

IN THE HIGH COURT OF SINDH, AT KARACHI

Special Criminal Acquittal Appeal No.04 of 2011

Date of hearing : 24.04.2013.

Appellant, the State/ANF through : Mr. Shafiq Ahmed, Advocate.

Respondent No.2 Mst. Hussan Ara through: Khawaja P. Mustafa, Advocate.

ORDER

IRFAN SAADAT KHAN, J: This Special Criminal Acquittal Appeal has been filed against the order passed by the Special Judge, Customs Taxation & Anti-Smuggling, Karachi, in Case No.01/2000, dated 29.01.2010.

2. Briefly stated the facts of the case are that the respondent No.1 Mushtaq Ahmed Malik was arrested by the Pakistan Coastguards and FIR in this regard bearing No.3201/1985 was registered under Sections 156(1)(8) of the Customs Act, 1969, as 10 kilogram heroin powder was recovered from his possession. The said case was proceeded against him before the Special Military Court DMLA-HQ Sector-1, Karachi and thereafter vide order dated 20.05.1985 he was convicted and sentenced to suffer R.I. for 03 years and to a pay fine of Rs.5 Lac. During the investigation it revealed that a property bearing Bungalow No.27/11, 19th Street, Khayaban-e-Tanzeem, Phase-V, Karachi, was in the name of Mrs. Rizwana Malik (wife of the respondent No.1). Upon further enquiry it revealed that since Mrs. Rizwana Malik was having no source of income, the property was purchased from illegitimate earning of her husband. Thereafter notice dated 27.06.2001 was issued under Section 31 of the Prevention of Smuggling Act, 1977, and Mrs. Rizwana Malik was restrained from entering into any transaction with regard to selling of the said property. Respondent No.2 upon coming to know about such information filed an application under Section 40 read with Section 32 of the Prevention of Smuggling Act, 1977 for recalling of the said order as, according to her, the said property had been purchased by her from the wife of respondent No.1 vide Conveyance Deed 29.10.1987, however, due to

some reasons, in the record of DHA the said transfer has not been recorded. It is further averred that though value of the property was shown at Rs.2 million, whereas she purchased the said property at Rs.7,48,000/-. Relevant documents in this regard were also produced. The matter then proceeded before the Special Judge, (Anti-Smuggling), Karachi, who vide his judgment dated 27.09.2005 found that the freezing of the property by the appellant was totally against the law and thereafter released /de-freezed the said property. An application for rectification of the said judgment thereafter was filed on 20.05.2008 by the department on the ground that judgment dated 27.09.2005 was silent in respect of proviso (2) of Section 31 of the Prevention of Smuggling Act, 1977, which application came up for hearing before the learned Judge, who vide his order dated 29.01.2010 by finding that the judgment of his predecessor since cannot be reviewed, therefore, dismissed the said application. It is against this order that the present appeal has been filed.

3. Mr. Shafiq Ahmed, Advocate has appeared on behalf of the ANF Authorities and stated that the learned Judge while passing the order dated 29.09.2005 has not considered various aspects of the case and that the judgment is silent with regard to the proviso (2) of Section 31 of the Prevention of Smuggling Act, 1977, therefore, review/rectification application was filed but that was dismissed by the learned Judge without considering the merits of the case. While elaborating his viewpoint he submitted that since the mistake was apparent from the record that is why rectification/review application was filed. He, therefore, prayed that the judgment dated 27.09.2005 as well as order dated 29.01.2010 be set aside and the property released/de-freezed may be ordered to be forfeited.

4. Mr. Khawaja P. Mustafa, Advocate has appeared on behalf of the respondent No.2 and submitted that the review/rectification application filed by the department was an afterthought on the part of the department. He further stated that if judgment passed by the learned Judge dated 27.09.2005 suffers from any legal infirmity, why no appeal was filed. He stated that the scope of the review/rectification in such like matters is very limited and only matters in which

mistake is apparent and patent from the record, the orders are interfered with, otherwise the Court has no authority under the law to sit upon its own judgment/order by way of reviewing the same. Hence, according to him, the learned Court was quite justified in not only allowing the application but also thereafter dismissing the review application filed by the department and releasing /de-freezing the property of the respondent No.2. He, therefore, prayed that this appeal being meritless is also liable to be dismissed.

5. I have heard both the learned counsel at considerable length and have perused the record and the relevant law.

6. I specifically asked a question from the learned counsel for the ANF Authorities that whether any appeal against the judgment passed by the learned Judge dated 27.09.2005 was filed, to which he replied in negative. I again asked from the learned counsel that what is the mistake, according to him, apparent and patent in the order against which he sought review, again no plausible reply was furnished. I asked yet another question from the learned counsel that what is the material defect in the order dated 29.01.2010 to which he reiterated his above view. It is apparent from the record that no appeal against the judgment dated 27.09.2005 was filed by the department and it appears that as an afterthought review application, at a belated stage, was filed just to give the case a new lease of life. The judgment passed by the learned Judge dated 27.09.2005 appears to be in consonance with law, since the learned Judge has passed the order when the Special Prosecutor appearing before him has candidly conceded that due to misunderstanding the property of the respondent No.2 was seized/freezeed and that he has no objection for release/de-freeze of the said property. It is only thereafter that the learned Judge, after recording the concession of the Special Prosecutor, who appeared before him, and upon looking at the fact of the case, ordered releasing/de-freezing of the property. It is also seen from the record that the departmental authorities have failed to point out any mistake apparent from the record or any justification for filing the review application before the learned Judge at a belated stage on 20.05.2008, which application also appears to be

vague, which has not been controverted by the learned counsel appearing on behalf of the ANF Authorities.

7. In view of the observations made above, I do not find any justification to set aside either the judgment dated 27.09.2005 or the order dated 29.01.2010, as prayed by the department, or to order freezing of the said property, as the department has totally failed to adduce a single plausible reason for interfering with the said judgment/order. This Special Criminal Acquittal Appeal is, therefore, found to be totally devoid of any merit and is hereby dismissed.

8. Above are the reasons of my short order dated 24.04.2013, whereby this appeal was dismissed.

JUDGE