HCJD/C-121

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

Criminal Appeal No. 300 of 2023

Al-Baraka Bank (Pvt.) Ltd.

Versus

The State

Appellants by	**:**	**Mr. Haseeb Hassan, Advocate**
Respondent by	**:**	**Rana Zulfiqar Ali, Special Prosecutor, ANF.** **Mr. Mohammad Bashir Khan, P.S. ANF, I.CT.**
Date of Hearing	**:**	**11.01.2024**

Babar Sattar, J.:- The appellant has impugned order dated 20.07.2023 pursuant to which his application for grant of *superdari* of a vehicle seized by Anti-Narcotics Force (ANF) in relation to FIR No.141/2022 registered Police Station ANF, Islamabad, was dismissed.

2. Learned counsel for the appellant submitted that the appellant bank was the real owner of the vehicle-in-question pursuant to a Higher Purchase Lease Agreement **("Musharakah Agreement")** between Al-Baraka Bank and Mohammad Usman. He submitted that Mohammad Usman had defaulted on his obligation to pay the installment and rental in lieu of the Musharakah Agreement and the appellant bank therefore had a right to take control of the vehicle-in-question. He submitted that the appellant bank had filed an application for *superdari* pending conclusion of the trial and it was an innocent owner that was not aware of the offence committed by the accused charged pursuant

to FIR No.141/2022. The Judge Special Court had however not appreciated the facts of the case and had dismissed the application.

3. The learned Special Prosecutor, ANF, submitted that the vehicle registration was in the name of Mohammad Usman who was also the last possessor of the vehicle and it was seized by ANF for being involved in an offence under the Control of Narcotic Substances Act, 1997 **("CNSA")**. The vehicle was yet to be exhibited before the trial Court and could therefore not be released on *superdari.*

4. The questions that arise for our consideration are twofold. One, whether a vehicle seized in relation to an offence under CNSA can be released on *superdari* even prior to it having been exhibited as case property before the trial court? And two, can a bank that has a loan over a vehicle under any instrument, such as a Musharakah Agreement, but is not in possession of such vehicle when an offence is committed be treated as the owner of the vehicle to be granted *superdari* pending conclusion of the trial pursuant to section 74 read together with section 33 of CNSA.

5. The law laid down with regard to grant of temporary custody does not fully discuss the second proviso to section 33 of CNSA read with proviso to section 74. It is therefore, essential to track the evolution of jurisprudence in relation to grant of temporary custody to an owner of the vehicle pending a trial under CNSA.

6. In ***Niazullah Vs. The State* *(2002 P.Cr.L.J. 97)***, section 74 of CNSA came under discussion before the Lahore High Court.

The said section was reproduced in the judgment but did not include an addition made to the proviso of section 74 that was added by Control of Narcotic Substances (Amendment) Ordinance, 2000 (Ordinance LXVI of 2000) dated 23.12.2000 **("CNSA Amendment Ordinance")**, which makes a reference to the second proviso to subsection 2 of section 33. The Lahore High Court held that an innocent owner fell in the category of private person mentioned in section 74 of CNSA to whom grant of custody was not prohibited. Consequently, custody was granted to the owner with the direction that the vehicle be produced by such owner whenever required by the trial court.

7. In ***Abdul Hamid Vs. The State (2002 P.Cr.L.J 666)***, Peshawar High Court observed that section 74 of CNSA created a prohibition against release of vehicle on temporary custody but such prohibition did not extend to an owner who had no involvement in the crime in relation to which the vehicle had been seized. In ***State Vs. Rashid (PLD 2003 Peshawar 87)***, Peshawar High Court again interpreted section 74 of CNSA as placing no embargo on release of vehicle in temporary custody of a *bona-fide* owner who was not associated with the accused or with the commission of the offence. Peshawar High Court held that if an embargo was to be created the proviso to section 74 creating such embargo should have used the word 'person' in place of 'private individual'. It further held that if the vehicle was to be ultimately released to the owner it would serve no purpose to keep it in custody of the detaining agency pending trial.

8. In ***Abdul Salam Vs. The State (2003 SCMR 246)***, the Supreme Court relied on a judgment rendered in ***Haji Abdul***

Razzak Vs. Pakistan* (PLD 1974 SC 5)**. In ***Haji Abdul Razzak while interpreting section 167 and 168 of Sea Customs Act, 1878, the Supreme Court had held that the words "liable to confiscation" in section 168 vested power to confiscate. But such power could not be exercised to deprive an owner of such property who was in no way responsible for commission of the offence as *"no innocent person could be unjustly punished or deprived of his act"*. Relying on this precedent the Supreme Court held in ***Abdul Salam*** that a court granting final relief could grant temporary relief as well. It held that where an owner had no knowledge of an offence and he was entitled to acquire possession of the vehicle after trial in view of section 32 of CNSA, there was no absolute bar prohibiting release of a vehicle pending trial. In ***Abdul Salam*** the Court did not refer to the amendment to the proviso of section 74 through the CNSA Amendment Ordinance, or to the second proviso of section 33(2) of CNSA, also added through the CNSA Amendment Ordinance.

9. The question of temporary custody next came before the Supreme Court in ***Allah Ditta Vs. The State* (2010 SCMR 1181)**. Here too the Supreme Court cited sections 32 and 74 of CNSA but did not discuss the import of the proviso to section 74 as amended through the CNSA Amendment Ordinance, or the second proviso to section 33 of CNSA. It was held that section 32 of CNSA deals with final disposal of a conveyance while section 74 regulates temporary custody. The Supreme Court observed that section 74 was not "happily worded" and the prohibition, which was in negative terms, was "neither absolute nor all embracing". It held that "private individual" as mentioned in the

proviso to section 74 was to be read *ejusdem generis* with "accused or any of his associate or relative". Consequently, private individual was interpreted as an individual *"who has some nexus with the offender or the offence"* and thus an innocent owner was excluded from the limitation provided in the proviso to section 74. The Supreme Court noted that section 32 of CNSA does not allow confiscation of a vehicle unless it is proved that the owner was aware that his vehicle was being used in the offence and burden of proving so was on the prosecution. It was therefore held in view of the law laid down in ***Allah Ditta*** that in the absence of express statutory prohibition, an innocent owner *"shall also have a right to obtain and retain its temporary custody pending trial"* in the following words:

> *"We, thus, conclude that the proviso of section 74 does not prohibit the release of the vehicle involved in the trafficking of narcotics to its owner, who is not connected in any way with the commission of the crime or the accused and was unaware that his vehicle was being used for the crime."*

10. In ***Allah Ditta*** there was no discussion re the effect of the release of a vehicle on *superdari* pending trial on such trial itself, and there was no discussion with regard to the amendment to the proviso of section 74 or the addition of the second proviso to section 33 as added by the CNSA Amendment Ordinance. It was, however, evident from ***Allah Ditta*** that the release of a vehicle to the owner is not unconditional, but subject to the owner establishing *prima-facie* that he/she is innocent and not involved in any manner with the offence in relation to which the vehicle has been seized.

11. The law in relation to grant of temporary custody to the owner was once again considered by the Supreme Court in ***Amjad Ali Khan Vs. The State and others*** ***(PLD 2020 SC 299).*** Here the question before the Court was whether a seized vehicle could be released to a person who claimed to be the owner of the vehicle on the basis of an open transfer letter. Here too, the Court referred to sections 516A and 523 of Cr.P.C. as well as sections 32(2) and 74 of CNSA. The Court observed that the proviso to section 32 excluded certain vehicles from the scope of vehicles that were liable to confiscation, including a vehicle that belonged to an owner who did not know that the offence was being committed or was to be committed. While enumerating the import of section 74 of CNSA the Supreme Court held that:

> *"Under the proviso to section 74 of Control of Narcotic Substances Act, 1997 ('the 1997 Act'), the provisions of Cr.P.C to the extent of custody and disposal of a conveyance under general law were not applicable under the 1997 Act. Vehicle used in the commission of an offence under the 1997 Act could not be released or given on custody (superdari) to the accused or any of his associate or relative or any private individual till the conclusion of the case."*

12. The term "associate" and "relative" had been defined in clauses (c) and (z-b) of section 2 of CNSA and the expression "any private individual" used in the proviso to section 74 has been explained in ***Allah Ditta*** to be an individual who has some nexus with the offender or the offence. The Supreme Court in ***Amjad Ali Khan*** upheld the judgment of the High Court whereby the release of a vehicle to the person holding an open transfer

letter was denied. It was further held that, *"in fact there was a freeze on the legal title of the owner of the vehicle till the conclusion of the trial. The rationale behind this being that any transfer or change in the title of the vehicle (case property) would undermine the safe administration of criminal justice system, as any such transfer (registration of the vehicle in the name of a third party) would amount to interference in the powers of the criminal court and in eroding the sanctity and security of the evidence in an ongoing criminal trial."* The Supreme Court therefore directed that where a vehicle was seized in relation to an offence under CNSA there could be no change brought in relation to its title in the interest of safe administration of criminal justice and preserving evidence in an ongoing criminal trial.

13. Let us reproduce here the relevant provisions of CNSA:

> ***32. Articles connected with narcotics.*** *(1) Whenever an offense has been committed which is punishable under this Act, the narcotic drug, psychotropic substance or controlled substance, materials, apparatus and utensils in respect of which, or by means of which, such offense has been committed shall be liable to confiscation.*
>
> *(2) Any narcotic drug, psychotropic substance or controlled substance law-fully imported, transported, manufactured, possessed, or sold along with, or in addition to, any narcotic drug, psychotropic substance or controlled substance which is liable to confiscation under sub-section (1) and the receptacles or packages, and the vehicles, vessels and other conveyances used in carrying such drugs and substances shall likewise be liable to confiscation.*
>
> *Provided that no vehicle, vessel or other conveyance shall be liable to confiscation unless it is proved that the owner thereof knew that the offense was being, or was to be or was likely to be , committed.*

33. Procedure for making confiscation. *(1) In the trial of offenses 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 offense is liable to confiscation.*

(2) Where any article seized under this Act appears to be liable to confiscation under section 32, but the person who committed the offense 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 narcotic drug, psycho-tropic substance or controlled substance is liable to speedy and natural decay, or if the Special Court is of opinion that its sale would be for the benefit of its owner, he may at any time direct it to be sold and the provisions of this sub-section shall, as nearly as may be practicable, apply to the net proceeds of the sale.

(3) Any person who is not convicted under this Act and claims any right to property which has been confiscated under sub-section (2) may, within thirty days, apply to the Special Court for setting aside the order of confiscation.

Provided that the period of thirty days may be extended for such further period as may be deemed appropriate by the Court in the event of the said person not having knowledge of the confiscation.

(4) A narcotic drug, Psychotropic substance or controlled substance seized under this Act shall be disposed of under section 516A of the Code of Criminal Procedure, 1898 (Act V of 1898).

74. Application of other laws. *If an offence punishable under this Act, is also an offence in any other law for the time being in force, nothing in that law shall prevent the offender from being punished under this Act.*

Provided that nothing contained in section 523 of the Code of Criminal Procedure, 1898 (Act V of 1898), or any other provision of the said Code or any other law for the time being in force, the custody of narcotic drugs, psychotropic substances, controlled substances, any material utensils used for production or manufacture of such drugs or substances or any conveyance used in import, export, transport or transshipment thereof or for commission of an offense under this Act, shall not be given on custody to the accused or any of his associate or relative or any private individual till the conclusion of the case.

14. Let us also reproduce section 516A of Cr.P.C. that has been referred in section 33(4) of CNSA:

Order for custody and disposal of property pending trial in certain case. *When any property regarding which any offence appears to have been committed or which appears to have been used for the commission of any offence, is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, If the property is subject to speedy or natural decay, may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.*

Provided that, if the property consists of explosives substance, the Court shall not order it to be sold or handed over to any person other than a Government Department or office dealing with, or to an authorized dealer in such substances:

Provided further that if the property is a dangerous drug, intoxicant, intoxicating liquor or any; other narcotic substance seized or taken into custody under the Dangerous Drugs Act, 1930 (II of 1930), the Customs Act, 1969 (IV of 1969), the Prohibition (Enforcement of Hadd) Order, 1979 (P.O. 4 of 1979), or any other law for the time being in force, the Court may, either on. an application or of its own motion and under its supervision and control, obtain and prepare such number of samples of the property as it may deem fit for safe custody and production before it or any other Court and cause destruction of the remaining portion of the property under a certificate issued by it in that Behalf:

Provided also that such samples shall be deemed to be whole of the property in an inquiry or proceeding in relation to such offence before any authority or Court.

15. There are two points to note with regard to the provisions cited above. One, that section 516A refers to disposal of property pending the conclusion of trial which is subject to speedy or natural decay and empowers the trial court to order the disposal or sale of such property *"after recording such evidence as it thinks necessary"*. Sections 32 and 33 of CNSA cited above relate to the confiscation or disposal of articles seized in connection with an offence under CNSA after the conclusion of the trial. Section 516A of Cr.P.C, to the extent that it permits the Court to dispose of or order the sale of property that is subject to speedy or natural decay, is similar in import through the second proviso to section 33(2) of CNSA, which also allows Director General, ANF, or an officer authorized by the Federal Government to sell a vehicle if such sale is for the benefit of its owner. The proviso to section 74 ousts the application of section 523 of Cr.P.C. as well as other provisions of Cr.P.C. for purposes of grant of custody *"to the accused or any of his associate or relative or any private individual till the conclusion of the case except as provided in the second proviso to sub-section 2 of section 33".*

16. The words, *"except as provided in the second proviso to sub-section 2 of section 33"* were added by the CNSA Amendment Ordinance, and link the release of a vehicle on temporary custody prior to the conclusion of the case upon satisfaction of conditions prescribed in the second proviso to section 33(2) of CNSA, which was also added through the CNSA Amendment Ordinance. The second proviso to section 33(2) of

CNSA explicitly deals with sale of a vehicle for the benefit of its owner. It is therefore hard to contemplate that while drafting the proviso to section 74 or at least while amending it through the CNSA Amendment Ordinance, the legislature did not have in its contemplation the owner of a vehicle or the sale of a vehicle for the benefit of the owner. One interpretation of section 74 read together with section 33(2) as amended by the CNSA Amendment Ordinance, 2000, could have been that an innocent owner of the vehicle who did not know that the vehicle was used or was to be used for an offence fell within the scope of "private individual" as used in the proviso of section 74. And it was thus that an amendment had been introduced in the proviso to section 74 to incorporate, for purposes of release of a vehicle prior to the conclusion of a case, the second proviso to section 33(2) of CNSA, which prescribed the condition for sale of a vehicle for the benefit of the owner, if it was vulnerable to speedy or natural decay (if supported by the opinion of DG, ANF or an officer authorized by the Federal Government for such purpose and the trial court approved of such opinion).

17. It appears from the law as laid down in ***Abdul Salam*** and ***Allah Ditta*** that the Supreme Court did not consider the argument that the proviso to section 74 as amended through CNSA Amendment Ordinance, 2000, was to be read with the second proviso to section 33(2) of CNSA added through CNSA Amendment Ordinance, 2000, to define "private individual" as used in proviso to section 74, and to read the conditions prescribed in the second proviso to section 33(2) of CNSA as prerequisites for sale of a vehicle for the benefit of an innocent

owner pending trial. Merely because there is no discussion on the aforementioned provisions by the Supreme Court, while holding that an innocent owner of a vehicle does not fall within the scope of "private individual" for purposes of the proviso to section 74 of CNSA, this Court cannot presume that the Supreme Court was not aware of the amendments introduced to the proviso to section 74 as well as the second proviso of section 33(2) of CNSA, introduced by the CNSA Amendment Ordinance, 2000. The law laid down by ***Abdul Salam*** and ***Allah Ditta*** is binding on this Court, wherein it has been held that there is no absolute bar on release of a vehicle pending trial to the extent that lack of the involvement of the owner in the offence is made out on a *prima-facie* basis.

18. Notwithstanding the above, two questions remain. One, given that the finding of the Supreme Court that a vehicle can be released into the temporary custody of an innocent owner is partly based on section 516A of Cr.P.C., can such vehicle that forms part of case property be released prior to it being produced in evidence? And two, even if the answer to question No.1 is in the affirmative, can a vehicle which has peculiar features, such as a secret cavity etc., which features are not those of the originally manufactured vehicle but have been added subsequently and preserving which is essential for purposes of proving the prosecution version in the facts and circumstances of the case, can also be released during the pendency of the trial prior to having been exhibited in evidence?

19. It is our view that section 516A of Cr.P.C. contemplates disposal of sale or sale of case property only after recording of

such evidence as the trial court deems fit. Section 516A of Cr.P.C. does not envisage the disposal of property pending trial which is yet to be exhibited in evidence. The proviso of section 74 of CNSA is similar i.e. it contemplates preserving evidence and case property for the safe administration of criminal justice and ensure a fair trial as also alluded to by the Supreme Court in ***Amjad Ali Khan***. We are therefore of the view that section 74 read together with section 33 does not envisage the release of a vehicle that has been seized in relation to an offence under CNSA prior to having been produced in evidence. Once a vehicle has been released on temporary custody to an innocent owner it will naturally be used by the owner and will be driven around the road. The vehicle could meet an accident and could be destroyed altogether resulting in a situation that a vital piece of case property that needs to be produced before the trial court for purposes of establishing all the facts on the basis of which the conviction of an accused is sought could stand extinguished altogether. This cannot be the intent of the law. The trials under CNSA do not mean to be prolonged affairs. The trial court can therefore prioritize the production of evidence in a manner that in the event that case property includes a confiscated vehicle that belongs to an innocent owner, such property is exhibited at the earliest so that it can be released to the owner in accordance with the law laid down in ***Abdul Salam*** and ***Allah Ditta***. The question of whether a vehicle with peculiar features be released at all also stands addressed. Once a vehicle has been exhibited and its peculiar features have been noted in evidence by the trial Court, the apprehension of interference with safe administration of justice dissipates. In any event, such question does not arise

from the facts of the present case and can be considered in an appropriate case more fully where it arises.

20. As regard the second question in Para 04 above re-release of vehicle to a leasing bank, it was held by the Supreme Court in ***Allah Ditta*** that once a vehicle is seized as case property in relation to an offence defined in CNSA, the title of the owner of the vehicle stands frozen till the conclusion of the trial. In cases where there is a hire-purchase agreement between an individual and a bank pursuant to which a vehicle has been purchased, the vehicle registration card is issued in the name of the individual even though the vehicle registration card recognizes the loan in favour of the bank. In such circumstance, in the event that the individual defaults on his obligation make a loan payment and/or rental payment under a loan or Musharakah Agreement the bank can claim that a default had taken place creating a right for the bank to initiate repossession proceedings if the bank has exercised its right to terminate the agreement in face of the default. However, where the vehicle-in-question at the time of default stands seized in relation to an offence under CNSA, while the bank can initiate proceedings to terminate the Musharakah Agreement or loan agreement and seek to repossess the vehicle, neither the title of the vehicle's owner can be changed on the vehicle identification card reissued by Excise and Taxation Department in view of the dicta in ***Allah Ditta***, nor can the vehicle be repossessed by the bank when it remains in the custody of the State as case property to be produced in a criminal trial. The purpose of grant of *superdari* of a vehicle to an innocent owner is to uphold the right of the owner to the use of

his property to the extent that he is not implicated or involved in the offence in relation to which the seizure has taken place. However, where the legal titleholder is a bank pursuant to provisions of Musharakah Agreement or loan agreement, the purpose of repossession is not to put the vehicle to ordinary use, but to sell the vehicle to recover the funds involved in the purchase of the vehicle and/or that are due and payable by the person who had leased/rented the vehicle from the bank. Such purpose can obviously not be achieved during the pendency of the trial as the vehicle cannot be disposed of when it is released on *superdari*. Sections 33 and 74 of CNSA when read together with section 516A of Cr.P.C. does not contemplate the release of a vehicle on *superdari* during the pendency of the trial to enable a financial institution to affect recovery of funds through the sale of such vehicle.

21. In the present case the Judge Special Court has correctly determined that the vehicle is registered in the name of Mohammad Usman as reflected in the vehicle identification card. The learned counsel for the appellant has shown us the Musharakah Agreement and a default notice issued by the appellant bank to Mohammad Usman but there is nothing on record to even establish that the Musharakah Agreement was terminated and the vehicle was repossessed by the bank and the title of the vehicle stood transferred to the appellant bank prior to the seizure of the vehicle in relation to the criminal case registered pursuant to FIR No.141/2022. Further, the Judge Special Court has also correctly concluded, for reasons that have already been discussed above, that a vehicle that is yet to be

exhibited as case property in a pending trial cannot be released on *superdari*.

22. We therefore find that the impugned order suffers from no infirmity. The appeal is without merit and is therefore ***dismissed.***

(MOHSIN AKHTAR KAYANI)
JUDGE

(BABAR SATTAR)
JUDGE

Announced in open Court on ***22.01.2024.***

JUDGE **JUDGE**

Approved for reporting.

M.A. Raza