry, Magistrate is to be satisfied whether the property used in commission of the offence should be forfeited, subject to the substantial provisions of the specific statutes which provide provisions for confiscation.

Section 425(1) of the Code Criminal Procedure Act No.15 of 1979 stipulates as follows:

"When an inquiry or trial in any criminal court is concluded the court may make such orders as it thinks fit for **the disposal of any document or other property** produced before it regarding which any offence appears to have been committed or which has been used for the commission of any offence."[7] (Emphasis added).

It has to be borne in mind that the term "disposal" does not mean or include "confiscation".[8] So, the Magistrate is bound to peruse the relevant statutes under which charges may be framed to confiscate a property, before confiscating a property.

At the confiscation inquiry, the owner of the property is heard from his side to explain the use of his property at the time of committing the offence.

In the case of ***Manawadu v. Attorney General***[9], Sharvananda J held that the term

[6] Police Sergeant v. Kandasamy, 3 CLW 45

[7] Code of Criminal procedure Act, No.15 of 1979
[8] 28 N.L.R.348
[9] 1987 3 SLR 30

"Forfieted" used in section 40(1) of the Forest Ordinance must be given a meaning as "Liable to be forfeited".

In the case of ***Orient Financial Corp. Ltd v. Range Forest Officer and 1 Other***[10], Priyasath Dep PC.J pronounced as follows:

"*According to the plain reading of this section, it appears that upon conviction, the confiscation is automatic*"[11].

Therefore, there is no doubt that 3rd parties who are the owners of such properties, are prejudiced. Thus, the rule of "*audi alteram partem*" came into existence. On that basis, it was understood that 3rd parties who are the owners of such properties, should be heard.

This view puts a burden on the Magistrates to conduct a confiscation inquiry and to take evidence, subject to specific statutes without making immediate orders to confiscate once the offence is committed.

At the confiscation inquiry, registration book should be marked as part of evidence in order to prove the "ownership" of such property.[12] "The claimant, in the first instance before claiming the production, must establish ownership."[13] Non-tender of the document will create an impression that "petitioner knew that the vehicle was not under the petitioner's name and cannot claim it."[14]

Proofs and standard of proof

When it comes to the purview of confiscation, the owner, who is heard, is expected to establish and satisfy the Court on two elements at the confiscation inquiry. Namely,

1. The accused committed the offence without his knowledge.
2. The accused committed the offence without his participation.

The first is the knowledge test. Here, what standard which the Court expects is a question of law. The latter is a question of

[10] SC Appeal No.120/2011 decided on 10.12.2013
[11] Ibid. (3)
[12] Abuthalibu Mujeeba v. A.G and Others, CA (PHC) APN No:122/15
[13] Ibid. (12)
[14] Ibid. (12)

fact which is precautionary measures that should have been taken. There are numbers of judgments which discuss these two elements deeply.

In the case of ***The Finance Company PLC v.Priyantha Chanadana and 5 Others***[15], Dr. Shirani Bandaranayake J held that 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 above said matters on a "balance of probability".

In the case of ***Abuthalibu Mujeeba v. A.G. and Others***[16], it was held that the petitioner has no "locus standi" to maintain the case since the property was not in her possession at the time of commission of the offence. In this case, it must be noted that petitioner (subsequent owner) was not the original owner at time of commission of the offence. Therefore, she cannot prove any one of these two elements even though she was noticed to be heard.

In the case of ***Mary Matilda Silva V. P.H. De Silva***[17], it was held that giving "mere instructions" is not sufficient to discharge the said burden. Owner must establish that "genuine instructions" were in fact given.

In the case of ***Kottasha Arachchige Ubhayaweera v. Range Forest Officer and Others***[18] ", it was held as follows:

"*Accordingly, it is amply clear that simply telling the driver is insufficient to discharge the burden cast on the vehicle owner by law*."[19]

In the case of ***Peoples Leasing Co. ltd v. The Forest Officer and Others***[20], the order reported to be given by the Magistrate, is reproduced as follows:

[15] 2010 2 SLR 220
[16] Abuthalibu (n12)
[17] CA (PHC) *86/97*
[18] CA (PHC) 95/2012 decided on 04.09.2018.
[19] Ibid(17)
[20] C.A. Revision No. CA (PHC) APN 106/2013

"*රාත්‍රී කාලයේ කරන දේවල් සම්බන්ධයෙන් සොයා බැලීමේ හැකියාවක් නොමෙති බව ද සාක්ෂිකරු පිළිගෙන ඇතඒ[21] 'බා මෙරළුයැර ඕලොරි රථයේ සන්තකය ලයා පදිංචි අයිතිකරු හාරයේ නොතිබී ඇති බව පෙනී යයි*"[22]

The judgment reported to be given by the Judge of the High court, is reproduced as follows:

"*මෙම සාක්ෂිකරු ප්‍රකාෂ කර ඇත්තේ, වාහනය සම්බන්ධයෙන් සොයා බැලීම අය කිරීමේ නිළධාරියා විසින් සිදු කරන බවය. එසේ වුව ද එම සොයා බැලුවේ යැයි කියන අය කිරීමේ නිළධාරියෙකු සාක්ෂියට කැඳවා නැත*"[23]

Therefore, it was held by the Court of Appeal that views of both the Magistrate and the Judge of the High Court are correct, in finding that the absolute owner has failed to establish the two elements.

Then, it is clear that the owner has a full time task to look after his property and the property must be under his effectual possession.

In the case of ***Ceylinco Leasing Corp. Ltd v. M.H. Harison and Others***[24], the court pronounced as follows:

"*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*."[25]

In the case of ***K.W.P.G. Samarathunga v. Range Forest Officer and 1 Other***[26], The term used in the judgment with regard to precautions, is "necessary precautions". In the later part of this judgment, his Lordship Chitrasiri J pronounced the term a "meaningful step". Therefore, one must note that what amounts to meaningful steps is a question of fact and it is a matter for the court to decide.

In the case of ***Kottasha Arachchige Ubhayaweera v. Range Forest Officer and Others***[27], K.K. Wickramasinghe J pronounced as follows:

"*We are of the view that the Appellant should have actively inspected and confirmed about a*

[21] Ibid. (7)
[22] Ibid. (7)
[23] Ibid. (8)
[24] SC (SPL) LA 181/11
[25] Ibid. (14)
[26] C.A (PHC) No.89/2013
[27] Kottasha (n18) (18)

valid permit of the said timber especially when he had prior knowledge about his vehicle being used for such transportation from 70km away from his residence. As per the evidence of the Appellant in the vehicle inquiry, it is observed that in some occasions he had no control over the vehicle for two days. Therefore, it is understood that the Appellant had failed to discharge the burden cast on him."[28]

Absolute Owner V. Registered Owner

It is obvious that it is settled law that owner of a property should be heard at the confiscation inquiry. Recently, the Appellate Courts of Sri Lanka had to address and interpret the term "owner" used in statutes which contain the provisions for confiscation. In other words, which "owner" (Absolute owner or registered owner or both) should be afforded the opportunity to be heard at the confiscation inquiry, has been a question to be dealt with.

When a property is subjected to a Hire Purchase Agreement, there would be two owners. Namely, the absolute owner (Financial companies) and the registered owner. In this circumstances, if an offence is committed, who should be noticed for confiscation inquiry is a well-argued topic in recent times.

When the judgment in the case of **Manawadu V. A.G**[29] was delivered, there was no provision in the Code of Criminal Procedure as to Hire Purchase Agreements. At that time, the Courts were inclined to apply the rule of "audi alteram partem" in order to enable registered owner to take part at the confiscation inquiry.

By the development of business practices and the existence of Financial companies which facilitate "Hire Purchase Agreements", the need of specific provisions to be enacted, was realized.

Thus, section 433A(1) of the Code of Criminal Procedure (Amendment) Act, No.12 of 1990 stipulates as follows:

"*In the case of a vehicle let under a higher purchase or leasing agreement, the person*

[28] Ibid. (18)

[29] Manawadu(n9)

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.*"[30](*Emphasis added*)

Then, the Courts had to address the same rule (*audi alteram partem*) allowing the Financial Companies to take part at the confiscation inquiries.

In the case of ***Merchantile Investment Ltd. V. Mohamed Mauloom and Others***[31], the Court held that in view of s.433A(1) of Act No. 12 of 1990, the petitioner being the absolute is entitled to possession of the vehicle, even though the claimant respondent had given its possession on the Lease Agreement. It was further stated as follows:

"*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*"[32].

After allowing the Financial Companies to take part at the confiscation inquiry, in some cases[33], it was argued that the burden to prove the above two elements is only upon the registered owner and that will not be applicable to an absolute owner. But in fact, that contention was rejected by the Supreme Court indicating as follows:

"*both the absolute owner and the registered owner should be treated equally and there cannot be a special privilege offered to an absolute owner such as financial company in terms of the applicable law in the country*"[34].

The Court further held the absolute owner also should discharge the burden of establishing the two elements[35].

Nevertheless, after some point of time, it was later understood about the trend that the Financial Companies after taking part of the confiscation inquiry and getting the vehicle released, gives the released vehicle back to the same registered owner.

To limit this strategic crime, by using the property subjected to Financial Facility, to

[30] Code of Criminal Procedure (Amendment) Act, No.12 of1990.
[31] 1998 3 SLR 32
[32] Ibid (35)
[33] 2010 2 SLR 220, SC Appeal No.120/2011.
[34] The finance(n16)(235)
[35] Ibid.

commit offences, the Courts were expected to address the issue carefully.

In the case of ***Orient Financial Corp. Ltd v. Range Forest Officer and 1 Other***[36], two questions were posed as to whether it can be said the absolute owner committed the offence or it was committed with the knowledge or participation of the absolute owner. The Court said as follows:

"*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 commission of the offence when the vehicle is not with them*"[37].

Then, it created a doubt whether the absolute owner should be heard. Therefore, in this case, The Supreme Court had to address the above issue and made its view as who should be fit to be heard.

The view of the Learnt Magistrate reported in the said judgment was as follows:

"*In terms of the lease agreement the absolute owner can recover the loss from registered owner and failing that from guarantors and sureties. Further the Learnt 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 objective of section 40 of the Forest Ordinance"*[38].

The Court of Appeal was of this view and introduced a new interpretation to the term "owner" used in the Forest Ordinance. The Court applied the "control test" in order to explain who should be fit to be heard at the inquiry. The Court introduced a civil remedy recognized by law. Under the law of contract, the absolute owners can have a civil suit against registered owners and can recover their loss sustained by them because of an illegal act. The court insisted as follows:

"*if the agreement is terminated, he will be liable only for the balance installments and other charges. This will remove the deterrent effect on the registered owners and encourage them to use vehicles subject to finance to commit offence.*"[39]

The Court further said as follows:

[36] Oreient (n10)
[37] Ibid (6)
[38] Ibid (6)-(7)
[39] Ibid (7)

"*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 obtains additional security by way of guarantors*."[40]

Therefore, the Supreme Court finally came to the conclusion that,

"*the person who is in possession of vehicle is the best person to satisfy the court to prevent the commission of the offence*."[41]

In the case of ***Peoples Leasing Co. Ltd v. The Forest Officer and 3 Others***[42], the registered owner never claimed his vehicle at all. But, still the Court of Appeal emphasized the principle drawn in the case of Orient Financial Corp. Ltd case. The Court emphasized that,

"*Handing over the vehicle to the registered owner itself shows that the power of the absolute owner to have the control over the vehicle is diminished. Moreover, control over the vehicle exercised by the absolute owner becomes very remote after handing over to the registered owner*".[43]

In the case of ***Ceylinco Leasing Corp. Ltd v. M.H. Harison and Others***[44], the Courts were to be expected to address whether the term "owner" includes the absolute owner as well in connection with Forest Ordinance. Here, the appellant relied on the judgment of ***Manawadu v. AG***[45] and relied on the section 433A of the Code Criminal Procedure as amended No.12 of 1979 to justify its argument.

The Court justified by holding that,

"*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*".[46]

The Court further insisted as follows:

"*for the purpose 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*"[47].

Therefore, it must be borne in mind that presently, the position is settled that the registered owner is the best person to be heard.

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[40] Ibid (7)
[41] Ibid(6)
[42] Peoples (n20)
[43] Ibid(10)

[44] Ceylinco(n24)
[45] Manawadu(n9)
[46] Ceylinco(n24)(12)
[47] Ibid.(14)

Nevertheless, this leaves a doubt or dilemma as to whether the position created by the Judgment of ***Manawadu V. A.G***[48], is still in force, because the position that "the best person to be heard is the registered owner" formed by ***Orient finance Case***[49] restricts or limits the right to claim of the absolute owner.

Conclusion

It can be presumed that the absolute owner who has the right to claim, is not in a position to exercise the right efficiently. Practically, the only option available to absolute owner is to seek civil remedies under contractual obligation suits.

Notwithstanding that, it is appreciated that the Appellate Courts of Sri Lanka are very much concerned about the intention of the legislature, making various practical interpretations appropriate to the current scenario.

It's commendable that The Courts have put a bar to control the commission of strategic crimes using the Financial Facility. Nevertheless, it is recommended that there should be proper mechanism to control these kind of misuses in order to achieve the intention of the legislature.

[48] Manawadu(n9)
[49] Oreient (n10)