

THE HIGH COURT OF SINDH, KARACHI

Spl. Criminal Appeal No. 47 of 2021

[The State/ANF versus Agha Mehmood ul Hassan Haravi & others]

Appellant : State/Anti-Narcotic Force, through
Mir Ali Nawaz Khan, Advocate.

Respondents 1, 2, 4 & 6 : Nemo.

Respondents 3 and 5 : Ayesha Zafar and Mehwish Tareen
through M/s. Muhammad Akram
Sheikh, Jam Asif Mehmood and Gohar
Mehmood, Advocates.

Applicant/Objector : Dr. Zeelaf Munir through M/s.
Mayhar Kazi, Shahbakht Pirzada and
Danish Nayyer, Advocates.

Dates of hearing : 28-02-2022 and 09-03-2022.

Date of decision : 19-10-2022

JUDGMENT

Adnan Iqbal Chaudhry J. - This appeal by the Anti-Narcotics Force [ANF] is under section 43 of the Prevention of Smuggling Act, 1977 [PSA] from an order dated 21-10-2021 passed by the Special Court-I (Control of Narcotic Substances) Karachi under section 32(1) of the PSA, discharging the show-cause notice issued to the Respondents 1 to 5 under section 31(1) of the PSA. It is important to note that in passing the impugned order the learned judge was exercising jurisdiction as the 'Special Judge' under the PSA, having been designated as such by the Federal Government by notification dated 21-01-2015 issued under section 44 of the PSA.

2. The information laid by the ANF before the Special Judge under section 31 of the PSA was numbered as Application No. 126/2016. It was alleged that the Respondents 1 and 2 (Aga Mehmood Hassan Haravi and Pervaiz Hassan Haravi - brothers) had amassed properties by smuggling narcotics, some of which properties were held in their own names, and some in the names of their

benamidars and associates i.e. the Respondents 3 to 5; hence the prayer to forfeit such properties under section 32(3) of the PSA. The 'subject properties' were listed in Schedule-A and Schedule-B of Application No. 126/2016. The nexus between the Respondents is that the Respondent No.5 is the ex-wife of the Respondent No.2; and the Respondent No.3 is the sister of the Respondent No.5.

3. To allege that the subject properties were the fruit of smuggling narcotics, the ANF averred:

(a) that the Respondent No.1 was an accused person in FIR No. SIB-429/1978 dated 30-05-1978, lodged on the detection of charas concealed in marble handicrafts intended for export to Germany; that during investigation, charas concealed in crates was also recovered from the residence of the Respondent No.1; and that the Respondent No.1 was an absconder in that case;

(b) that the Respondent No.1 had been convicted by the Special Court (CNS) Lahore by judgment dated 21-02-2000 passed in Narcotic Case No. 09/1998 (FIR No. 20/1997) on the charge of smuggling/exporting hashish concealed in medicinal balls, *albeit* he was eventually acquitted by the Supreme Court by judgment dated 19-10-2010;

(c) that the Respondent No.2 had been convicted by a court in the U.K. for smuggling hashish;

(d) that businesses set-up by the Respondents 1 and 2 were merely to conceal proceeds of smuggling; that tax returns of the Respondents 1 and 2 showed negligible income, insufficient for purchasing properties; that the Respondents 3 and 5 who were related to the Respondents 1 and 2, had no independent income, and thus it could be presumed that they were benamidars of the Respondents 1 and 2.

4. Based on the above information, the Special Judge proceeded to issue show-cause notice to the Respondents 1 to 5 under section 31(3) of the PSA. The Respondents 1, 3, 4 and 5 and one objector, namely

Zeelaf Munir, appeared before the Special Judge to contest the proceedings although the Respondent No.1 stopped appearing subsequently. The impugned order notes that the Respondent No.2 was never served. By order dated 28-05-2019, the Special Judge excluded the property held by the objector but on the condition of a bond that she will not sell the same while the case is pending.

5. By order dated 28-05-2019, the Special Judge framed points for determination and called upon the parties to adduce evidence. However, after recording evidence of the prosecution witnesses and after perusing the documents produced by the Respondents, the Special Judge held by the order impugned that the ANF had not placed sufficient information on the record so as to raise a reasonable suspicion that the subject properties were acquired from proceeds of smuggling narcotics; that the information laid before the court had never met the test of section 31 of the PSA; and that most of the subject properties, though earlier forfeited by the Special Judge (CNS) Lahore in Narcotic Case No. 09/1998 (FIR No. 20/1997), had been subsequently released upon the acquittal of the Respondent No.1 by the Supreme Court.

6. Mir Ali Nawaz Khan, learned counsel for the ANF (Appellant) submitted that the impugned order is erroneous inasmuch as sufficient information had been placed before the Special Judge to show that the Respondents 1 and 2 were involved in smuggling of narcotics; that since the Respondents 3 and 5 were womenfolk related to the Respondents 1 and 2, the presumption was that properties held by them were as benamidars; that though the Respondent No.1 had been acquitted in Narcotic Case No. 09/1998 (FIR No. 20/1997), for the purposes of section 31 of the PSA it was sufficient to show that he was 'involved' in smuggling; and that once notice to show-cause had been issued under section 31 of the PSA, the burden to prove that the subject properties were not acquired by smuggling was on the Respondents 1 to 5 in view of section 33 of the PSA.

7. Mr. Akram Sheikh, learned counsel for the Respondents 3 and 5, and Mr. Meyhar Qazi, learned counsel for the objector/Zeelaf Munir, supported the impugned order. Mr. Akram Sheikh submitted that firstly there was no evidence whatsoever that the subject properties were acquired from proceeds of smuggling narcotics; and secondly, on cross-examination the officers of the ANF had admitted that they had never even inquired into the source of income or lifestyle of the Respondents 3 and 5 who were wealthy ladies in their own right and who had paid valuable consideration for the properties held by them. Learned counsel also drew attention to the order dated 29-10-2010 passed by the Special Court (CNS) Lahore, and order dated 14-10-2011 passed in C.P. No. D-619/2010 to submit that after the Respondent No.1 had been acquitted by the Supreme Court in Narcotic Case No. 09/1998, the subject properties, including the properties held by the Respondents 3 and 5, had been de-frozen by the court of competent jurisdiction acting under the Control of Narcotic Substances Act, 1997; and that the attempt thereafter by the ANF to forfeit the same properties on same grounds by invoking section 31 of the PSA, was not only *malafide* but also without jurisdiction.

Mr. Meyhar Qazi while adopting the submissions of Mr. Akram Sheikh further added that though the objector/Zeelaf Munir had purchased an immovable property from the Respondent No.5, at that time such property was free from dispute, and thus the objector was a *bonafide* purchaser for value.

8. Heard the learned counsel and perused the record.

9. Adverting first to M.A. No. 13724/2021, which is by the objector/Zeelaf Munir for excluding her property from the scope of this appeal. That property is Plot No. 3, Khayaban-e-Jabal, Phase-V, DHA, Karachi, mentioned at serial No.1 of Schedule-B under para-1 of the memo of appeal, transferred to her by the Respondent No.5 (Mehwish Tareen) *vide* DHA's Transfer Order dated 21-08-2013 i.e. prior to Application No. 126/2016 moved by the ANF under section

31 of the PSA. The scope of sections 30 and 31 of the PSA is restricted to that property acquired by smuggling which is held by a person either in his own name, or in the name of any “relative” or “associate”, the latter two having been defined in section 2 of the PSA. Though the ANF had acknowledged in Application No. 126/2016 that Zeelaf Munir was present owner of said plot, she was never arrayed as a respondent, nor was it alleged that she was a ‘relative’ or ‘associate’ of the Respondents 1 and 2. In fact, the prayer for forfeiture in Application No. 126/2016 was not even made for the properties listed in Schedule-B. Apparently, for these reasons the Special Judge did not issue any notice to show-cause under section 31 of the PSA to Zeelaf Munir or to the owner of the other property mentioned in Schedule-B. Therefore, the inclusion in this appeal of the properties in Schedule-B is completely unwarranted. M.A. No. 1374/2021 stands allowed.

10. Emphasis was laid by learned counsel for the ANF on the fact that the Respondent No.1 was an absconder in a smuggling case emanating from FIR No. SIB-429/1978 dated 30-05-1978 which had been lodged for an offence under the Customs Act, 1969. However, the judgment dated 27-04-2002 passed in that case (Case No. 125/1981) shows that out of 11 accused persons, 3 were acquitted; the case against absconders was kept on dormant file, whereas the case against the Respondent No.1 was separated to be tried as and when he was produced before the court. From the record it appears, as was also submitted by Mr. Akram Sheikh Advocate, that at the time of trial of that case, the Respondent No.1 was in custody in Narcotic Case No. 09/1998 (FIR No. 20/1997). No record was produced by the ANF with regards to further proceedings taken against the Respondent No.1 in respect of FIR No. SIB-429/1978.

11. Regards the prayer for forfeiting properties of the Respondent No.2 (Pervaiz Hassan Haravi) for his conviction abroad for smuggling narcotics, the case reported as *The State/Anti-Narcotics Force v. Pervaiz Hassan Haravi* (PLD 2017 Sindh 140), upheld by the

Supreme Court (2018 SCMR 1397), shows that the attempt made by the ANF to forfeit some of the properties of the Respondents 2 and 5 under section 40 of the Control of Narcotic Substances Act, 1997 on the basis of said foreign conviction, had remained unsuccessful.

12. Except for drawing an inference from the above mentioned cases registered against the Respondents 1 and 2, the information placed before the Special Judge did not reveal any effort made to tie the subject properties to proceeds of narcotic smuggling. PW-2 Nasir Aziz, Deputy Director ANF acknowledged: *"I had not done any tracing regarding properties acquired through proceeds of narcotics"*. PW-4 Faisal, Assistant Director Law, ANF, acknowledged: *"I personally did not visit the residence of Respondents 3 to 5 in order to assess their means and living style Vol. says that both ladies are the benamidars of Mehmood-ul-Hassan Haravi. I infer from the wedlock of the Respondent No.5 with Respondent No.2 that the both ladies are the benamidars of Respondent No.1. It is correct I have not conducted inquiry whatsoever under the provision of section 31 of PSA, 1977 as well as under the provision of CNS Act, 1997 and against the Respondents. Vol. says that I have only prepared application/information under section 31 of PSA, 1977 and on the basis of documents which were collected by the other PWs"*. In fact, it appears that most of the properties in Schedule-A of Application No. 126/2016 were simply lifted by the ANF from earlier proceedings taken by it under the Control of Narcotic Substances Act, 1997 to forfeit properties held by and on behalf of the Respondent No.1. Those proceedings are discussed *infra*.

13. The Respondent No.1 was booked in FIR No. 20/1997 leading to Narcotic Case No. 09/1998 where he was initially convicted and sentenced by the Special Court (CNS) Lahore by judgment dated 21-02-2000 for the offence under section 15 of the CNSA for aiding in the smuggling of narcotics. After such conviction, the ANF moved applications before that Special Court (CNS) Lahore for forfeiting properties held by the Respondent No.1 and that of the Respondents 2 and 5 as his relatives. The properties that were forfeited by order

dated 03-08-2001 were most of the properties that are now in Schedule-A of Application No. 126/2016. One of those properties was a bungalow in KDA, Karachi, held at that time by the Respondent No.2, who transferred the same to the Respondent No.3 by a registered sale deed dated 25-10-2002 to satisfy a decree for specific performance. The ANF at Karachi issued notice dated 20-02-2004 to freeze said bungalow, which was challenged by the Respondent No.3 before this Court by C.P. No. D-619/2010 claiming that she was a *bonafide* purchaser. While that petition was pending, the Respondent No.1 was acquitted in Narcotics Case No. 09/1998 (FIR No. 20/1997) by the Supreme Court *vide* judgment dated 19-10-2010, and the order for forfeiting his properties was also set-aside by the Supreme Court. Resultantly, on 29-10-2010, the Special Court (CNS) Lahore also recalled its earlier order for forfeiting the properties of the Respondents 1, 2 and 5. Given that, the ANF conceded to C.P. No. D-619/2010 filed by the Respondent No.3, which was allowed *vide* order dated 14-10-2011. But then, on 24-05-2016, the ANF proceeded to file Application No. 126/2016 under section 31 of the PSA, which was dismissed by the impugned order.

14. The narration of facts above is to show that forfeiture of the subject properties under the provisions of the PSA was sought by the ANF after it was unsuccessful in forfeiting some of those properties under the provisions of the Control of Narcotic Substances Act, 1997 [CNSA]. Similar to the PSA, the CNSA also lays down a scheme and regime for forfeiting assets acquired from proceeds of smuggling *albeit* where the smuggling is that of narcotic drugs and psychotropic substance prohibited by the CNSA (hereinafter '**narcotics**'). Section 12 of the CNSA prohibits a person from knowingly possessing, acquiring or using any assets derived or obtained, either in his own name or in the name of any other person, through an act relating to narcotics which constitutes an offence under the CNSA, the Customs Act, 1969 or under any other law in force or repealed by the CNSA. Section 13 makes the contravention of section 12 an offence, and the

assets so held liable to forfeiture. Section 19 provides that where the Special Court finds a person guilty of an offence under the CNSA and sentences him to imprisonment for a term exceeding three years, the Court shall also order that his assets derivable from trafficking in narcotics stand forfeited. Upon the conviction of the offender, section 39 enables the Special Court to forfeit also the assets held by persons on behalf of the offender. Section 40 provides for forfeiture of assets of a citizen who is convicted by a foreign court for an offence which is also an offence under the CNSA. Under section 45, the Special Court appointed under the CNSA has exclusive jurisdiction to try an offence cognizable under the CNSA. As per section 76, the provisions of the CNSA shall have effect notwithstanding anything contained in any other law for the time being in force.

15. Given the special provisions of the CNSA discussed above, the question is that where the alleged smuggling is that of narcotics prohibited under the CNSA, whether the provisions of the CNSA will override sections 30 and 31 of the PSA ?

16. 'Smuggling' within the meaning of the PSA is smuggling as defined in section 2(s) of the Customs Act, 1969 (see section 2(f) of the PSA). Section 2(s) of the Customs Act includes the smuggling of narcotics. At the same time, though section 7 of the CNSA does not use the word 'smuggling', however in restricting the "import into Pakistan; export from Pakistan; transport within Pakistan; or transshipment" of narcotics, sections 7 and 9 of the CNSA make the 'smuggling of narcotics' an offence under said Act. However, section 72 of the CNSA assimilates the Customs Act as follows:

"72. Application of the Customs Act, 1969.— All prohibitions and restrictions imposed by or under this Act on the import into, export from, Pakistan and transshipment of narcotic drugs, psychotropic substances or controlled substances shall be deemed to be prohibitions and restrictions imposed by or under the Customs Act, 1969 (IV of 1969), and the provisions of this Act shall apply accordingly:

Provided that, notwithstanding anything contained in the Customs Act, 1969 (IV of 1969) or any other law for the time being in force, all offences relating to narcotic drugs, psychotropic substances

or controlled substances shall be tried under the provisions of this Act.

Provided further that, where the Officers of Customs apprehend a person involved in any offence relating to narcotic drugs, psychotropic substances or controlled substances shall be empowered to carry out inquiry and investigation in the manner as an officer authorized under this Act.”

17. The question whether the smuggling of narcotics under the Customs Act is an offence separate from the one under the CNSA, has since been addressed. It was held by a Full Bench of this Court in *Hussain Abdullah Salum v. The State* (PLD 2001 Karachi 283), and by the Supreme Court in *The State v. Nasim Amin Butt* (2001 SCMR 1083) that after sections 7, 9 and 72 of the CNSA, the smuggling of narcotics was no longer a separate offence under the Customs Act and has to be treated as an offence under the CNSA, one which can only be tried by the Special Court constituted under the CNSA. In the case of *Nasim Amin Butt*, the entire proceedings taken by the Special Judge under the Customs Act for the offence of smuggling narcotics were declared to be without lawful authority and of no legal effect. Thereafter, by Finance Act, 2005, clause (8) of section 156(1) of the Customs Act was amended to distinguish the offence of smuggling narcotics from the offence of smuggling other goods.¹ Eventually, section 185-B of the Customs Act was also amended by the Finance Act, 2014 to clarify that the offence of smuggling narcotics is triable exclusively by the ‘Special Court’ constituted under the CNSA², leaving the ‘Special Judge’ appointed under the Customs Act³ to try the offence of smuggling of goods other than narcotics.

18. Since the PSA itself does not lay down the offence of smuggling separate from the Customs Act, it has nothing to do with the trial of such offence. It is for this reason the legislature did not see the need to assimilate the PSA with the CNSA as it did for the Customs Act in section 72 of the CNSA.

¹ See clauses (8)(i) and 8(ii) of section 156(1) of the Customs Act, 1969.

² Section 46 of The Control of Narcotic Substances Act, 1997.

³ Section 185 of the Customs Act, 1969.

19. While section 30 of the PSA prohibits the holding of property acquired from proceeds of smuggling and makes it liable to forfeiture, again, it does not classify that as an offence. On the other hand, as discussed above, after the enactment of the CNSA, sections 12 and 13 stipulate that it is an offence to knowingly possess, acquire or use any assets derived or obtained by means of smuggling prohibited narcotics, and that such assets are liable to forfeiture. Said offence is triable exclusively by the Special Court appointed under the CNSA. As per sections 19 and 39 of the CNSA, the order for forfeiting assets of the offender and persons holding assets on his behalf is also to be passed by the Special Court. Ultimately, as per section 76 of the CNSA, it has overriding effect. Therefore, after the enactment of the CNSA, where the allegation is that an asset held by a person is the fruit of smuggling narcotics and liable to forfeiture, proceedings can only be taken under the CNSA and sections 30 and 31 of the PSA have no application nor does the Special Judge appointed under the PSA have any jurisdiction. In other words, sections 30 and 31 of the PSA can only be invoked where smuggling is alleged of goods other than narcotics.

20. In view of the forgoing, Application No. 126/2016 which was moved by the ANF (Appellant) under section 31 of the PSA after the enactment of the CNSA for forfeiting assets allegedly acquired/held by means of smuggling narcotics, was not maintainable to begin with. The entire proceedings before the Special Judge were *coram non iudice* and are hereby quashed. The appeal is disposed of accordingly.

JUDGE

Karachi
Dated: 19-10-2022