

MERCANTILE CREDIT LIMITED
V.
SIRIMAWATHIE AND OTHERS

COURT OF APPEAL.

SENANAYAKE, J.

C.A. APPLICATION NO. 626/86.

M.C. GAMPAHA CASE NOS. 23418/ B & 24984 /A.

14 NOVEMBER, 1995.

Hire purchase contract- Court order for sale - Breach of section 431 (2) of the Code of Criminal Procedure Act- Code of Criminal Procedure Act, section 29. - Judicial Sale under Sale of Goods Act, section 22(b) - Sale in market overt- Purchase in good faith without notice of any defect in title.

The Petitioner a duly incorporated Company was engaged *inter alia* in the business of Hire Purchase Contracts. The Petitioner had on 20.04.84 entered into a Hire Purchase contract in respect of Isuzu Elf Diesel Motor Lorry No. 40 Sri 893 of which it was the owner with the 3rd Respondent. The 3rd Respondent defaulted in payment of the hiring rentals and the Petitioner therefore terminated the hiring on 22.10.84 and demanded the return of the vehicle. On 20 May, 1985 the petitioner instituted action in the District Court of Colombo against the 3rd Respondent as hirer and the Guarantors.

On 12.11.1985 the O.I.C Ragama Police Station produced lorry No. 40 Sri 893 before the Magistrate's Court of Gampaha with an 'A' report that no one claimed to be the owner. On 15.11.85 the Magistrate made order that the vehicle be included in the next auction sale. Accordingly the said vehicle was sold by public auction on 21.12.85 (in the presence of the Court officials and Ministry of Justice officials), after the sale had been gazetted in the Government Gazette of 15.12.85. The 1st Respondent bought the lorry at the auction sale of 21.12.85. The Magistrate apparently without any application therefor, caused the Registrar of his Court to send a letter, dated 16.04.86 to the O.I.C. Peliyagoda Police Station to deliver possession of the said vehicle to the 1st Respondent.

In the meantime on 12.04.86 a representative of the Petitioner being unaware of the said public auction took possession of the said vehicle. Thereafter on 27.4.86 the Registrar of the Magistrate's Court of Gampaha wrote to the O.I.C Sapugaskanda informing that 40 Sri 893 was confiscated and sold by public auction but the vehicle had been forcibly removed from the lawful owner by Mercantile Credit Ltd., and the police should take steps to take the vehicle into custody and produce it to Court. The Sapugaskanda

Police took possession of the lorry and reported to Court that the 2nd Respondent had purchased the lorry from 1st Respondent and requested Court to hand the lorry over to the 2nd Respondent. The vehicle was eventually handed over to the 2nd Respondent on an order of Court of 02.05.86.

The Petitioner moved the Court of Appeal in revision and the Court made order staying action on the order of 02.5.86.

Held:

- (1) The number plates of the lorry were available and the Court or the O.I.C. Ragama could have found out who the registered owner of the vehicle was.
- (2) The conduct of the O.I.C. Ragama was fraudulent in that he deliberately misled the Magistrate by filing the 'A' report which led the Magistrate to include the lorry in the public auction.
- (3) The indecent haste in including the vehicle for sale and the sale for a paltry sum of Rs. 31,000/- disclose a covert manoeuvre by a judicial officer with deliberate assistance by a corrupt Police Officer- in- Charge of a Police Station.
- (4) The Magistrate acted in contravention of the provisions of section 431(2) of the Code of Criminal Procedure and his action is tainted and does not appear to be a *bona fide* mistake when one considers his subsequent conduct in sending directions to O.I.C. Peliyagoda and O.I.C Sapugaskanda (in regard to handing over possession of the vehicle).
- (5) The vehicle was not a property taken in terms of section 29 (b) (of the Code of Criminal Procedure Act) as there was no reason to believe that the vehicle (and its contents) were the instruments or the fruits or evidence of crime.
- (6) If the legal owner was not known the Magistrate should have acted in terms of section 431(2) of the Code of Criminal Procedure Act, and, as the articles were not perishables, he could have detained them and published a notification in the court notice board and two public places to be decided on by him specifying the articles of which such property consists and requiring any person who may have a claim to come before him and establish his claim within six months from the date of such publication. Under sub-section (3) the Magistrate, if he thinks fit, may publish this notification at least once in newspapers in Sinhala, Tamil and English where the value of the property is Rs.2,500/- or more. Non-compliance with the section 431(2)

was fātal and the order of 15.11.85 to sell the vehicle was null and void and all subsequent acts flowing from that order are of no force or avail in law. The order of 2.5.86 was also a nullity.

(7) The principle that a judicial sale gives good title and section 22(b) of the Sale of Goods Ordinance also confers validity on a contract of sale held under any statutory power of sale or under the order of a Court of competent jurisdiction are of no avail because the judicial sale was a nullity. Further the principle that where goods are sold in market overt, the buyer acquires good title provided he buys in good faith without notice of any defect or want of title on the part of the seller does not apply. The buyer in market overt is only protected if the entire transaction takes place in the market itself between the hours of sunrise and sunset ; and if stolen goods which are sold in the market overt come back into the hands of the thief he cannot rely on the title acquired in market overt by his predecessor.

(8) There are exceptional circumstances which amount to a breach of the principles of natural justice and to a fundamental miscarriage of justice and this is a fit case for the exercise of the Court's revisionary powers.

Cases referred to:

1. *Ferreria v. Haniffa* 15 N.L.R. 445.
2. *Mohammed Bhoy v. Lebbe Marikar* 15 NLR. 466.
3. *Manomari v. Velupillai* 50 N.L.R. 289.
4. *Nilabdeen v. Farook* [1984]1 Sri L.R. 14.

APPLICATION in revision seeking setting aside of the orders of the Magistrate of Gampaha.

Chula de Silva, P.C. with *Mrs. D. Wimaladharma* for Petitioner.

R.K.W. Goonesekera for 1st Respondent.

D.S. Wijesinghe, P.C. with *Ms. D. Dharmadasa* for 2nd Respondent.

D. Jayakody, S.C. for 4th Respondent.

No appearance for 3rd Respondent.

Cur. adv. vult.

February 23, 1996.

H.W. SENANAYAKE, J.

The Petitioner filed this application to revise the impugned orders

dated 15.11.85, 02.05.86 and 06.05.86 made by the Learned Magistrate of Gampaha.

The relevant facts briefly are as follows:

The Petitioner was a duly incorporated Company engaged *inter alia* in the business into Hire Purchase Contracts. At the relevant time the Petitioner was the owner of Isuzu Elf Diesel Motor Lorry bearing No. 40 Sri 893. On 20.03.84 the Petitioner entered into a Hire Purchase agreement with the 3rd Respondent with respect to the said vehicle and in pursuance of the said agreement as the 3rd Respondent failed to pay the hiring rentals, the Petitioner terminated the hiring of the said vehicle dated 22.10.84 and demanded the return of the vehicle. On the 20th May 1985 it instituted action in the District Court of Colombo against 3rd Respondent as Hirer and the Guarantors.

The Officer in Charge of the Ragama Police Station on an 'A' Report had produced the said lorry at the Magistrate's Court, Gampaha with the contents found inside the said vehicle on 12.11.85. According to the report marked 'P5', on 21.09.85 the Sub-Inspector Seneviratne had received information that there was an Isuzu Lorry without number plates parked at No.11, Kandana Road, Peralanda, Ragama and on questioning the occupants of the nearby house they had informed him that one Anton Fernando of Gulf Marketing Limited had parked the lorry and left; on further investigations he had found the number plates of the vehicle inside and various other grocery items and bill books and on questioning he was informed that the lorry belongs to Central Finance Company but on investigation was informed that they were not the owners. Further the Officer-in-Charge, Anura Senanayake had reported that as so far no one had claimed ownership of the vehicle he was producing the said vehicle and the contents. On 15.11.85 the learned Magistrate had made order that the vehicle be included to be sold at the next auction and the said vehicle was sold on 21.12.85 by public auction after it was gazetted in the 15.12.85 Government Gazette.

The 'A' report marked 'P5' was a false report as John Anthony Fernando had informed the Police and made a statement to the Ragama Police on 23.09.85 where he had claimed the said vehicle as shown by

the statement 'P6'. The statement made by K.J.T. Anthony of 11 Kandana Road, Ragama marked 'P7' on 23.09.95 from whose premises the vehicle was taken in to custody by the police and who had categorically stated that his friend Anthony Fernando had towed the said vehicle on 20.08.85 and had left it there ; however he was not aware of the contents in the lorry. The statements 'P6' and 'P7' dated 23.09.95 respectively establish the fraudulent conduct of Anura Senanayake O.I.C. Ragama, when he deliberately misled the learned Magistrate by filing the 'A' Report which led to the learned Magistrate to take steps to auction the said vehicle on 21.12.85. I do not understand why the learned Magistrate acted so precipitately without following the explicit provisions of the Code of Criminal Procedure. The Petitioner's position was that the said order is a nullity and made without jurisdiction and contrary to the principles of natural justice.

On 12.04.86 a Representative of the Petitioner being unaware of the said public auction took possession the said vehicle. The said vehicle had been purchased at the public auction by 1st Respondent. The learned Magistrate caused the Registrar of the said Court to send a letter dated 16.04.86 to the Officer-in-Charge of the Peliyagoda Police Station to deliver possession of the said vehicle to the 1st Respondent, by letter dated 16.04.86. This appears to have been sent without any application made to the Magistrate's Court. The order apparently had been made without any motion. The Representative of the Petitioner had made a statement 'P14', as a result the order of the learned Magistrate was not complied with by the Peliyagoda Police.

Thereafter by letter dated 27.4.86 marked 'P15' the Registrar of the Magistrate's Court of Gampaha wrote to the O.I.C., Sapugaskanda, informing him that 40 Sri 893 was confiscated and sold by public auction. The Court was informed that the said vehicle had been forcibly removed from the lawful owner by Mercantile Credit Ltd., and the police should take steps to take the vehicle into custody and produce it in Court. In pursuance of the said directive 'P15', the Sapugaskanda Police removed the said vehicle after forcibly entering the said premises of the Petitioner accompanied by 1st Respondent's brother. On the next day the Sapugaskanda Police made a report to the Magistrate's Court of Gampaha in Case No:23418/B, marked 'P19' where the O.I.C., Sapugaskanda had reported to Court that on a complaint made by

Ajith Premaratne on 12.04.86 of the robbery of the Vehicle No. 40 Sri 893 worth Rs.31,000/- for non-payment of finance, on investigation it was found that the present owner of the vehicle was Sarathchandra Hewapathirana, 2nd Respondent, who had purchased from the 1st Respondent who had purchased from a public auction at the Gampaha Courts and requested the Court to hand over the vehicle to the 2nd Respondent and to issue notice on the Petitioner; and asked for further time to make further investigation and take the suspects to custody. According to Journal Entry of 29.04.86 the vehicle was produced in Court and an order was made by the acting Magistrate to call the case on 06.05.86 and notice the Manager of the Petitioner Company.

On 02.05.86 a motion was filed by Attorney-at-Law, Herbert Ekanayake and the matter was called and Attorney-at-Law, Mr. Dunstan de Alwis had submitted that the said vehicle was sold on the orders of Court after due publication in the Government Gazette and as there was no claimant and the 1st Respondent was the purchaser at the public auction who had subsequently sold the vehicle to the 2nd Respondent and as stated by the police in their report the vehicle be handed to the 2nd Respondent. The Acting Magistrate had directed the police to hand over the said vehicle to the 2nd Respondent. Though subsequently an inquiry was held, the Acting Magistrate confirmed the order made on 02.05.86 allowing the 2nd Respondent to retain possession of the vehicle.

The Petitioner filed the said application in this Court on 05.06.86 and supported it on 09.06.86 and obtained stay of proceeding in terms of paragraph (e) of the prayer of the petition staying the operation of the order of the Magistrate's Court dated 02.05.86 and the Registrar was to communicate this order to the Registrar of Motor Vehicles. It is a pity to note that it had taken nearly 9 years to reach finality in the Court of Appeal. This establishes the pace of disposal of the cases. I would be failing in my duty if I fail to point out that the said delay amounts to denial of justice. R.M. Jackson in his book "The Machinery of Justice" has stated that most of the worst factors of our legal system cannot be cured by legislation for they come from the habits of mind and ways of the legal profession and the judiciary". In my view a strong judicial commitment is essential for reducing the delay. It is time that we should examine our conscience and ask ourselves, have we fulfilled our obligations?

On 23.06.86 the 2nd Respondent was present in the Court of Appeal and represented by his Counsel K.Balapatabendi and had given an undertaking to see that the vehicle is not disposed of to any other party as well as not to remove any parts of the vehicle until the inquiry is completed regarding the custody of the vehicle.

The submission of the learned Counsel for the Petitioner was two fold: that the judicial sale was a nullity and it was in contravention of section 431(2) of the Code of Criminal Procedure Code. The Counsel submitted the said vehicle was not a property taken in terms of the provisions of section 29(b) as articles which there was reason to believe were the instruments or the fruits of evidence of crime. There was a legal duty and obligation on the learned Magistrate to comply with the mandatory section 431(2) of the Code of Criminal Procedure. Section 431(2) reads as follows if such person is unknown the Magistrate may detain it and shall in such case publish a ratification in the Court notice board and two other public places to be decided on by the Magistrate specifying the articles of which such property consists and requiring any person who may have a claim there to come before him and establish his claim within six months from the date of such public notification.

Sub-section (3) envisages such notification may also, if the Magistrate thinks fit, be published at least once in newspapers in Sinhala, Tamil and English if the value of the property amounts to two thousand five hundred rupees or more.

I cannot understand as to what the indecent haste was for the learned Magistrate to act so precipitately without following the explicit provisions of the Statute. The Registration number of the vehicle was stated in the 'A' report submitted to Court. In those circumstances the Magistrate had a duty cast on him as a judicial officer to call for a further report and instruct the O.I.C., Ragama to check with the Registrar of Motor Vehicles as to who was the Registered owner of the vehicle No.40 Sri 893, Isuzu Elf Diesel Motor Lorry. The indecent haste of including the vehicle to be sold at the next auction and gazetted on 15.12.85 within one month of production and selling the said vehicle for Rs.31,000/- a paltry sum on 21.12.85 in my view, disclose a covert manoeuvre by a judicial officer with deliberate assistance by a corrupt

Police Officer-in-Charge of a station. This is clearly established by the documents 'P6' and 'P7' that there was a claimant to the said vehicle. The Officer-in-Charge of the Ragama Police Station at the relevant time had deliberately suppressed the relevant material which he was in possession of at the time he submitted the 'A' report to the Magistrate's Court dated 12.11.85.

The said vehicle was not a perishable item and there was no necessity to act in contravention of the provisions of section 431(2) of the Code of Criminal Procedure. The Judicial officer's action is tainted and does not appear to be a *bona fide* mistake when one considers the subsequent conduct of the said Judicial officer in sending directions to the O.I.C., Peliyagoda and O.I.C., Sapugaskanda.

The learned Counsel submitted that the judicial sale was a nullity. The learned Counsel relied on the authority *Ferreria v. Haniffa*.⁽¹⁾ It was a case where the sale of all the real property of an insolvent had to take place under conditions determined by the majority of the creditors present at any meeting. Where no meeting of creditors was held and the assignee refused to sell, the Court took the matter into its own hands and ordered the Secretary to put the property for sale. Lascelles, C.J. held that the order was on the face of it beyond the jurisdiction of the Court. These facts have no relevance to the instant case.

He also relied on *Mohammed Bhoj v. Lebbe Marikar*,⁽²⁾ where the Court held that the interest of a *fidel commissarius* cannot be sold in execution during the lifetime of the *fiduciarius* as it is a contingent interest within the meaning of section 218 (k) of the Civil Procedure Code. I am of the view that the facts of the said case have no relevance to the instant case.

He also relied on the authority of *Manomari v Velupillai*,⁽³⁾ where a decree against a Defendant on whom summons has not been served is void and no rights can pass to a purchaser at an execution sale under such decree even if such purchaser was *bona fide* and without notice. In my view the facts have no bearing to the instant case.

The 1st Respondent admitted that the said vehicle was purchased on 21.12.85 in her name by her brother at an auction sale held at

Gampaha Magistrate's Court premises for the purpose of resale and her brother had attended to the repairs, sold the vehicle to the 2nd Respondent, but for some reason she does not disclose the date of the said transfer of the vehicle or the price that she received for the said vehicle. The 1st Respondent averred that by virtue of the Court sale she became the lawful owner and the orders made by the Magistrate and the Acting Magistrate were lawful and within jurisdiction and moved the action be dismissed.

The 2nd Respondent in his statement admits that he purchased this lorry on 10.01.86 from the 1st Respondent; that negotiations were done with the 1st Respondent's brother Dharmadasa introduced to him by one Keerthi Dissanayake and that he paid a sum of Rs.125,000/-. He relied on the original cash receipt issued by the Registrar, Magistrate's Court dated 21.12.85 and received subsequently, the photocopy of a letter dated 24.03.86 issued by the Registrar, Magistrate's Court, Gampaha to the Commissioner of Motor Traffic requesting to register the said lorry in the name of the 1st Respondent. At the time he purchased, he was not in possession of transfer papers pertaining to the vehicle. He purchased the said lorry *bona fide* and at the prevailing market value and he moved that the application be dismissed.

The learned Counsel for the 1st Respondent submitted that the 1st Respondent was a purchaser of the said vehicle at the public auction carried out at the Magistrate's Court premises in the presence of two officers of the Ministry of Justice. Therefore he submitted that since the 1st Respondent was a *bona fide* purchaser she was entitled to transfer or sell the said vehicle to the 2nd Respondent and the Petitioner had failed to claim the said vehicle when it was gazetted that the said vehicle would be auctioned on 21.12.85.

The learned Counsel for the 2nd Respondent submitted that he was a *bona fide* purchaser of the said vehicle from the 1st Respondent and he had paid a sum of Rs.125,000/- to the 1st Respondent and obtained possession of the vehicle. He was informed by the 1st Respondent's brother who negotiated the sale of the 1st Respondent with the help of one Keerthi Dissanayake that the said vehicle was purchased at the public auction held in the Magistrate's Court of Gampaha. He was unaware that the Petitioner had title to this vehicle. The learned

Counsel for the 2nd Respondent relied on the authority of *Nilabdeen v Farook*,⁽⁴⁾ where he submitted that the remedy available to the Petitioner was to institute a civil action in a Civil Court. It was held in the said case an order regarding possession made in a criminal proceedings does not operate as *res judicata* in respect of the question of title arising in a civil action. His submission was the application of the Petitioner was misconceived in Law.

In the case of a registered motor vehicle unlike any other article the registered owner of the vehicle could be traced without any difficulty by the police or by the Magistrate of the Court from the Commissioner of Motor Traffic. Section 2(1) of the Motor Traffic Act, in explicit terms states no person shall possess or use a motor vehicle unless that vehicle is registered and the person for the time being entitled to the possession of the vehicle is registered as the owner thereof. By statute it was necessary that a vehicle should be registered and the distinctive registered number obtained before the motor vehicle could be used on the high way.

In the instant case the 'A' report submitted by the O.I.C., Ragama on 12.11.85 mentioned the make of the lorry and the distinctive registered No. 40 Sri 893. The learned Magistrate had made an order to auction the said vehicle. He had made an order to produce the contents of the lorry before the Health Officer to find out whether the articles were fit for human consumption and there is a report dated 09.12.85 by the M.O.H., Gampaha informing that he had inspected the articles and found that the goods were not fit for human consumption.

The crucial question the Court has to inquire was whether the order made by the learned Magistrate on 15.11.85 was a valid order and was it in compliance with the relevant provisions of the Code of Criminal Procedure.

Did the learned Magistrate and the O.I.C. of the Ragama Police make any attempt to trace the registered owner of the said vehicle from the Commissioner of Motor Traffic?

Regarding the first question the 'A' report submitted by the O.I.C., Ragama indicated that the registered owner was unknown. In terms of

section 431(2) of the Code of Criminal Procedure the Magistrate may detain the property and shall publish a notification in the Court notice board and two other public places to be decided on by the Magistrate specifying the articles and requiring any person who may have a claim thereto to come before him and establish his claim within six months from the date of such publication. The learned Magistrate had failed to comply with the imperative section: a motor vehicle is not a perishable item. In view of the value of the motor vehicle in terms of section 431 (3) the Magistrate had a discretion at least to publish once in the Sinhala, Tamil and English newspapers. It is only after the lapse of six months from the date of such public notification, the Magistrate could act in terms of section 432 of the Code of Criminal Procedure, where he could make an order for sale. His failure to comply with the imperative section makes his order dated 15.11.85 null and void as it is contrary to the provisions of section 431(2) of the Code of Criminal Procedure ; as I stated earlier there was an indecent haste on the part of the judicial officer to order the sale of this vehicle even without taking the rudimentary precaution of finding out from the Commissioner of Motor Vehicles as to the registered owner of vehicle No. 40 Sri 893. The said vehicle was produced before the Magistrate only on 15.11.85 according to the 'A' report dated 12.11.85 ; and the vehicle was gazetted in the Government Gazette on 13.12.85 informing that the auction will be held on the 21st of December 1985. The vehicle was not in the custody of the learned Magistrate for more than one month before he decided to gazette in the Government Gazette including the said vehicle for sale. Non compliance of the section was fatal and his order was null and void and all subsequent acts flowing from that order are of no force or avail in law.

The learned Counsel for the 1st Respondent submitted that it was a judicial sale and he relied on the book "Introduction to Roman Dutch Law" by *R. W. Lee*, page 429 where Lee quotes Voet 6.1.13. where a judicial sale gives a good title to the purchaser subject to certain several exceptions. He further relied on section 22(b) of the Sale of Goods Ordinance, on the validity of any contract of sale under any less statutory power of sale or under the order of a Court of competent jurisdiction. The owner of the goods is precluded from denying the seller's authority to sell and he relied on the book *Sale of Goods* by P.S. Atiyah 5th Edition, page 200: "The Court has a wide jurisdiction under the

rules of Supreme Court to order the sale of goods where for any just and sufficient reason it may be desirable to have the goods sold at once. Eg. because they are of a perishable nature or because the market is falling. The Court has power to insist on a sale despite the objection of the owner where such a course seems necessary or desirable and he relied on the book *Commercial Law* by *R.M. Godde*, page 400 which states that where goods are sold in market overt according to the usage of the market the buyer acquired a good title to the goods provided he buys them in good faith without notice of any defect or want of title on the part of seller

The buyer in market overt is only protected if the entire transaction takes place in the market itself between the hours of sunrise and sunset and if stolen goods which are sold in the market overt come back into the hands of the thief he cannot rely on the title acquired in market overt by his predecessor. I am unable to agree with the submissions of the 2nd Respondent. In the instant case the judicial sale was a nullity. The learned Magistrate had failed to comply with the pre conditions of section 431(2) and (3); as the said order was a nullity all consequential orders flowing have no effect in law. The concurrence or the presence of the high officers of the Ministry of Justice does not give sanctity to any illegal order made by the Judicial officer. The publication in the Government Gazette has no effect as the order of the learned Magistrate was in breach of the express provisions of the Code of Criminal Procedure. Thereby his order was a nullity. I am of the view the maxim "*Actus curiae gravabit*" is a complete answer to the said matter. This maxim is founded upon justice and good sense and affords a safe and certain guide for administration of the law.

In view of the above reasons I am of the view this is a fit case to exercise the revisionary jurisdiction of this Court because there are exceptional circumstances which amount to a breach of the principles of natural justice and to a fundamental miscarriage of justice. In the circumstances, I set aside the order made by the learned Magistrate on 15.11.85 and the purported judicial public auction and I direct the 2nd Respondent to hand over the possession of the vehicle to the Magistrate's Court of Gampaha and the learned Magistrate will inquire regarding the 'B' report filed by the Ragama Police in case N^o : 23418/B and if there was no criminal offence committed regarding the

said vehicle to hand it over to the Petitioner Company as they were the absolute owners of the said vehicle.

It is my considered view that the action of the judicial officer and the O.I.C. Ragama during the relevant period merits condemnation, such action brings disrepute to the judicial service and the police service.

Sale by court set aside.

Vehicle ordered to be handed over to the Petitioner.