(2002) 08 AHC CK 0016

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 23332 of 1997

Sudhir Kumar Jain APPELLANT

Vs

State of U.P. RESPONDENT

Date of Decision : 29-08-2002

Acts Referred:
Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 115(2)
Gold (Control) Act, 1968 — Section 72

Citation : (2003) 160 ELT 80

Hon'ble Judges : Lakshmi Bihari, J;Binod Kumar Roy, J

Bench : Division Bench

Advocate : Amar Saran, for the Appellant; C.K. Parikh and S.P. Malviya, S.C., for the Respondent

Final Decision : Dismissed

Judgement

Binod Kumar Roy, J.—The prayer of the petitioner is to direct the respondent i.e., the State of U.P. and the Union of India to release his Maruti Car. No. DDC 5513 in his favour by issuing a writ, order or direction in the nature of mandamus, which on his statement (as contained in Annexure 4) was purchased by him for Rs. 66,000/- in the year 1988 from Dr. Arun Singhal of Samli.

2. Firstly the facts pleaded by the petitioner :--

His aforementioned Car was intercepted at 7.45 p.m. of 3rd January, 1989 at Nanuata on Delhi Saharanpur Road by the Customs and Central Excise Officers of Saharanpur Division on suspicion that some persons were carrying contraband gold in it. Four persons, namely, Ashok Kumar Agarwal son of Keshav Ram, Sunil Kumar son of Rameshwar Prasad, Sanjiv Kumar Jain son of Vakil Chandra Jain and Kishore Kumar, the driver of the vehicle, were said to be seated in the vehicle. Even though the petitioner was not said to be present in his vehicle yet proceedings were initiated against him. Show cause notices u/s 115, of the Customs Act, 1962 and u/s 72 of the Gold (Control) Act, 1968 were issued to show cause why the vehicle should not be confiscated for carrying contraband gold. Show cause notice were also issued under Sections 112 and 117 of the Customs Act, 1962 and under Sections 74 and 75 of the Gold (Control) Act as to why a penalty be not imposed upon him and the four persons aforesaid by the Collector, Customs and Central Excise, Meerut. All of them submitted their replies to the show cause notices. Vide his order dated 8th January, 1991, the Collector, Customs and Central Excise, Meerut directed confiscation of (a) 6 Gold biscuits of Foreign origin belonging to Sanjeev Kumar u/s 111(d) of the Customs Act and Section 71 of the Gold (Control) Act, directing release of Bank Draft No. 506710, dated 3rd January, 1989 of Rs. 66,018/- in his favour, (b) 4.044 Kgs. of silver ornaments whose ownership was claimed by Ashok Kumar Agarwal u/s 119 of the Customs Act and Section 71(2) of the Gold (Control) Act, however, permitting him to redeem the confiscated goods on payment of fine of Rs. 15,000/- in lieu of confiscation, (c) of one gold biscuit of Chinese origin and 10 Ginnis claimed by Ashok Kumar u/s 11(d) of the Customs Act and u/s 71 of the Gold (Control) Act, directing release of 4 Churis and one Kangan to him and cash of Rs. 4550/- and Rs. 1,80,000/- in favour of Subhash Chandra. He imposed a personal penalty of Rs, 50,000/- u/s 112(b)(i) of the Customs Act and Rs. 10,000/- under Sections 74 and 75 of the Gold (Control) Act. He also imposed a personal penalty of Rs. 5,000/- on Kishore Kumar u/s 112(b)(i) of the Customs Act and Rs. 1,000/- under Sections 34 and 75 of the Gold (Control) Act. He also directed confiscation of the vehicle u/s 115(2) of the Customs Act and Section 72 of the Gold (Control) Act. The petitioner went up in appeal under Sections 129A(1) of the Customs Act and u/s 68 of the Gold (Control) Act before the CEGAT. The appeal of the petitioner was dismissed by the Tribunal vide its order dated 13-10-1995 (copy appended as Annexure-1) holding that the petitioner had lent his vehicle to Sanjeev Kumar for the day in order to bring his mother. So far as Kishore Kumar was concerned, who was the driver of the vehicle, his plea that the goods were kept under his seat when he had gone for tea and buy cigarette was not accepted and a finding was recorded that only the driver and the owner (that is to say the petitioner) knew about those boxes who could have informed the other occupants about the same confirming order of confiscation of the car. A copy of the said order was furnished to the petitioner on 30-12-1996, who after seeking legal advice is moving this writ petition and thus the slight delay, if any, in its filing may kindly be condoned. The authorities should have returned the vehicle in the interest of justice in view of the clear finding of the Tribunal that the petitioner had no knowledge or complicity in the transport of contraband gold. There was no evidence by way of statement by Kishore Kumar (his statement appended as Annexure-3) or of any other person to the effect that the contraband gold has been placed in the specially constructed boxes below the driver''s seat. There was no reason for disbelieving the version of Kishore Kumar that he had gone away to buy cigarettes and to take tea when someone placed the contraband items in the boxes below his seat. It was nobody''s case that any part of contraband gold, etc., belonged to the petitioner or Kishore Kumar, which was seized from the vehicle and the occupants.

Admittedly, Sanjeev Kumar was a friend and neighbour of the petitioner (copy of the statement of the petitioner appended as Annexure-4) who had been on the vehicle several times and it could be very naturally expected that he knew about the boxes constructed under the driver''s seat and the front side seat which was quite conspicuous in which the driver kept tools, blankets and dresses, etc., when he was sent out for a number of days. Sanjiv Kumar during interrogation gave the name of Anju Kumar, as the person for whom he was carrying gold, and if the petitioner or the driver were in any manner his accomplices he would have disclosed their names also in his statement. Since the vehicle of the petitioner was being used as a private Taxi its absolute confiscation was illegal inasmuch as no opportunity had been given to the petitioner u/s 115(2) Proviso of the Customs Act for its release on payment of fine. The action of seizure was misconceived as neither of Clauses (a) to (e) of Sub-section (1) of Section 115 of the Customs Act were applicable. No rule prescribing precaution to be taken have been prescribed u/s 115(2) of the Customs Act for transport of such occupants or goods. Nanauta does not fall within the custom area as defined u/s 2(ii) of the Customs Act. In any case the vehicle remained seized for the last eight years the petitioner has suffered adequate punishment and it would be expedient in the interest of justice to release the vehicle also on this ground.

3. The respondents filed a counter-affidavit serving its copy of Sri Amar Saran, learned Counsel for the petitioner, on 1-8-1997 which was sworn by the Assistant Commissioner, Central Excise, Division Saharanpur.

3.1 The Counter Affidavit states, inter alia, following facts :--

(i) While searching the persons as well as the Maruti Car Silver ornaments. Gold Bar and Currency were found concealed in secret cavity fitted under its front seats. Some Indian Currency was also recovered from the another front seat concealed in the secret iron box fitted under front seat from it. Some gold biscuits and ornaments and cash, etc., were also recovered from the custody of Ashok Kumar Agrawal and Sunil Kumar. The search was taken in presence of all the occupants of the Car as well as two independent witnesses.

(ii) As the car was used in smuggling of contraband foreign marked gold concealed in specially built cavity specially got manufactured by the Driver with the consent of the petitioner in the said car where the contraband gold and other goods were kept within the knowledge and consent of the driver, the vehicle was also seized u/s 115(2) of the Customs Act, 1962.

(iii) It is important to mention that the original manufacturer of the vehicle do not provide such secret boxes in the vehicle and thus those secret chambers were got manufactured by the Driver with the consent of the petitioner as it is disclosed by him in his statement dated 6-2-1989 to provide extra safety to the smuggler.

(iv) The petitioner approached the Chief Judicial Magistrate, Saharanpur for release of the vehicle but his request was not acceded. He also made request to the Collector, Central Excise, Meerut for provisional release of the said car but his request was turned down vide order dated 10th April, 1989 which was intimated to him.

(v) Show cause notices dated 12th May, 1989 were issued by the Assistant Collector, Central Excise, Saharanpur.

(vi) The matter was adjudged by the Collector, Central Excise, Meerut (copy appended as Annexure C.A-II) and the Maruti car was confiscated after considering all the facts. The Appeal filed by the petitioner before CEGAT, New Delhi against the order of the Collector was dismissed confirming the order of confiscation. Against the order of the Appellate Tribunal the petitioner sought for rectification which plea was considered and rejected vide order dated 15-10-1996 (copy appended as Annexure CA-IV).

(vii) The seizure of the vehicle was made under reasonable belief that the same has been used for smuggling and carrying of contraband gold. The seizure and confiscation of the vehicle was strictly as per the provisions'' of the Customs Act.

(viii) The vehicle is registered as a private car and it was used as a private taxi and its confiscation was made after giving proper opportunity to the petitioner.

(ix) Anurag Kumar in his statement had denied that the contraband gold was being carried to him.

(x) There is no question of Custom Area as u/s 115(2) of the Act, it is clear that any conveyance or animal used as means of transport in the smuggling of any goods or in the carriage of any smuggled goods shall be liable to confiscation.

(xi) The grounds mentioned have got no force and the writ petition deserves to be dismissed.

(xii) The writ petition was filed after one and half years of the passing of the final order dated 19-10-1995 and thus there is abnormal delay in its filing.

4. No Rejoinder has been filed to the aforementioned counter. The submission :-

5. Sri Amar Saran, learned Counsel on behalf of the petitioner made only one submission namely that on the finding recorded by the CEGAT that the petitioner had no knowledge or complicity in the transport of the contraband Gold the order of confiscation of his vehicle was illegal and it should have been released by the Authorities and thus the desired mandamus be issued.

The questions involved :-

6. Following questions crop up for our adjudication in this writ petition :-

(i) Can the State of U.P. be sued through the Collector of Customs and Central Excise, Meerut, who is an employee of the Central Government and that an employee of the Government of U.P. as respondent Nos. 1 and 2 when no relief is sought for against the State of U.P.?

(i) Can the Union of India be sued through Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi (hereinafter referred to as CEGAT) which had dismissed the statutory appeal filed by the petitioner against the order of the Collector, Customs and Central Excise, Meerut?

(ii) Whether this Court will be justified in Issuing a writ of Mandamus commanding the Respondents when Collector, Customs and Central Excise, Meerut had passed the order of confiscation of the petitioner''s vehicle, who had not been impleaded as party respondent nor his aforementioned order has been prayed to be quashed by bringing on the record by the petitioner or the petitioner has not come up even with a prayer to quash the Appellate order of the CEGAT, which too has not been impleaded as party Respondent nor its order is sought to be quashed by the petitioner by grant of a writ of Certiorari?

(iii) Whether the petitioner has come with clean hands inasmuch as he has suppressed the filing of his earlier writ petition in the year 1989 as disclosed in paragraph 6 of the Counter-Affidavit or its result thereof even during the commencement of hearing of this writ petition before us and has incorrectly relied upon the original Section 115(2) of the Customs Act despite its change (omission) by Finance Act (26 of 1988)?

(iv) Whether the statutory Authorities have committed any error of law in passing that order which requires correction by this Court under Article 226 of the Constitution of India?

(v) Whether in the peculiar facts and circumstances the petitioner is entitled to any relief from this Court in its exercise of discretionary jurisdiction?

Our Findings :-

7. We find that the Collector, Customs and Central Excise, Meerut, and the CEGAT have not been impleaded as party respondents. The State of U.P., which is a juristic person, has been impleaded as respondent No. 1 through the Collector of Customs and Central Excise, Meerut. No relief is claimed also against the State of U.P. Similar is the position of respondent No. 2 the Union of India, which cannot be sued through CEGAT, New Delhi.

8. The worst is that the petitioner has suppressed the factum of filing of his earlier writ petition before this Court in 1989, which fact was required to be stated as per the rules of the Court.

8.1 At this stage of our order Sri Amar Saran, learned Counsel for the petitioner, stood up and made a statement that the petitioner has explained filing of his earlier writ petition in his rejoinder. When we disclosed that we have already mentioned the fact that no rejoinder has been filed by the petitioner as we found none on the record, he comes up with a plea that he is having the rejoinder in his file. When we asked him whether he has served its copy on the respondents he kept mum.

8.2 It is relevant in this regard to reproduce our order dated 9th July, 2002, which reads as follows :-

"It is stated by Sri Amar Saran, learned counsel appearing on behalf of the petitioner, that Mr. S.P. Malviya, who was a retainer counsel of the Union of India in this case has shifted his practice to Delhi. If this be the fact then Mr. Saran is required to serve a copy of his Rejoinder on the present retainer counsel of the Union of India.

List this writ petition again in the next cause list."

8.3 Sri Saran, learned Counsel for the petitioner again stood up and said that he wants to file the rejoinder. We refuse on two grounds : -- (a) It is not claimed that its copy has not been served on Sri C. K. Parikh, the Standing Counsel of Union of India and (b) It is attempted to be filed during midst of our order.

8.4 A writ-petitioner is bound to approach this Court with clean hands. The petitioner was bound to disclose the filing of his earlier writ petition and of its result.

9. For the reasons best known to him the petitioner has also not appended a copy of the order dated 8-4-1991 passed by the Collector of Customs and Central Excise, Meerut.

10. In the Counter Affidavit, however, the order aforementioned has been brought on the record as Annexure C. A.-II.

10.1 On its perusal we find following observations and findings have been recorded against the petitioner and his driver :-

(A)"From the search of said vehicle following items and goods were recovered.

(i) One Gold bar of Chinese origin and seven Gold Biscuits of foreign origin kept in a bag and kept concealed in the Silver ornaments placed in a specially made box under driver''s seat.

(ii) Indian Currency Notes valued at Rs. 1,80,000/- were found concealed in another box specially made under second front seat. The detailed punchnama of recoveries made were drawn in presence of aforesaid two independent witnesses."

(B) "The said Shri Kishore Kumar, driver of the said vehicle admitted the recoveries made as per details in the punchnama dated 2-1-89."

(C) "The said vehicle used for carrying contraband gold was liable for confiscation u/s 72 of Gold (Control) Act, 1968 read with Section 115 of Customs Act, 1962 and was seized u/s 66 of the Gold (Control) Act, 1968."

(D) "On 6-2-89 Shri Kishore Kumar the driver of the said vehicle was summoned and his statement was recorded in which he admitted that he was driving the said vehicle since last August, 1988 as Taxi and he was paid employee of Shri

Sudhir Kumar Jain and Shri Sudhir Kumar asked him on 3-1-89 at about 8.00 A.M. for going to Delhi. He also stated that he had picked up the said three persons from their houses which he knew. He also stated that the iron boxes were got made under the front seat and under the driver''s seat of the said vehicle after its purchase for Rs. 150/- with the consent of its owner. He also stated that the three persons S/Shri Ashok Kumar Agarwal, Sanjeev Kumar Jain and Sunil Kumar went to Delhi in the said vehicle and were returning in the said vehicle together on 3-1-89. He further stated that the above persons were aware of those iron boxes made under the front seat and driver''s seat and he was not aware when the goods under seizure were put into those boxes."

(E) "Thus it appears that S/Shri Ashok Kumar Agarwal, Sanjeev Kumar Jain and Sunil Kumar had brought the contraband gold and other articles as mentioned in the recovery memo with the knowledge of each other and said Shri Kishore Kumar driver and Sudhir Kumar Jain, the owner of the said vehicle had associated them in possessing, carrying, procuring, concealing and smuggling of the contraband gold of foreign market."

(F) "It also appears that the said Shri Sudhir Kumar Jain, owner of the said vehicle (Maruti Car No. DDC-5513) and said Shri Kishore Kumar, driver of the said vehicle were using the said vehicle for carrying contraband gold and other goods by providing them extra facilities like iron box cavities specially made under the front two seats of the said vehicle, thereby said vehicle appears liable to confiscation u/s 72 of the Gold (Control) Act, 1968 and u/s 115 of the Customs Act, 1962, as the said driver and the said owner were fully aware of the fact that the said vehicle was being used for carrying contraband gold, and thus a case was made out and submitted for adjudication by the Divisional Officer, Central Excise, Saharanpur to the Collector of Central Excise, North U.P. Collectorate Meerut having jurisdiction and competence to adjudicate the case."

(G) "From the spot statement of Shri Kishore Kumar, driver of Maruti Car No. DDC-5513 and the statement dated 24-1-89 of owner of the said vehicle Shri Sudhir Kumar Jain, it appears that all the three persons namely; S/Shri Ashok Kumar Agarwal, Sanjeev Kumar and Sunil Kumar intercepted by the Central Excise Officers at Nanauta travelled in the vehicle from Saharanpur to Delhi on 3-1-89 in the morning and returned back from Delhi to Saharanpur and were intercepted at about 7.45 P.M. in the evening at Nanauta. Two of them were carrying briefcases and one was carrying a bag. The contents of which were not known to the driver. The vehicle was arranged by Shri Sanjeev Kumar from the owner of Shri Sudhir Kumar Jain. However, the spot statement of Shri Sunil Kumar does not indicate such things."

(H) "I also find that the driver did not object while the three persons namely; S/ Shri Ashok Kumar Agarwal, Sanjeev Kumar and Sunil Kumar boarding the Maruti Car No. DDC-5513 were keeping these goods in these two boxes. Rather he allowed them to keep these things in the boxes for safe keeping. Normally presumption, therefore, would be that these three persons were having the knowledge of these two boxes for safe keeping of the contraband goods and the driver also was aware of this. The presumption is further confirmed from the statement dated 6-2-89 of the driver Shri Kishore Kumar that he knew the three persons and his master were connected quite well and he had dropped them from Saharanpur to Delhi in the past also on many occasions. Accordingly, therefore, it is proved beyond doubt that the Maruti Car No. DDC-5513 having two boxes fitted for safe keeping of contraband goods was being used as means of transport/carriage of smuggled goods and/or contraband gold. Therefore, the vehicle No. DDC-5513 is liable to confiscation u/s 115(2) of the Customs Act, 1962 and Section 72 of the Gold (Control) Act, 1968. The owner of the vehicle was also knowing Shri Sanjeev Kumar quite well, he was his neighbour and friend, he must be therefore aware of the activities of Shri Sanjeev Kumar. Therefore, it also proved beyond doubt that Maruti Car No. DDC-5513 was used as a means of transport/carriage of contraband foreign goods in connivance of the owner Shri Sudhir Kumar Jain, thereby, he is liable to penal action under Sections 112 and 117 of the Customs Act, 1962 and Sections 74 and 75 of the Gold (Control) Act, 1968. The driver Shri Kishore Kumar was also aware that certain consignments were kept in boxes fitted underneath the driver''s seat and the side seat of the driver and he allowed this thing to happen without questioning the contents of the same, as is revealed from his own statement dated 6-2-89, meaning thereby that he did not take reasonable precaution, so as not to get the vehicle used for the purpose of transportation/carriage of smuggled goods. This action of the driver Shri Kishore Kumar also makes him liable to penal action under Sections 112 and 117 of Customs Act, 1962 and Sections 74 and 75 of Gold (Control) Act, 1968."

(I) "I order the confiscation of Maruti Car No. DDC-5513 belonging to Shri Sudhir Kumar Jain u/s 115(2) of Customs Act, 1962 and Section 72 of Gold (Control) Act, 1968. Confiscation is absolute."

(J) "I also impose a personal penalty of Rs. 50,000/- (Rupees Fifty thousand) only on Shri Sudhir Kumar Jain S/o Shri Nem Chand Jain, Mohalla Kujjat, Saharanpur u/s 112(b)(i) of the Customs Act, 1962 and Rs. 10,000/- (Rupees Ten thousand) only under Sections 74 and 75 of Gold (Control) Act, 1968."

(K) "I also impose a personal penalty of Rs. 5,000/- (Rupees Five thousand) only on Shri Kishore Kumar S/o Shri Hari Chand R/o village Khajoori Akbarpur, P.O. Gangelheri, Dist. Saharanpur driver of the Maruti Car No. DDC-5513 u/s 112(b)(i) of the Customs Act, 1962 and Rs. 1,000/- (Rupees one thousand) only under Sections 74 and 75 of Gold (Control) Act, 1968."

11. From the order of the CEGAT (as contained Annexure-1) it appears that Eight Appeals were filed in all by the petitioner and others. The petitioner has not clarified that which appeal was preferred against the order of confiscation of his vehicle. However, we find that in regard to the penalty imposed on him the CEGAT observed that "in the absence of anything specification to connect Sudhir Kumar with the gold there is no basis for penalty on him" (vide paragraph 6).

While rejecting the prayer of the petitioner in regard to confiscation of the vehicle and the penalty imposed on the Driver the CEGAT had observed as follows :-

"7. Kishore Kumar, the driver has in his statement also denied knowledge of the fact that he was carrying gold. He says that he went away to have tea and buy cigarette. They kept the goods in the boxes in his absence. This argument is not applicable. The other persons could not be expected to know that these boxes have been built in the car. It was only the owner and driver who knew that these boxes existed. The statement of Kishore Kumar does not show that he was questioned about where exactly he picked up, the others, when they kept the goods in boxes, how they came to know about the boxes, etc. The statements are sketchy. However, the passengers in the car would not have come to know about the existence of the specially built boxes in the car by themselves. They would have to be told about them either by the owner or the driver. We do not find anything in the record to say that either of them passed on this information to any of the passengers. Since the passengers had obviously come to know about the boxes and it can reasonably be said that they would have come to know about these only from the owner or the driver. There is nothing to show that the owner told them about these boxes. This leaves the driver. He was aware of the existence of these boxes, and he was also incharge of the vehicle. It is therefore not possible to escape the conclusion that he would have been responsible for arranging and keep the gold and the currency in the boxes. The penalties of Rs. 5,000/- and 10,000/- imposed on him are extremely reasonable and are therefore confirmed.

8. It would also follow that confiscation of the car, ordered u/s 115 of the Customs Act and Section 72 of the Gold Control Act is confirmed. In the circumstances under which the car was seized, we do not find any reason to interfere with its absolute confiscation."

12. Section 72 of the Gold (Control) Act, 1968, read as follows :-

"Section 72. Confiscation of Conveyances.

Any Conveyance or animal which has been, or is being, or is attempted to be, used for the transport of gold in relation to which any provision of this Act or any rule or order made thereunder has been, or is being, or is attempted to be, contravened, shall be liable to confiscation unless the owner of the conveyance or animal proves that it was so used or about to be used without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the conveyance or animal and that each of them had taken all reasonable precautions against such use :

Provided that where any such conveyance or animal is used for the transport of goods or passengers for hire, the owner of the conveyance or animal shall, notwithstanding the provisions contained in Section 73, be given an option to pay in lieu of confiscation of the conveyance or animal, a fine not exceeding the value of the gold in relation to which the provision of the Act or any rule or order made thereunder has been, or is being, or is about to be, contravened."

13. Section 115 of the Customs Act, 1962 reads as follows :-

"115. Confiscation of conveyances :--

(1) The following conveyance shall be liable to confiscation :-

(a) any vessel which is or has been within the Indian customs waters, any aircraft which is or has been in India, or any vehicle which is or has been in India, or any vehicle which is or has been in custom area, While constructed, adapted, altered or fitted in any manner for the purpose of concealing goods;

(b) any conveyance from which the whole or any part of the goods is thrown overboard, stayed or destroyed so as to prevent seizure by an officer of customs;

(c) any conveyance which having been required to stop or land u/s 106 fails to do so, except for good and sufficient cause;

(d) any conveyance from which any warehoused goods cleared for exportation, or any other goods cleared for exportation under a claim for drawback, are unloaded, without the permission of the proper officer;

(e) any conveyance carrying imported goods which has entered India and is afterwards found with the whole or substantial portion of such goods missing, unless the master of the vessel or aircraft is able to account for the loss of, or deficiency in, the goods.

(2) Any conveyance or animal used as a means of transport in the smuggling of any goods or in the carriage of any smuggled goods shall be liable to confiscation, unless the owner of the conveyance or animal proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the conveyance or animal :

Provided that where any such conveyance is used for the carriage of goods or passengers for hire, the owner of any conveyance shall be given an option to pay in lieu of the confiscation of the conveyance of fine not exceeding the market price of the goods which are sought to be smuggled or the smuggled goods, as the case may be."

14. We find that in Banwarilal Pasari v. D.R. Kohli 1977 Cri. LJ (NOC) 97 a Division Bench of the Calcutta High Court has held that "proviso to Section 115(2) of the Customs Act curbs out an exception from the main provision of Sub-section (2), otherwise the same would fall within the general language of the main enactment. The exception must relate to the innocence not only of the owner but also of his agent, and the person who has been put in charge of his conveyance. If one has to come within the exception in Sub-section (2) one would have to prove not only that such persons were innocent but also that all such possible precautions against such wrongful user of the vehicles had been taken by each such person or persons."

P.S. Kailasam, J of the Madras High Court (lateron elevated to the Hon''ble Supreme Court) in K.M. Mohammed Ghouse and Co. Vs. The Collector of Central Excise and Another, Interpreting Section 115(2) held as follows :-

"...........Under Section 115(2), the conveyance is liable to be confiscated when it is used as a means of transport in the smuggling of any goods, unless the owner of the conveyance proved that it was so used without the knowledge or connivance of the owner himself, his agent or a person in charge of the conveyance. Though the plea of the owner was that he did not know anything about the smuggling there is no attempt to prove that the smuggling was without the knowledge or connivance of himself or the person in charge of the conveyance, that is, the Tinda Natarajan and the crew Subramaniam. The fact that Tindal Natrajan and Subramaniam were found guilty of smuggling by the Customs Authorities is not disputed. In the circumstances the order of confiscation is right and cannot be questioned."

We fully agree with the aforementioned views.

15. It was the Driver who was incharge of the vehicles in question. The CEGAT has recorded a clear finding in his regard which is as follows :-

"He was aware of the existence of these boxes and he was also incharge of the vehicle. It is therefore not possible to escape the conclusion that he would have responsible for arranging and keep the gold and currency in the boxes."

16. The petitioner being the owner of the vehicle was required to prove that he/ his/Agent/the person in charge of the vehicle had taken necessary precautions mentioned in Section 72 of the Gold (Control) Act and that it was used without knowledge or connivance of his Agent or Incharge of the vehicle as mentioned in Section 115(2) of the Customs Act.

17. We do not find any pleading in the writ petition in this regard either what to talk of dealing of any evidence by the petitioner before the original authority. In fact it was not even the submission of Sri Saran that the petitioner has taken such precautions.

18. We find that in paragraph 22 of the writ petition a stand has been taken that no Rule has been enacted u/s 115(2) of the Customs Act prescribing precautions to be taken thereunder. This stand is thoroughly misconceived inasmuch as the words "and that each of them had taken all such precautions against such use as are for the time being specified in the rules". Occurring in Section 115(2) of the Customs Act were omitted by Section 79 of the Finance Act (26 of 1988). This is apparent from even The AIR Manual 5th Edition, 1989''. A care was required to be taken by the learned Counsel of the petitioner before drafting the pleadings in this regard.

19. We cannot hold that in disbelieving the driver of the petitioner the CEGAT has committed an error.

20. We find that in Union of India and Another Vs. M/s. Mustafa and Najibai Trading Co. and Others, dealing with a cause under the same Act it was held that "While dealing with the writ petition, the High Court cannot embark upon re-appreciation of the evidence and deal with the matter as if we are hearing an appeal on facts and record a finding in favour of the petitioner."

21. We also find that in Kripal Singh Vs. Collector of Customs (Preventive) Patna, it was held by the Apex Court to the effect that if the owner of the vehicle had failed to prove that at the time when the contraband goods were found in the vehicle it was being used without the knowledge or connivance of the owner of the vehicle/his agent or the person incharge of the vehicle, which was one of the requirements u/s 115(2) of the Customs Act, then no case for interference is made out.

22. It cannot be said that non-giving of the express option as contemplated under the proviso to Section 72 of the Gold (Control) Act and to Section 115(2) of the Customs Act has resulted in an illegality when show cause notices were issued under these sections to the petitioner. In any view of the matter he cannot be said to be prejudiced and it is not the case of the petitioner before us that he was ever prepared or is still prepared to pay the fine of the value of the contraband gold and the article brought with the purview of the Gold (Control) Act and the Customs Act as envisaged u/s 72 of the Gold (Control) Act and Section 172 of the Customs Act. Relying upon the ratio decidendi laid down by the Hon''ble Supreme Court in Union of India v. Mustafa and Najibai Trading Company (supra) we hold that the proviso to Section 115(2) of the Customs Act or proviso to Section 72 of the Gold (Control) Act are not mandatory provisions. The discretionary jurisdiction vested in us should not be exercise in favour of those who indulge or allow their vehicles to indulge in smuggling of contraband goods for which the two Acts have been enacted by our Parliament to be dealt with effectively so that our economy could sustain and recover without completing with any parallel black money/economy.

23. We are also surprised to find that no prayer has been made in this writ petition for quashing the orders passed by the Custom Authority and the CEGAT by granting a writ of certiorari. A writ of certiorari is sought to be issued whenever an inferior Tribunal wrongly exercises jurisdiction or exceeds its jurisdiction whereas a writ of mandamus is issued when the inferior Tribunal has declined jurisdiction with object of the latter is not to review or control the action of the inferior Tribunal but merely to compel it to act. The petitioner has failed to show what statutory duty the State of U.P. or the Union of India has failed to perform or declined jurisdiction vested in them. The remedy of invoking the jurisdiction to issue a writ of mandamus in the peculiar facts and circumstances is somewhat misconceived and is not available unless the orders passed by the two authorities are prayed to be set aside after impleading them. In fact no endeavour was made by Sri Saran to show why a prayer for issuance of writ of certiorari has not been made and why and how a mandamus be issued against

the State of U.P. and the Union of India.

24. The petitioner has sought to explain laches in filing this writ petition dated 15-7-1991 on 17th July, 1991 on the ground that there was a mistake in the order dated 19-10-1995 passed by the CEGAT which was corrected by it by passing another order on 17-10-1996, which was furnished on 30-12-1996 (vide paragraphs 8 and 9). In paragraph 21 of the Counter it has been pointed out that the writ petition has been filed after one and half years from the final order dated 19-10-1995 and thus there is an abnormal delay in its filing. A perusal of the order dated 15-10-1996 of the CEGAT as contained in Annexure-2 shows that the petitioner had applied for rectification of mistake in regard to non-recording of a specific finding in regard to penalty only and not in regard to confiscation of his vehicle. The final order rejecting the petitioner''s Appeal preferred before CEGAT in regard to confiscation of his Maruti Car was passed on 19-10-1995. Thus the laches have been wrongly attempted to have been explained with reference to an irrelevant fact. The question of laches in the instant case is also of importance.

25. Accordingly, we answers all the questions against the petitioners.

26. We, thus, hold that this writ petitions is a misconceived one and dismiss it with cost quantified to Rs. 5,000/- (Five Thousand) only.

