

(1972) 10 BOM CK 0025**Bombay High Court****Case No:** Criminal Revision Application No. 144 of 1972

Nazir Gulam Saheb Baddi

APPELLANT

Vs

D.G. Mugwe

RESPONDENT

Date of Decision: Oct. 12, 1972**Acts Referred:**

- Customs Act, 1962 - Section 110, 111, 115, 115(2), 124
- Penal Code, 1860 (IPC) - Section 109, 120

Citation: (1973) MhLj 581**Hon'ble Judges:** J.R. Vimadalal, J**Bench:** Single Bench**Advocate:** G.A. Merchant and T.M. Menon, for the Appellant; V.H. Gumaste, Government Pleader for State and G.V. Limaye, for the Respondent**Final Decision:** Dismissed**Judgement**

J.R. Vimadalal, J.

This is an application to revise the order passed by the Sessions Judge of Kolaba, on December 15, 1971, confirming the order passed by the Judicial Magistrate (First Class), Uran, at Panvel, on November 6, 1971, dismissing the application made by the present applicant for an order for return of his motor-truck u/s 516 A of the Code of Criminal Procedure.

2. The facts of the case are that on December 18, 1970, the Customs authorities seized silver worth more than Rs. 6,00,000 dumped at Dassakushi in Uran for being illegally transported out of India, and in the course of their investigation, it was found that the present applicant's truck No. MHS. 121 7 had been used for the transport of that silver, and they, therefore, seized the truck. It appears that the truck had been seized earlier, but had been returned to the present applicant, and was seized again on September 26, 1971. A notice to show cause why the said truck should not be confiscated u/s 115(2) of the Customs Act, 1962, was thereafter served

on the present applicant on November 6, 1971.

3. The present applicant and some other persons were prosecuted for offences under sections 109 and 120 of the Indian Penal Code, section 133 of the Customs Act, and section 5, read with section 12 (1) of the Export and Import Control Act, and in the criminal proceedings that ensued in the Court of the Judicial Magistrate (First Class) Uran, being Criminal Case No, 40 of 1970, the said truck was produced and exhibited as exh 61. The present applicant thereafter filed an application u/s 516A of the Code of Criminal Procedure on October 27, 1971 praying that the said truck be handed over to him pending the hearing and final disposal of those criminal proceedings. That application was opposed on behalf of the State and was dismissed by the trial Magistrate on November 6, 1971 on the ground that the present applicant had the remedy under sub-section (2) of section 115 of the Customs Act available to him, of proving that the said truck was not liable to confiscation on the ground that it had been used for transport of the goods confiscated without his knowledge or connivance, and it would not, therefore, be proper for him to make an order u/s 516A of the Code of Criminal Procedure.

4. That order of the trial Magistrate was confirmed in revision by the Sessions Judge of Kolaba on December 15, 1971, but the learned Sessions Judge appears to have gone farther than the trial Magistrate, insofar as he held that the discretion which the Court had u/s 516A of the Code of Criminal Procedure "cannot be exercised so as to deprive of the property any competent authority which is competent to hold an independent proceeding in respect of the said property." He took the view that the only remedy of the applicant was to take proper steps under the relevant provisions of the Customs Act for getting his truck released.

5. It is from that order that the applicant has approached this Court in revision.

6. I have no doubt that the orders passed by both the Courts below are erroneous. The trial Magistrate has refused to exercise jurisdiction, which, according to him he had u/s 516A of the Code of Criminal Procedure, on the ground that the applicant had a remedy under sub-section (2) of section 115 of the Customs Act. The Sessions Judge, on the other hand, took the view that the only remedy of the applicant was to take proper proceedings under the Customs Act for getting his truck released and that the criminal Court could not exercise its powers u/s 516A of the Code of Criminal Procedure so as to deprive the Customs authorities of their powers in independent proceedings for confiscation, thereby, in effect, holding that he had no jurisdiction to make the order applied for. There is nothing either in the Customs Act or in the Code of Criminal Procedure, to justify the view taken by either of the Courts below. I have no doubt whatsoever that a criminal Court before which proceedings are pending, not only has the power and the jurisdiction to make a proper order u/s 516A of the Code of Criminal Procedure notwithstanding the fact that independent powers are vested in the Customs authorities under the Customs Act, 1962, but that in a proper case; the criminal Court should exercise its powers u/s 516A of the Code

of Criminal Procedure notwithstanding the powers conferred on the Customs authorities under Customs Act, 1962. The orders passed by both the lower Courts are, in my opinion, therefore, wrong and must be set aside.

7. The next question that I must proceed to consider is whether this is a proper case in which an order u/s 516A of the Code of Criminal Procedure should be made by the criminal Court, or by me in revision. It was sought to be contended by Mr. Merchant, on behalf of the applicant, that since the Customs authorities had failed to give a show cause notice within six months of the initial seizure of the truck by them, as required by sub-section (2) of section 110 of the Customs Act, 1962, the Customs authorities no longer had jurisdiction to confiscate the said truck, and there is, therefore, no reason why the criminal Court could not exercise its powers u/s 516A of the Code of Criminal Procedure. However, as the learned Government Pleader has pointed out, on a plain reading of its language, section 110 of the Customs Act, applies only to "goods". It is true that the term "goods" has been defined in section 2 (22) of the Customs Act, 1962, as including "vehicles". In section 115 of the Customs Act, there is, however, an independent provision in regard to confiscation of the conveyances, and in that connection it is necessary to note that the notice served on November 6, 1971 upon the applicant by the Customs authorities is under sub-section (2) of that section, and not u/s 124 read with section 110 of that Act. To such a notice the provisions of sub-section (2) of section 110 would have no application and it would not be necessary that such a notice should be served within six months of the seizure of the conveyance. The question, as to whether the vehicle is "goods" within the definition in section 2 (22) and is governed by sections 110, 111 and 124 of the Customs Act, 1962, or is a conveyance within the meaning of section 115 of the Act, would depend upon the use which is made of that vehicle. If, for instance, the vehicle was sought to be smuggled into India without payment of import duty or without the necessary permission of the authorities concerned, it would be "goods" and would be governed by the provisions relating to the same in the Customs Act, 1962. If, on the other hand, the vehicle is used for the purposes specified in section 115 of the Act, one of which would be for conveyance of smuggled goods, it would not be governed by the provisions relating to "goods" in the Customs Act, 1962, but would be governed by the specific provision relating to the confiscation of conveyances contained in section 115 of the Act. In that view of the matter, there is no defect in the show cause notice which has been served on the applicant on November 6, 1971, and in my opinion, it is still open to the Customs authorities to proceed with the confiscation of the motor-truck in question in the present case.

8. Having regard to that legal position, the fair and proper order to make in this case is to give the Customs Authorities an opportunity to adopt and conclude confiscation proceedings if they so desire, and on their failing to do so within a reasonable time, the learned Magistrate, to whom I remand this matter, should be asked to proceed to exercise his powers u/s 516A of the Code of Criminal Procedure

on such facts as may be placed before him.

9. I, therefore, order that if the Customs Authorities do not conclude their adjudication proceedings in respect of the said vehicle and confiscate the said motor-truck on or before December 31, 1972, the learned Magistrate to whom I remand this matter, should dispose of the application made to him by the present applicant in accordance with law on such facts as may be placed before him. In the event of an order for confiscation being made by the Customs Authorities on or before December 31, 1972, the learned Magistrate must, of course, dismiss that application.

10. The Rule is made absolute, as stated above.