

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

W.G. Ranasinghe

2nd Claimant - Respondent - Petitioner

C.A.(PHC) APN 71/2010

HC Kandy No. Appeal 129/2006

Vs.

Kaluthota Investments (PVT) Ltd.

1st Claimant - Appellant - Respondent

Officer-in-Charge, Police Station,

Katugathota.

Complainant- Respondent-Respondent

The Attorney General

Respondant- Respondent

Before : Sisira de Abrew J &

Upaly Abeyrathne J

Counsel : Wijedasa Rajapakshe President's Counsel with

Luxsman Livera for the petitioner

Sumedha Mahawanniarachchi with Amila Withana for the

1st Claimant- Appellant- Respondent

Argued on : 03.06.2010, 4.06.2010 and 07.06.2010

Decided on : 07.07.2010

Sisira de Abrew J.

Upon a hire purchase agreement between JPD Indika Gunarathne and JPM Gunarathne (one party) and Kaluthota Investment (pvt)Ltd, JPD Gunarathne and JPM Gunarathne on 19.01.2002 acquired possession of vehicle bearing registration N0.32 Sri 5861. Kaluthota Investments (Pvt) Ltd, the 1st claimant respondent (hereinafter referred to as the respondent) became the absolute owner and two Gunarathnes became the registered owner of the vehicle. Upon an agreement dated 09.12.2003 between two Gunarathnes and W.G. Ranasinghe, the petitioner in this case, the latter acquired possession of the said vehicle. Two Gunatathnes have failed to obtain prior consent of the respondent before they entered into the said agreement and as a result the said agreement has been entered into without the prior consent of the respondent. The said agreement has therefore been entered into in violation of clause 4 (b) of the hire purchase agreement. The said agreement is also in violation of Section 25(1) of the Finance Leasing Act No. 56 of 2000 which is as follows.

ö A lessee shall not except with the written permission of the lessor and subject to any rights of third parties, transfer the right to the possession and use of an equipment under a finance tease to any other person.ö For the above reasons, I hold that the petitioner has acquired the possession of the said vehicle through illegal and unlawful means.ö

Both Gunarathnes did not pay installments as agreed. The respondent thereafter by letter dated 06.10.2004, informed them that the hire purchase agreement would be terminated within seven days from 06.10.2004 if arrears of money is not paid. They were further requested to hand over the

vehicle to the respondent within seven days of the date of the letter. Hire purchase agreement stands terminated since the arrears was not paid. Two Gunarathnes did not hand over the vehicle. The respondent thereafter decided to seize the vehicle. The agent of the respondent having made a complaint at police station Kandy on 03.12.2005, with his assistants took possession of the vehicle from the possession of the petitioner. I have earlier held that the petitioner had acquired the possession of the vehicle through unlawful and illegal means. The petitioner shot at the group [the agent of the respondent and his assistants] which came to taken the possession of the vehicle. The petitioner had taken up the position that he shot at the group in the exercise of his private defense. Police on a complaint by the petitioner, filed a B report in the Magistrate's court [MC] alleging that the said group robbed the vehicle. The learned Magistrate, by his order dated 24.01.2006, ordered the production of the vehicle in court and the respondent in compliance with the said order, on the same day, produced the vehicle in court. The learned Magistrate, by his order dated 30.05.2006 handed over the vehicle to the petitioner.

The respondent, on 08.06.2005, filed a case against two Gunarathnes in the District Court of Colombo claiming Rs.21, 88,428/71 and possession of the vehicle. The learned District Judge issued an enjoining order dated 09.01.2006 directing two Gunarathnes and their agents to refrain from taking possession of the vehicle from the respondent and not to disturb the possession of the vehicle which was with the respondent. Since the vehicle was handed over to MC by the respondent only on 24.01.2006 it should have been in the possession of the respondent when the enjoining order was issued.



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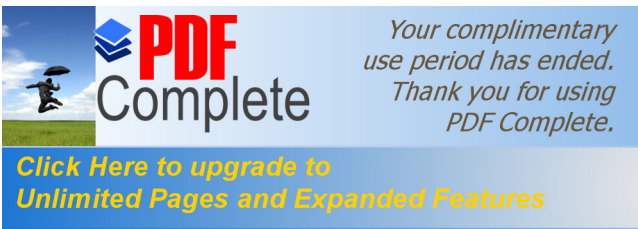
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The learned High Court Judge, by his order dated 31.03.2010 set aside the order of the learned Magistrate dated 30.05.2006. The petitioner has filed this revision application to set aside the learned High Court Judge's order.

Learned President's Counsel (PC) for the petitioner at the hearing of this case submitted the respondent having withdrawn the revision application, filed in the High Court to set aside the order of the learned Magistrate, preferred an appeal in the High Court claiming the same relief. He contended that under the said circumstances it was wrong for the learned High Court Judge to use his revisionary powers in the appeal filed before him. He further contended that High Court Judge who is hearing an appeal cannot use his revisionary powers to set aside an order of a Magistrate. I now advert to this contention. The appeal in this case was filed in the High Court of Kandy on 29.07.2006. The revision application was called along with the appeal even on 17.12.2009 (vide journal entry on 17.12.2009 page 22). On 17.12.2009 the appeal case was taken up for argument in the High Court. The learned High Court Judge on 31.03.2010 delivered his order. Thus the contention that the respondent filed the appeal after withdrawing the revision application in the High Court is not supported by the facts.

In *Attorney General Vs Gunawardene* [1996] 2 SLR 149 a bench of five judges of the Supreme Court decided: "Revision like an appeal is directed towards the correction of errors but it is supervisory in nature and its object is the



due administration of justice and not primarily of solely the relieving of grievances of a partyö

In the instant case the record of the MC was before the learned High Court Judge. Applying the principles laid down in the above judicial decision I hold that High Court Judge has the power to act in revision and correct errors of the order of the Magistrate if he has formed such an opinion. The learned High Court Judge in this case has come to the conclusion that the order of the Magistrate was incorrect. I am therefore of the opinion that the learned High Court Judge was right when he decided to use his revisionary powers in the appeal before him. For these reasons I reject the above contention of the learned PC.

Learned PC next contended that in view of R2 submitted to the MC (page232), the respondent could not have engaged in finance leasing. Learned counsel for the respondent at the hearing before us submitted that R2 was submitted to the MC with further written submissions dated 24.05.2006 but without notice to the respondent. According to R2 the respondent is not registered under section 44 of the Finance Leasing Act No.56 of 2000 to carry on finance leasing business. Learned PC therefore contended that in terms of section 2 of the said Act, the respondent could not engage in business on 19.01.2002. He therefore contended that the hire purchase agreement was illegal. Section 2 of Finance Leasing Act No. 56 of 2000 reads as follows :

õSubject to the provisions of section 44 from and after the appointed date, no person shall carry on finance leasing business, except under the authority of a certificate of registration issued in that behalf under the provisions of this Act.õ But Section 2 of this Act should be read subject to section 44 of the Act. But Section 2 of this Act should be read subject to section 44 of the Act. Section 44 (1) of the Act reads as follows:

õ Every person who is carrying on finance leasing business on the appointed date, may, notwithstanding the provisions of section 2 of this Act, continue to carry on such business for a period not exceeding one year from such appointed date, but shall within that period apply for and obtain a certificate of registration under this Act to carry on such finance leasing business.õ The appointed dateø stated in the said section is 1.8.2001 (vide gazette No 1196/27 dated 10.8.2001). Thus anybody who was carrying on finance leasing on 1.8.2001 can legally carry on finance leasing up to 1.8.2002 without a certificate of registration. Thus the hire purchase agreement between the respondent and two Gunarathnes on 19.01.1992 is Legal. The contention of learned Presidentø's Counsel should therefore fail.

Learned PC harping on section 43(1) of CPC next contended that the petitioner is entitled to the possession of the vehicle since it was taken from his possession by the agents of the respondent. He therefore contended that the vehicle should be handed over to the petitioner. Section 431(1) of the CPC reads as follows:

õ The seizure by any police officer of property taken under section 29 or alleged or suspected to have been stolen or found under circumstances which create suspicion of the commission of any offence shall be immediately reported to a Magistrate who shall forthwith make such order as he thinks fit respecting the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained respecting the custody and production of such property.ö

In the present case the agents of the respondent have taken possession of the vehicle from the petitioner. Learned PC relied on the judgment of Justice HNG Fernando (as he then was) in *Punchinona Vs Hinniappuhamy* 60 ALR 518. His Lordship held: õ Where the seizure by a police officer of property alleged or suspected to have been stolen is reported to a Magistrate under section 419 of the Criminal Procedure Code, The Magistrate, if he does not consider õofficialö custody to be necessary, has no alternative but to order the property to be delivered back to the person from whose possession it was seized. The Magistrate has no power to order the property to be given to any other person on the ground that the latter is the true owner.ö Justice HBG Fernando expressed the same view in *Piyadasa Va Punchibanda* 62 NLR 307. But Justice Sri Skanduraja in *Sugathapala Vs Thambiraja* 67 NLR 91 did not follow the view expressed by Justice HNG Fernando in the said two cases. His Lordship observed: õ That it is open to a Magistrate, when he acts under section 419 (1), to direct the property found in the possession of one person to be delivered to another person who is entitled to possess it. Section 419 has conferred jurisdiction on the Magistrate to decide who is entitled to the possession of such property. In exercising that power, the magistrate is not deciding a civil dispute, but only the right of possession in respect of the property. In the absence of anything to show the title

to the property, it should be ordered to be delivered to the person in whose possession it was when it was seized by the police.ö

His Lordship Justice Sirimanna in Balagalla Vs Somarthne 70 NLR 382 too did not follow the view expressed by justice HNG Fernando in these two cases and remarked thus: ö where a person, after discovering that stolen property has been sold to him, surrenders the property to the police, the Magistrate has power under section 419 (1) of the Criminal Procedure Code to order the property to be handed over to the true owner and not to the person from whom it was taken by the police.ö

However later His Lordship Justice Thambiah in Mariyathan Vs Rose 71 NLR 164 again followed the view expressed by Justice HNG Fernando in the said two cases.

In De Alwis Vs De Alwis (78-79-80) SLR 17 Justice Ismail held thus: ö That for an order to be made for disposal of this property under section 102 of the Administration of Justice Law (which was based on section 419 of the Criminal Procedure Code) the car must have been property alleged to be stolen or suspected to have been stolen or found in circumstances which created the suspicion of the commission of any offence. As the vehicle did not fall into any of these categories the Magistrate had no jurisdiction to make an order for its disposal under this section and had no alternative but to order its return to the possession of the person from whose custody the police had apparently taken it.ø



His Lordship Justice Senevirathne in *Freudenburg Industries Ltd Dias Mechanical Engineering Ltd CA Application No.69/79 CA Appeal No.102/82 - Court of Appeal minute 14.07.1983* observed that the principle that property be delivered to the person who had possession of it at the time seizure will not apply if there is an unlawful or criminal element in such possession.

Justice S.N Silva (as he then was) following the said judgment of justice Senevirathne in *Silva and Another Vs OIC Police Station Thambuththegama [1991] 2 SLR page 83* held: "There are limitations to the principle that property must be delivered to the person from whose possession it was seized, since it may result in the property being delivered to a person who may have obtained possession through criminal means. In such an event the Magistrate may have to consider the Question of title."

Having considered all the above judicial decisions, I endorse the view expressed by Justice SN Silva in *Silva's* case (supra) and hold that the principle that property must be delivered to the possession from whose possession it was seized is not an absolute one and that there are limitations to the said principle. The applicability of this principle depends on the facts of each case. I further hold that this principle will not apply if the possession of the property had been obtained through unlawful or criminal means and that the Magistrate, under section 431 of the CPC, has the power to deliver the property to a person other than the person from whose possession it was taken.



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In the instant case, I have earlier held that the contract between the petitioner and two Gunarathnes was illegal and the petitioner has obtained possession of the vehicle through illegal means. The petitioner is not the registered owner of the vehicle. Monthly installments of the vehicle have not been paid to the absolute owner. The respondent is the absolute owner of the vehicle. The petitioner has no legal right to possess this vehicle. In these circumstances court cannot hand over the possession of the vehicle to the petitioner. Court should hand over possession of the vehicle to the respondent. Therefore the learned Magistrate was wrong when he handed over possession of the vehicle to the petitioner. For these reasons, I hold that the learned High Court Judge was right when he set aside the order of the learned Magistrate.

For these reasons I affirm the order of the learned High Court Judge dated 31.03.2010 and dismiss the petition of the petitioner. Possession of the vehicle was handed over to the petitioner on a wrong order of the learned Magistrate. I therefore direct the Magistrate to take all necessary legal steps to ensure the delivery of the vehicle to the respondent in this case [Kaluthot Investments (pvt) Ltd].

Petition dismissed

Judge of the Court of Appeal.

Upaly Abeyrathne J.

I agree



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Judge of the Court of Appeal