

JUDGMENT SHEET  
IN THE PESHAWAR HIGH COURT, PESHAWAR  
[JUDICIAL DEPARTMENT]

Cr.A No.346-P/2021.

*"Mustajab-ul-Hassan vs. The State"*

For appellant: - *Mr. Ali Azim Afridi, Advocate.*  
For State: - *Malik Akhtar Hussain, AAG.*

Date of hearing: 03.08.2021

**JUDGMENT**

**MUHAMMAD NAEEM ANWAR. I.** Mustajab-ul-Hassan, the appellant, through the instant appeal, filed under section 48 of the Control of Narcotics Substances Act, 1997, has assailed the judgment dated 16.03.2021 of the learned Additional Sessions Judge-II/Judge Special Court, Mardan whereby, in the case of crime report No.1011 dated 09.09.2020 under section 9 (D) of KP CNSA, Police Station, Hoti, District, Mardan, the accused facing trial namely Imad Khan s/o Gul Muhammad r/o Mohallah, Akhtar Abad, Tangi, District, Charsadda and Imtiaz s/o Mir Alam r/o Sikandari Koroona, Par Hoti, District, Mardan, were acquitted, however, the motorcar No.AKT-513-Islamabad was confiscated to the State being unclaimed property through Director General, Khyber Pakhtunkhwa, Excise & Taxation Department, Peshawar.

**02.** Learned counsel for the appellant contended that just after registration of crime report No.1011 dated 09.09.2020 wherein, the above named accused were involved, the appellant through his application No.122/4 of 2020 filed on 18.09.2020, approached to the Court of

learned Additional Sessions Judge-III, Mardan for superdari of vehicle in question but his application was dismissed on the ground that the motorcar in question was involved in smuggling/transportation of huge quantity of narcotics however, when through judgment dated 16.03.2021, the accused named above, were acquitted of the charges but the case property/motorcar in question was declared as unclaimed property, which is against the mandate of section 32 & 33 of CNSA, 1997, especially, when the application of petitioner was filed prior to submission of challan, therefore, it was the duty of the learned trial Court to have inquired about the ownership of motorcar in question. Next, he argued that appellant is the registered owner as it was purchased by him on 19.09.2018 and was transferred in the name of appellant on 31.12.2020.

*M*

**03.** Malik Akhtar Hussain, learned AAG vehemently opposed the contention of learned counsel for the appellant by submitting that the appeal under section 48 of CNSA, 1997 is not maintainable as after promulgation of KP CNSA, 2019, the appeal should have been filed under the relevant provision of law. He further contended that section 32 & 33 of CNSA, 1997 is also inapplicable to the controversy in question as after promulgation of Act, 2019, section 34A & 34B have been inserted through KP Act No.XXVI of 2020. He added that the registration of confiscated vehicle in

appellant's name is also a question mark, being the case property of FIR No.1011 dated 09.09.2020.

04. Arguments heard and record perused.

05. Though the prayer of the appellant in his appeal was for the grant of vehicle in question after setting aside of confiscation order however, learned counsel for the appellant at the very outset, stated at the bar that on merits, he does not want to press his appeal and confines himself to the extent of legal question as the learned trial Court has held that vehicle in question is unclaimed property of crime report No.1011. Perusal of record reveals that the crime was reported on 09.09.2020 whereas, the present appellant approached to the Court of learned Additional Sessions Judge, Mardan through his application dated 18.09.2020, within a period of 10-days, by contending therein that he is the purchaser of vehicle in question and that there is no other rival claimant of it. Perusal of record reveals that on 07.01.2021, the accused of crime report No.1011 were charge sheeted and trial was commenced. During trial, statement of Mira Khan, Inspector/ OII, PS, Hoti, Mardan was recorded as PW-2, who in his cross examination deposed that "I have not made any effort regarding the ownership of vehicle in question". Proviso to section 34A deals with the vehicle, vessel or any conveyance, being used for the purpose of commission of offence, shall not be

confiscated unless it is proved that the owner knew that the offence was being or to be committed, which reads as:

**"Provided that no vehicle, vessel or other conveyance shall be liable to confiscation unless it is proved that the owner knew that the offence was being, or was to be, committed".**

06. The above reproduced proviso to section 34A is self-explanatory, unambiguous, open only to one interpretation that before confiscation it shall be proved that owner was in the knowledge of offence so committed and if the prosecution had proved it, the vehicle, vessel or conveyance shall be confiscated. Likewise, section 34B deals with the procedure for making confiscation, which reads as under: -

**"34B. Procedure for making confiscation. -**

**(1) In the trial of offences under this Act, whether the accused is convicted or acquitted, the Special Court shall decide whether any article frozen or seized in connection with such offence is liable to confiscation.**

**(2) Where any article seized under this Act, appear to be liable to confiscation under section 34A, but the person who committed the offence, in connection therewith, is not known or cannot be found, the Special Court may inquire into and decide such liability and may order confiscation accordingly;**

**Provided that no order of confiscation of an article shall be made until the expiry of one month from the date of freezing or seizure or without hearing any person who may claim any right thereto and the evidence, if any, which he produces in respect of his claim:**

**Provided further that if any such article other than a narcotics drug, psychotropic substance or controlled substance is liable to speedy and natural decay or in case of a vehicle, the Director General or any other officer authorized by him through notification in the official Gazette, is of opinion that the sale of such article or vehicle is for the benefit of its owner, he may, with the approval of the Special Court, after due notice to the owner**

**and by public auction, direct that the article or, as the case may be, the vehicle be sold in accordance with the rules made under this Act and the sale proceeds shall be deposited in Government Treasury for drug abuse till the final judgment of the Special Court".**

07. First proviso of sub-clause 2 of section 34B make it abundantly clear that no such property shall be confiscated unless within one month from the date of freezing or seizer any claimant thereto is given an opportunity of being heard alongwith evidence if any pertaining to his claim. Record of the case promulgates that neither I.O. of criminal case has collected any evidence nor issued any notice within a period of one month after seizer of vehicle in question nor the learned trial Court has made any effort in consonance with the provision of section 34A & 34B of KP CNSA, 2019. When, learned AAG was confronted with this legal aspect, he could not wriggle out of the situation. Undoubtedly, the vehicle in question has been registered in appellant's name, after its seizer in crime report No.1011, however, the fate thereof shall be determined by the learned trial Court in accordance with the dicta laid down by the apex Court in case titled *"Amjad Ali Khan vs. The State & others"* (PLD 2020 SC 357). It is pertinent to mention that first proviso of sub-clause 2 of section 34B is not limited to the extent of owner because the legislature has intentionally used the word "any person" instead of "registered owner" in first proviso of sub-section 2 of section 34B so that the person may be the registered owner or purchaser of vehicle through any

instrument but has not been registered as its owner yet, or any person having any interest or claim thereto may approach to the Court or entitles to be put on notice, in order to prove his claim, if any, through evidence and till then no such property shall be confiscated under section 34A. When, the petitioner has submitted the application for superdari of vehicle in question within a period of 10-days from the date of crime report, of course, he had got a claim regarding the property in question and was required to be served with a notice prior to submission of complete challan before the Court of competent jurisdiction by the seizing officer/investigating officer, however, if during investigation, I.O of the case has not served him with a notice, as required in accordance with the above reproduced *ibid* section, "*the Court*" after submission of complete challan was required to serve the appellant with a notice about his claim pertaining to the motorcar in question and by not doing so, neither the seizing officer nor "*the Court*" has complied with the legal requirements/formalities as provided in section 34B of the Act of 2019. The proviso of section 34A of the KP CNSA, 2019 and that of section 32 of CNSA, 1997 is the same which provides that property used in an offence under the *ibid* Act can only be confiscated when it is established that the owner of the vehicle knew that the offence was or being committed. It is a pre-requisite for confiscation of the vehicle that whether a person has or

4

has not the knowledge of an offence, is a point of fact and was liable to be adjudicated upon in accordance with law in normal procedure of dispensation of justice by putting the owner or claimant on notice. Likewise, first proviso of subsection 2 of section 34B of the KP CNSA, 2019 and that of CNSA, 1997 is one and the same. The Division Bench of this Court in a case titled "Aamir Khalil vs. Government of Pakistan through Director General, ANF Rawalpindi and 5 others" (PLD 2004 Peshawar 251) in connection with a matter in which, the vehicle was confiscated to the State by the Government functionaries and thereafter it was put to auction, when it was challenged before this Court, has held:

"It is crystal clear from the first proviso to subsection 2 of section 32 of the *ibid* Act that vehicles shall not be liable to confiscation unless it is proved that the owner thereof knew that the offence was being or was to be committed in respect of it while the combined reading of first and second provisos to sub-clause 2 of subsection 2 of the *ibid* section places restriction on the confiscation of an article before the expiry of one month and that before confiscation order the claimant must be given an opportunity of hearing and that the Special Court in case of an article which is subject to speedy and natural decay may direct that it be sold and the claimant may apply for the receiving of the net proceeds of sale. Similar rider is provided in sub-clause 3 of subsection 2 conferring power on the claimant to get set aside the order of confiscation within a period of 30 days from the date of order".

08. The Hon'ble Supreme Court of Pakistan in the case of "Abdus Salam vs. State" (2003 SCMR 246), "Alla Ditta vs. The State" (2010 SCMR 1181) and in case titled "Amjad Ali Khan vs. The State and others" (PLD 2020 SC 299)

have thoroughly discussed and enunciated the principle of law, especially in the case of Amjad Ali Khan that there are certain restrictions for granting the vehicle on superdari used in connection with the commission of an offence under the Control of Narcotics Substance Act, 1997 however, in the instant matter, the learned trial Court has held the vehicle in question as "unclaimed". The word "unclaimed" has not been defined either in CNSA, 1997 or KP CNSA, 2019, nonetheless, the simple meaning of "unclaimed property" is "*the property that an owner has given up all claims, possession and rights*" or "*the property which it appears that the owner has relinquished the rights and possession, for example, property left intentionally in an empty lot and left as trash as an abandoned property*". Thus, when on 18.09.2020, appellant claimed himself to be the owner was entitled to be given a notice by the seizing officer or by the Court for providing him an opportunity of being heard pertaining to his claim clinched with the vehicle in question by not doing so, the learned trial Court has committed an illegality. Moreso, after dismissal of his application, the appellate filed a criminal appeal No.817-P/2020 under section 24 of CNSA, 2019, however, the same was dismissed as withdrawn leaving the appellate at liberty to file a fresh one but unfortunately, it appears that prior to 26.03.2021, the learned appellate Court has confiscated the vehicle in question through judgment dated 16.03.2021.



09. Furthermore, the filing of appeal under section 48 of CNSA, 1997 in fact was a misconception as the memo of appeal reflects that on the same date, the appellant has corrected it with the memo of appeal under section 24 of CNSA, 2019. Even otherwise, wrong mentioning the proper provision of law would not debar a person from seeking a statutory remedy as provided under the law.

10. In view of the above, the instant appeal to the extent of confiscation of vehicle only is allowed, the judgment of the learned Additional Sessions Judge-II/Judge Special Court, Mardan vide which, the vehicle in question was confiscated, is set aside and the case is remanded to the learned trial Court to decide it after issuing a notice to the appellant in view of proviso to sub-clause 2 of section 34A & first proviso to sub-clause 2 of section 34B of the KP CNSA, 2019.

**Announced**  
**03.08.2021.**



**JUDGE**