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(1988) 12 AHC CK 0077

In the Allahabad High Court

Case No : Writ Petition (H.C.) No. 8350 of 1988

Amar Nath and Another — APPELLANT

Vs

Union of India (UOI) and Others — RESPONDENT

Date of Decision : 02-12-1988

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3
Constitution of India, 1950 — Article 20, 22, 22(1), 22(2), 226
Criminal Procedure Code, 1973 (CrPC) — Section 11, 167, 167(1), 209, 30
Customs Act, 1962 — Section 104, 104, 104(1), 104(1), 104(2)
Evidence Act, 1872 — Section 25
Foreign Exchange Regulation Act, 1973 — Section 35(3)

Citation : (1990) 14 ACR 634

Hon'ble Judges : Virendra Kumar, J;S. Saghir Ahmad, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

S. Sagir Ahmad, J.—This petition was allowed by us by our short order dated 2-12-1988. We now proceed to give our reasons.

2. By this petition, filed under Article 226 of the Constitution, the Petitioners have challenged their detention in the Central Jail, Naini, Allahabad.

3. The petition was filed on 24-10-1988 after giving notice to the Senior Standing Counsel of the Central Government. On that date an order was passed that the case shall come up for final hearing on 28-10-1988. It was further directed that the remand papers shall be brought to this court through special messenger from the court of the Special Chief Judicial Magistrate, Allahabad.

4. The remand papers were brought from the court of the Special Chief Judicial Magistrate, Allahabad and were produced before us.

5. The case of the Petitioners? is that they are the Cleaners of trucks. On 1-10-1988 at about 7 a.m. they were arrested by the Custom authorities at a tea

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shop situate near the Chakwa barrier in between Tulsipur and Balrampur in district Gonda and were detained by the custom authorities illegally in their custody prior to their being sent to. jail on 4-10-1988. They were not produced before any Magistrate within 24 hours of their arrest and, therefore, their detention in Central Jail, Naini, Allahabad where they were lodged, was absolutely illegal.

6. On notice of this petition being given to the counsel for the opposite parties, they filed a counter affidavit on 3-11-1988 to which a rejoinder affidavit dated 4-11-1988 was filed. The opposite parties also filed supplementary counter affidavit dated 17-11-1988 to which a supplementary rejoinder affidavit dated 19-11-1988 was filed on behalf of the Petitioners. The opposite parties also filed a supplementary counter affidavit (sworn by Sri G.S. Singh, Arresting Officer) dated 1-12-1988. The case of the opposite parties is that the Petitioners were not arrested on 1-10-1988 but were arrested on 3-10-1988 at 7.00 p.m. at Gorakhpur. It is pointed out in the counter affidavit that the copies of Panchnama (recovery memos) containing the details of the contraband goods and the trucks on which they were being carried were served on the Petitioners on 2-10-1988 and that their statements were also recorded on 3-10-1988. Next day i.e. on 4-10-1988 the Petitioners were produced before Sri S.P. Misra, Judicial Magistrate 1st Class, at 4.00 p.m. as the Special Chief Judicial Magistrate, Allahabad was on leave on that date, and they were remanded to judicial custody till l8-10-1988. On 18-10-1988 there was no presiding officer in the court of Special Chief Judicial Magistrate and consequently the Petitioners were produced before the Addl. Chief Judicial Magistrate, who remanded ? them to judicial custody till 1-11-1988. On that date, namely, 1-11-1988 the Petitioners alongwith other accused were produced before Sri A.N. Kakkar, who was appointed as Special Chief Judicial Magistrate, Allahabad. He remanded thetn to judicial custody till 3-11-1988 when the Petitioners and other accused were again produced before him (Sri A. N- Kakkar) and all of them were remanded to judicial custody till 17-11-1988. In the meantime a detention order dated 15-11-1988 issued u/s 3 of conservation of Foreign Exchange and Prevention of smuggling Activities Act, 1974 (hereinafter called ?Cofeposa?) was issued and served on the Petitioners as also the other accused. Sri A.N. Kakkar consequently passed an order on 17-11-1988 that the accused including the Petitioners need not be produced for remand in that court, as they have already been detained under COFEPOSA. It is in these circumstances that it is contended by the opposite parties that Petitioners? detention being valid is liable to be sustained.

7. Section 104 of the Customs Act, 1962 (hereinafter referred to as the Act) provides as under ;

104 (1) If an officer of customs empowered in this behalf by general or special order of the Collector of Customs has reason to believe that any person in India or within the Indian Customs Waters has been guilty of ah offence punishable u/s 135, he may arrest such person and shall as soon as may be, inform him of the

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grounds for such arrest.

(2) Every person arrested under sub-section (1) shall without unnecessary delay, be taken to a Magistrate.

(3) Where an officer of customs has arrested any person under subsection (1) he shall, for the purpose of releasing such person on bail or otherwise, have the same powers and be subject to the same provisions as the officer-in-charge of a police-station has and is subject to under the Code of Criminal Procedure, 1898.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1898, an offence under this Act shall not be cognizable.

8. Section 104 of the Customs Act empowers an officer of Customs to arrest a person regarding whom he has reason to believe that he is guilty of an offence punishable u/s 135. An analysis of Section 104 further reveals.

(i) The person arrested has to be informed of the grounds for arrest (as soon as. may be);

(ii) Even arrested person has to be taken, without unnecessary delay, to a Magistrate.

(iii) The Officer of Customs who has arrested a person shall, for purposes of releasing such a person on bail, have the same powers and be subject to the same provisions as the Officer-in-charge of a Police Station has and is subject to under the Code of Criminal Procedure.

(iv) An offence under the Customs Act shall not be cognizable.

9. On the basis of the provisions of Section 104 of the Customs Act, Learned Counsel for the Petitioners has raised two principal contentions.

10. His first contention is based on Sub-section (2) of Section 104 which provides that a person arrested under sub-section (1) shall, without unneces sary delay, be taken to a Magistrate. It is contended that since the Act does not provide as to what a Magistrate would do when the arrested person ?is brought before him, the Magistrate cannot pass an order remanding such person to further custody.

11. His second contention is based on sub-section (4) of Section 104 which says that an offence under the Customs Act shall not be cognizable. It is contended that since the provisions of Section 167 of the Code of Cri minal Procedure, 1973 under which a Magistrate can pass an order of remand are applicable only to the investigations carried out by a Police Officer who can make an arrest without warrant only in cognizable offences, the Magistrate before whom a person arrested u/s 104 of the Customs Act is pro-duced, cannot invoke those provisions to pass an order of remand.

12. Section 167 of the Code is reproduced below :

167 (1) Whenever any person is arrested and detained in custody, and it appears

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that the investigation cannot be ? completed within the period of twenty four hours fixed by Section 37, and there are grounds for believing that the accussation or information is well-founded, the officer in charge of the Police Station or the Police Officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this Section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction :

Provided that --

(a) the Magistrate may authorise the detention of the accused person otherwise than in the custody of the police, beyond the period of fifteen days if he is satisfied that adequate grounds exist for doing so, but no Magis trate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding, --

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term-of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence,

and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this subsection shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;

(b) no Magistrate shall authorise detention in any custody under this Section unless the accused is produced before him;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

Explanation I -- For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail.

Explanation II -- If any question arises whether an accused person was produeed before the Magistrate as required under paragraph (b), the production of the accused person may be proved by his signature on the order authorising detention.

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(2A) Notwithstanding anything contained in sub-section (1) or sub-section (2), the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of a sub-inspector, may, where a Judicial Magistrate is not available, transmit to the nearest Executive Magistrate, on whom the powers of a Judicial Magistrate, or Metropolitan Magistrate have been conferred, a copy of the entry in the diary hereinafer prescribed relating to the case, and shall, at the same time, forward the accused to such Executive Magistrate and thereupon such Executive Magistrate, may, for reasons to be . recorded in writing authorise the detention of the accused person in such custody as he may think fit for a term not exceeding seven days in the aggregate; and, on the expiry of the period of detention so authorised, the accused person shall be released on bail except where an order for further detention of the accused person has been made by a Magistrate competent to make such order, and where an order for such further detention is made, the period during which the accused person was detained in custody under the orders made by an Executive Magistrate under this sub-section, shall be taken into account in computing the period specified in paragraph (a) of the proviso to sub-section (2) ;

Provided that before the expiry of the period aforesaid, the Executive Magistrate shall transmit to the nearest Judicial Magistrate the records of the case together with a copy of the entries in the diary relating to the case which was transmitted to him by the officer in charge of the Police Station or the police officer making the investigation, as the case may be.

(3) A Magistrate authorising under this Section detention in the custody of the police shall record his reasons for so doing.

(4) Any Magistrate other than the Chief Judicial Magistrate making such order shall forward a copy of his order, with his reasons for making it, to the Chief Judicial Magistrate.

(5) If in any case triable by a Magistrate as a summons case, the investigation is not concluded within a period of six months from the date on which the accused was arrested, the Magistrate shall make an order stopping further investigation into the offence unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interests of justice the continuation of the investigation beyond the period of six months is necessary.

(6) Where any order stopping further investigation into an offence has been made under sub-section (5), the Sessions Judge may, if he is satisfied, on an application made to him or otherwise, that further investigation into the offence ought to be made, vacate the order made under sub-section (5) and direct further investigation to be made into the offence subject to such directions with regard to bail and other matters as he may specify.

13. A perusal of the provisions of Section 167 extracted above would show that under sub-section (1) thereof, the arrested person or the accused has to be forwarded to the nearest Magistrate who, under sub-section (2), has the power

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to authorise the detention of the accused in such custody as he thinks fit for a term pot exceeding fifteen days. (The requirement whether the Magistrate had or had not the jurisdiction to try the case is, for the time being ignored as it is not, for purposes of the present discussion, relevant. It will, however, be considered at the appropriate stage in this judgment.)

14. A person can be arrested under the provisions of the Code of Criminal Procedure; so also can an arrest to be made u/s 104 of the Act. The arrest can be made under the Code by a Police Officer while under the Act, it can be made by an Officer of Customs.

15. A person arrested under the Code by a Police Officer or other person without warrant has to be informed of the full particulars of the offence for which he is arrested or other grounds for such arrest as required by Section 30 of the Code. Similarly, u/s 104(1) of the Act, the grounds for arrest have to be given out to the person arrested by the Officer of Customs.

16. u/s 56 of the Code, a person arrested by a Police Officer without warrant has to be produced before a Magistrate or Officer-in-charge of a Police Station and he cannot be detained in custody for a period exceeding twenty four hours unless?, as required by Section 57, there is an order passed by the Magistrate u/s 167 of the Code,

17. There is a parallel provision contained in Section 104(2) of the Act for the production of the arrested person before the Magistrate. But this Section does not speak about the maximum period for which the arrested person can be detained without being produced before the Magistrate. It only speaks of the production of the arrested person before a Magistrate qualifying it with the phrase ?without unnecessary delay? which would indicate that it is silent as to the time of 24 hours within which an arrested person has to be produced before the Magistrate. But the statutory silence is of no significance or relevance as the constitutional mandate contained in Article 22 has stil to be observed and the arrested person has to be informed of the grounds for his arrest and produced before the Magistrate within twenty four hours excluding journey time.

18. In view of the similarities pointed out in the provisions of the Code and Section 104 of the Customs Act regarding arrest of a person and his production before the Magistrate, the question which immediately crops us is ?what then is the difference ??. The answer is not for to seek.

19. The Supreme Court in Romesh Chandra Mehta Vs. State of West Bengal, , while considering the provisions of the Sea Customs Act, 1978 vis a vis Section 25 of the Evidence Act and Article 20 of the Constitution of India, held that though the Customs Officer is invested with the power to arrest u/s 104(3) of the Act, he does not thereby become a Police Officer within the meaning of Section 25 of the Indian Evidence Act. (It may be stated that the power to arrest was contained in Section 173 of the Sea Customs Act which is equivalent to Section 104 of the Customs Act, 1962). It was further observed that Customs Officer is

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not a member of the Police force and he is not entrusted with the duty to maintain law and order. He, the Supreme Court further observed, is entrusted with the power which specifically relates to the collection of custom duties and prevention of smuggling. The test for determining whether an Officer of Customs is to be deemed a Police Officer is whether he is invested with all powers of the Police Officer qua investigation of an offence including the power to submit a report u/s 173 of the Code. The Supreme Court found that a Customs Officer exercising power to make an enquiry cannot submit a report u/s 173 of the Code. The Supreme Court further found that where a customs Officer arrests a person and informs that person of the grounds of his arrest as required by Article 22(1) of the Constitution, there is no formal accusation of an offence The Supreme Court held that in the case of an offence by infringement of the Sea Customs Act and punishable at the trial before a Magistrate, there is an accusation when a complaint is lodged by an officer competent in that behalf before the Magistrate. It was in this background that the Supreme Court held that a person against whom an enquiry is made by the Customs Officer under the Sea Customs Act is not a person accused of an offence and the evidence, if any, collected by examining him u/s 171-A of the Sea Customs Act is not inadmissible.

20. This decision was followed by the Supreme Court itself in Illias Vs. Collector of Customs, Madras, . The Supreme Court in this case was again concerned with the question whether the Customs Officer was a Police Officer so that the statements recorded by him during the enquiry were admissible in evidence or would be hit by the provi sions of Section 25 of the Evidence Act. The contention that an Officer of Customs has the same powers as the Officer-in-Charge of a Police Station under the Code of Criminal Procedure based on Section 104(3) was rejected by the Supreme Court which held that it was for the limited purpose of releasing a person on bail that a Customs Officer was to be treated as Officer- in-Cbarge of Police Station. The word ?-otherwise? occuring in Section 104(3) on which emphasis was held to mean as under :

It may be observed at once that the word ?otherwise? clearly relates to releasing a person who has been arrested and cannot possibly be construed in the manner suggested by the Learned Counsel.

21. It may be stated that the Learned Counsel for the Appellant had suggested before the Supreme Court that the word ?otherwise? invests a Cus toms Officer with all the powers which an officer-in-charge of a Police Station can exercise under Chapter XIV of the Code of 1898, which, is pointed out earlier, was not accepted by the Supreme Court.

22 The above view was reiterated by the Supreme Court in Percy Rus-tamji Basra v. State of Maharashtra, 1971 SCC 345 and it was held that the statement made by a person arrested by the Customs Officer before such officer of the statement recorded during an enquirv coDducted by that officer are not covered by the provisions of Section 25 of the Evidence Act.

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23. To the same effect is the view expressed in Hira H. Advani v. State of Maharashtra AIR 197 SC 44 in which it was held that Customs authorities were not judicial Tribunals. It was further held that the statements made to Customs Officers in enquiry u/s 171A of the Sea Customs Act, 1878 were admissible in evidence against the maker in criminal proceedings launched against him.

24. In view of the distinction pointed out by the Supreme Court in the above cases, it was contended by the Learned Counsel for the Petitioners that an arrest made by the Customs Officer u/s 104(3) followed by production of the arrested person before a Magistrate would not be governed by Section 167 of the Code under which an arrest should have been made by an Officer-in-Charge of the Police Station without warrant and that too in respect of a cognizable offence.

25. An offence .under Section 335 of the Act is non-cognizable offence as provided by Section 104 itself The arrest of a person by a Customs Officer on the suspicion that such person has been guilty of an offence u/s 135 cannot be equated with an arrest made by an Officer-in-Charge of the Police Station in respect of a cognizable offence. Obviously, therefore, an order of remand cannot be passed by the Magistrate u/s 167 of the Code.

26. Section 104 also does not speak of remand being granted by the Magistrate on the arrested person being produced before him. Obvious anomaly, therefore, is that in respect of a person arrested u/s 104 of the Act an order of remand cannot be passed u/s 167 of the Code and, therefore, as contended by the Learned Counsel for the Petitioners, such a person has necessarily to be released.

27. It was further contended that although u/s 344 of the Old Code of 1898, an order of remand could be passed even at the stage of investigation, such an order cannot be passed under the parallel provisions (section 309) of the present Code as under this Section an order of remand can be passed only where the court has taken cognizance of the matter which, in the case offences under the Customs Act cannot be taken (the offences being non-cognizable unless a complaint in writing is filed before the Magistrate. It is contended that Sections 167, 309 or for that matter, 209 of the Code of Criminal Procedure being not available, the Magistrate cannot pass an order of remand in respect of a person arrested under the Customs Act and produced before him. The argument appears to be attractive on its first impact but has to be rejected on scrutiny of Section 437 of the Code which provides as under :

437. (1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer-in-charge of a police station or appears or is brought before a court other than the High Court or Court of Session, he may be released on bail, but --

(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

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(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life, or imprisonment for seven years or more, or he had been obviously convicted on two or more occasions of a non-bailable and cognizable offence,

Provided that the court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm :

Provided further that the court may also direct that a person referred to in clause :

(iii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason.

Provided also that the mere fact that an accused person may be required for being identified by witnesses duriDg investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the court.

(2) If it appears to such officer or court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall, subject to the provisions of Section 446-A and pending such enquiry, be released on bail or at the discretion of such officer or court, on the execution by him of a bail without sureties for his appearance as hereinafter provided.

(3) When a person accused or suspected of the commission of an offence punishable with imprisonment which may extent to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code (45 or 1860) or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under sub-section (1), the court may impose any condition which the court considers necessary --

(a) in order to ensure that such person shall attend in accordance with the conditions of the bond executed under this Chapter, or

(b) in order to ensure that such person shall not commit an offence similar to the offence of which he is accused or of the commission of which he is suspected, or

(c) otherwise in the interests of justice.

(4) An officer or a court releasing any person on bail under sub-section (1) or sub-section (2), shall record in writing his or its reasons or special reasons for so doing.

(5) Any court which has released a person on bail under sub-section (1) or sub-

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section (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody.

(6) If, in any case triable by a Magistrate, the trial of a person accused of any non bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.

(7) If, at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered, the court is of the opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered.

28. We may point out at the very begining that the Customs Act inclusive of Section 104 under which Customs Officer has been given the power to make arrest, does not speak of bail applications or the procedure regulating the consideration and disposal of those applications.

29. Since an offence u/s 135 of the Act is punishable with imprisonment for a term exceeding three years, it would be non-bailable as provided by Schedule II appended to the Code in which the various categories of offences have been specified.

30. It. is at this predicament that one has to look to the provisions of Section 4(2) of the Code which provides as under :

4 (2). All offence under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisioas, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

31. Invoking the provisions of Section 4(2) quoted above, the provisions of Section 437 of the Code would be available for consideration of bail application filed by a person arrested u/s 104 of the Act. There -would be no difficulty if the bail application is allowed and a person arrested is released on bail on his furnishing bail bonds. The difficulty would crop up where the bail application is refused because then the question will arise whether the Magistrate is competent to pass an order remanding the arrested person to custody. Section 437(1) does not contain any specific were authorising a Magistrate to remand such a person to custody after rejecting his bail application but Section 437(5) contains a specific provision that any court which has released a person on bail may, if it considers it necessary so to do, direct such person to be arrested and commit him to custody.

32. If the argument of the Learned Counsel for the Petitioners that a Magistrate would have no jurisdiction to pass an order of remand after reject-ting the bail

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application under Aection 437(1) or 437(2) is accepted, it would give rise to strange results.

33. The first obvious anamely would be that inspite of having rejected the bail application, the Magistrate would still be obliged to release the arrested person, as he cannot, as contended by the leared counsel for the Petitioners, pass an order of remand. Can this be said to be the legislative intent in enacting Section 104(2) of the Customs Act and Section 437(1) of the Code ? No, as we shall presently see.

34. The second anamely would be that although a Magistrate can be said to possess the power to pass an order of remand in respect of a person who has already been released on bail, he would not have such power in respect of a person whose bail application has been rejected. There can possibly be no difference (in terms of consequences) in the rejection of a bail application u/s 437(1) and cancellation of bail u/s 437(3). If a person is brought under arrest before a Magistrate and his bail application is rejected, obvious consequences would be that he must remain under arrest. Similarly, where a person has been released on bail and his bail is subsequently cancelled, he has to be put under arrest as a consequence of the cancellation of bail. If one were to read the power of remand only in Section 437(5) and not in Section 437(1), the consequence flowing from the rejection of the bail application would not be that the? person, must and should continue in custody.

35. It, therefore, follows that if a court possess a power to direct a person to be arrested and has further power to commit him to custody at any time after the grant of bail, it must be treated to possess such power even at the initial stage when the arrested person is first produced before it and the court rejects the bail application. Such power cannot be said to be the inherent power of the court but a power specifically conferred on the court by a statutory provision, namely, Section 437(5) which can be interpretatively said to be possessed by the court even u/s 437(1).

36. Learned Counsel for the Petitioner relied upon the decision of the Delhi High Court in Dalam Chand Baid Vs. Union of India and Others, in which the Delhi High Court on a consideration of the provisions of the Foreign Exchange Regulation Act specially those of section 35(3) which are equivalent in material particulars to those of Section 104(3) of the Customs Act, laid down that Section 167 would not applicable to an arrest made u/s 35(3) of the Foreign Exchange Regulation Act, 1973 nor can the provisions of Section 437 be relied upon to lay down that the Magistrate has the jurisdiction, may be, inherent jurisdiction, to grant remand.

37. It also took into consideration the provisions of Section 341 of the Old Code as also those of Section 309 of the present Code and came to the conclusion that a remand order can be passed u/s 309 only after the Magistrate has taken cognizance of an offence and it would not be applicable to arrest made under the

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Foreign Exchance Regulation Act as the court cannot merely at the stage of arrest be said to have taken cognizance of the Act.

38. The Delhi High Court further referred to the Supreme Court decision in Matabar Parida, Bisnu Charan Parida, Batakrushna Parida and Babaji Parida Vs. The State of Orissa, and relied upon the following observations of the Supreme, Court :

It may be emphasised here that the court will have no inherent power of remand of an accused to any custody unless the power is conferred by law?.

and held that unless the power of remand was found in some provisions of the Foreign Exchange Regulation Act, 1973 and the Code, the court would have no power of remand. It further held that Section 437 of the Code cannot be invoked to hold that the court have the power to put the accused in jail if bail was refused or not furnished as that would be contrary to the decision of the Supreme Court in Natabar Parida?s case referred to above.

39. The decision of the Delhi High Court in Dalam Chand?s case (supra) has not been followed by other High Courts.

40. The Kerala High Court in Superintendent of Customs v. P.K. Ummer Kutty dissented with the Delhi view and held that in a case falling u/s 104(3) of the Customs Act, remand can be granted by the Magistrate u/s 437 of the Code. The Kerala High Court followed the decision of the Gujrat High Court in N.H. Dave, Inspector of Customs Vs. Mohmed Akhtar Hussain Ibrahim Iqbal Kadar Amad Wagher (Bhatti) Ors., .

41. The above decision of the Gujrat High Court was rendered by M.P. Thakkar, CJ (as he then was) who held that an order of remand can be granted by the Magistrate u/s 437 of the Code where a person arrested u/s 104 of the Costoms Act is produced before him.

42. The Kerala High Court again in M.K. Ayoob and Others Vs. Superintendent, Customs Intelligence Unit and Another, , took the view that an order of remand can be passed by the Magistrate and that Section 167 (2) and (3) of the Code together with the proviso to sub-section (2) would be applicable to arrest made u/s 104 of the Customs Act.

43. It may be stated that the decision in M.K. Ayub?s case was rendered by U.L. Bhat, 3. who had decided Ummer Kutty?s case (supra) but had not considered Section 167 of the Code of Criminal Procedure in the latter case.

44. The Punjab and Haryana High Court also in Deputy Director of Enforcement v. Anoop Kumar, 1986 (9) ECC 74, dissented with the view expressed by the Delhi High Court in Dalam Chand?s case (supra) and followed the decision of the Gujrat High Court in N.H. Dave?s case (supra).

45. The Patna High Court in Nagendra Prasad and Another Vs. The State, did not agree with the view expressed by the Delhi High Court in Dalam Chand?s case

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(supra) and laid down that in a case where a person is arrested u/s 104 of the Customs Act and is produced before the Magistrate, the latter can pass an order of remand u/s 437 of the Code which, by virtue of Section 4(2) of the Code, would be applicable to a case u/s 104 of the Customs Act.

46. It may be stated that before the Patna High Court it was conceded by both the counsel appearing on behalf of the Petitioners as also on behalf of the State that the provisions of Section 167 of the Code cannot be invoked. The Patna High Court, like Gujrat High Court in N.H. Dave?s case (supra) held that offences u/s 135 of the Act which are punishable with three years imprisonment and upwards would be non-bailable.

47. It did not, as pointed out earlier, follow the decision of the? Delhi High Court in Dalam Chand?s case which, in its opinion, was not correctly decided as Section 4(2) of the Code had not been noticed and the argument based on the provisions of Section 437 of the Code were lightly brushed aside.

48. Learned Counsel for the Petitioners contended that in view of the law laid down by the Supreme Court in Natabar Parida?s case (supra) the Magistrate cannot take recourse to or invoke its inherent jurisdiction in granting remand for which there must exist a specific power in the statute. He invited our attention to two decisions of this court in (1) Ram Chandra Vs. State of Uttar Pradesh, and (2) Kamlesh Pratap Singh v. State 1987 LLJ 273.

49. In the first case a Single Judge (A.N. Varma, J.) of this court held that where an accused person surrenders before the Magistrate and the latter passess an order remanding such person to jail custody, the order cannot be treated to be an order u/s 167 of the Code which would be applicable only when a person arrested by the Police is forwarded to a Magistrate. It was consequently held that the remand orders would be bad.

50. In the second case a Division Bench of this court comprising of Kamleshwar Nath and D.S. Bajpai, JJ. held that there cannot be said to He in a court inherent powers to pass an order of remand which can be passed only when there is a specific provisions made in the Act or statute authorising the court to pass an order of remand.

51. A perusal of the judgment passed by the Kerala, Gujrat and Patna High Courts which have been referred to above would indicate that the provisions of Section 4(2) of the Code were invoked and it was held that the Magistrate can pass an appropriate order of remand in a case in which a person is arrested u/s 104 of the Customs Act on the suspicion (based on reasonable grounds) that he has committed an offence punishable under 135 of the Act. The contention that since there was no power given to the Magistrate u/s 104 of the Customs Act to pass an order of remand and therefore, he cannot pass an order of remand even when the arrested person is brought before him, was rejected and it was held that a Magistrate can well be said to possess the power to pass an order of remand.

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52. Having considered the decisions of the various High Courts referred to above, we respectfully fall in line with the view expressed by the Gujrat and Patna High Courts and dissent with the view expressed by the Delhi High Court in Dalam Chand?s case (supra).

53. In view of the above discussion, the orders by which the Petitioners were remanded to custody from time to time have to be upheld and it has to be held by us, and we do hereby hold, that the Magistrate was fully competent to pass the order of remand. The detention of the Petitioners in jail custody cannot, therefore, be said to be bad on the ground that the remand orders were without jurisdiction.

54. Learned Counsel next submitted that even if Section 437 of the Code is found to be applicable to arrests made u/s 104 of the Act and it is found that the Magistrate has power u/s 437 to pass an order of remand, such order can be passed only by a court established u/s 11 of the Code of Criminal Procedure to try cases under the Customs Act and by no other court It is contended that once a specific court was established u/s 11 of the Code, the offences in respect of which such courts were constituted, can be tried only by those courts and, therefore, the bail applications can be considered only by that court and on the rejection of this application, an order of remand can be passed only by the court and not by an ordinary criminal court.

55. He further contended that assuming that the Petitioners were arrested on 3-10-1988 (as pleaded by the opposite parties in their counter affidavit), they were produced before Sri S.P. Misra, Judicial Magistrate. Allahabad on 4-10-1988, who passed the first order of remand. On 18-10-1988 the Petitioners were produced before Sri B.L. Pandey, Addl. Chief Judicial Magistrate, Allahabad, who passed the second order remanding the Petitioners to judicial custody till 1-11-1988. On that day i.e. on 1-11-1988 the Petitioners were produced before Sri A.K. Kakkar, Special Chief Judical Magistrate, Allahabad, who was appointed to be the Chief Judicial Magistrate of the Special Court at Allahabad vide notification No. C-1483/Dr (sj/88 dated October 28, 1988 issued by the Registrar of the High Court. A copy of this notification has been filed with the counter affidavit of Sri G. S Singh (Arresting Officer) dated 1-12-1988 as Annexure SSC IV. It will be relevant at this stage to reproduce paras 5, 6, 7 and 8 of the aforesaid supplementary counter affidavit.

5. That the Petitioners alongvvith five others having been arrested by the deponent at 7-00 p.m. on 3-10-1988 were produced at about 400 p.m. on 4-10-1988 before Sri S.P. Misra, Judicial Magistrate 1st Class at Allahabad as the Special Chief Judical Magistrate, Allahabad was on leave on that day and they were remanded to judicial custody till 18-10-1988. Thereafter on 18-10-1988 all the accused including the Petitioners were produced before the Addl. Chief Judicial Magistrate 1st Class Judicial Magistrate, Allahabad, who was exercising the power of Special Chief Judicial Magistrate as on 18-10-1988, the Court of Special Chief Judicial Magistrate was vacant without any Presiding Officer.

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Accordingly he passed the order of remanding the accused to judicial custody till 1-11-1988.

6. That on 1-11-1988 the Petitioners alongwith other accused were produced before Sri A.K. Kakkar as the Special Chief Judicial Magistrate, Allahabad.

7 That Sri A.K. Kakkar had been appointed to be the Chief Judicial Magistrate in the Special Court at Allahabad vide notification No. C-1483/ Dr (s)/88 dated October 28. 1988 issued by the Registrar of the Hon?ble High Court of Judicature at Allahabad. A photostat copy of the aforesaid notification is filed herewith as Annexure No. SSC-IV.

It may be added that the Chief Judicial Magistrate of the Special Court granted judicial remand to the Petitioners and other accused till 3-11-1988.

8. That on 3-11-1988 the Petitioners and other accused were again produced before the Special Chief Judicial Magistrate Sri A.K. Kakkar and they were all remanded to further judicial custody till 17-11-1988.

56. From the facts set out in the aforesaid paras of the counter affidavit, it would be seen that on 4-10-1988 when the Petitioners were first produced before the court, the Special Chief Judicial Magistrate was on Ieav.e. while on 18-10-1988 when the second order of remand was passed, the court of Special Chief Judicial Magistrate had no Presiding Officer and, therefore, the Petitioners were produced before the Addl. Chief Judicial Magistrate, Allahabad. Sri A.K. Kakkar was appointed Chief Judicial Magistrate in the Special Court at Allahabad by notification dated October 28, 1988, who passed the third remand order on 1-11-1988. Another remand order was passed by Sri A.K. Kakkar on 3-11-1988. The fact, therefore, remains that the Petitioners were produced before the Special Chief Judicial Magistrate, Allahabad on the date on which he was available, while earlier, in the absence of the Special Chief Judicial Magistrate, the Petitioners were produced before the Judicial Magistrate on 4-10-1988 and before Addl. Chief Judicial Magistrate on 18-10-1988.

57. In the light of these facts, let us now examine the contention of the Learned Counsel for the Petitioners that the remand orders could have been passed only by the Special Chief Judicial Magistrate and by no other court

58. Section 11 under which special or designated courts are created provides as under:

11 (1). In every district (not being a metropolitan area) there shall be established as many courts of Judicial Magistrates of the first class and of the second class, and at such places, as the State Government may, aftet consultation with the High Court, by notification, specify.

Provided that the State Government may, after consultation with the High Court, established for any local area, one of more Special Courts of Judicial Magistrates of the first class or of the second class to try any particular case or particular

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class of cases, and where any such Special Court is established, no other court of Magistrate in the local area shall have jurisdiction to try any case or class of cases for the trial of which such Special Court of Judicial Magistrate has been established.

(2) The Presiding Officers of such courts shall be appointed by the High Court.

(3) The High Court may, whenever it appears to it to be expedient or necessary, confer the powers of Judicial Magistrate of the first class or of the second class on any member of the Judicial Service of the State, functioning as a Judge in a Civil Court.

59. Without going into the history of the legislative changes brought about in Section 11 by U.P. Act XVI of 1976 or insertion of the provision by the Central Legislation, namely, Criminal Procedure Code (Amendment) Act 1978, it may be pointed out that it is within the competence of the State Government to establish, after consultation with the High Court, in any local area, Special Courts of Judicial Magistrate of the first class or of the second class to try any particular case or class of cases.

60. The proviso to sub-section (1) of Section 11 further provides that where a special court has been established, no other court or Magistrate in the local area, shall have jurisdiction to try any case or class of cases for the trial of which such special court of Judicial Magistrate has been established. Sab-section (2) of Section 11 provides that the Presiding Officers of such courts shall be appointed by the High Court.

61. The constitutional requirement under Article 22(2) is that every person who is arrested and detained in custody shall be produced before the? nearest Magistrate within a period of 24 hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of Magistrate and no such person shall be detained in custody beyond the said period without the authority of the Magistrate (emphasis supplied). The constitutional requirement is not that the person arrested or detained in custody has to be produced before the Magistrate having jurisdiction to try the case or offence for which the person has been arrested. A Magistrate spoken of in Article 22(2) need not be Magistrate having jurisdiction to try the offence for the commission of which the accused has been arrested.

62. Section 41 of the Code authorises a Police officer to arrest any person without an order from the Magistrate and without a warrant. Section 48 provides that a police officer may, for the purpose of arresting without warrant any person whom he is authorised to arrest, pursue such person into any place in India.

63. Section 167 of the Code also speaks Of ?nearest Magistrate? in sub-section (1) thereof and ?the Magistrate to whom an accused person is forwarded under this section? in sub-section (2).

64. It is in sub-section (2) of Section 167 that the question of jurisdiction comes

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in. The Magi strafe to whom an accused person is forwarded may authorise the detention of the accused in custody and if Magistrate has no jurisdiction to try the case or commit it for trial and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction.

65. Other sub- Sections of Section 167 also indicate that a Magistrate can authorise detention in the police custody or such custody as deems fit and that he need not necessarily be the Magistrate having jurisdiction to try the case.

66. The of State of Uttar Pradesh Vs. Abdul Samad and Another, the production of a person before the High Court within 24 hours from the time the of arrest was held to be sufficient ?compliance with the requirement of Article 22(2) of Constitution In Jagannath Misra and Others Vs. State of Orissa, it was held that the Magistrate passing an order of remand u/s 167 need not always be the Magistrate who has jurisdiction to try the case. But if any detention beyond the period of 15 days from the date of arrest is sought, that can be ordered only by the Magistrate having jurisdiction to try the case who, it was clarified, would exercise the power not u/s 167 but u/s 344 of the Code of Criminal Procedure (old) In State of Tamil Nadu Vs. V. Krishnaswami Naidu and Another, it was held that a Special Judge appointed under Criminal Law (Amendment) Act, 1952 can legitimately exercise the powers of a Magistrate u/s 167 of the Code of Criminal Procedure to authorise detention of the accused in the custody of the police.

67. The latitude provided by Section 167 of the Code of Criminal Procedure and Article 22(2) that a person arrested can be produced before the nearest Magistrate and not necessarily before the Magistrate having jurisdiction to try the case is intended to cover the cases in which it might not be possible to approach the Magistrate having jurisdiction to try the case owing to various factors and difficulties including the ?distance.?

68. Learned Counsel for the Petitioner has placed reliance upon a decision of this court in Mohd. Mahir v. State of U.P. 1986 ALJ 346 to contend that the Petitioners ought to have been referred to the Magistrate having jurisdiction to try the case under the Customs Act who alone could have granted remand for further custody. The reliance on the aforesaid decision is wholly misconceived as this decision does not decide the question under consideration. In that case the question was that if the bail application is rejected by the Judicial Magistrate (Special), Allahabad and the person arrested under the Customs Act is not granted bail, who then would act as the Sessions Judge; whether the Sessions Judge, Allahabad would be the Judge to be approached for the purpose of bail or some other Sessions Judge. Hon?ble B.D. Agarwal, J. who decided the above case held that where the case is triable before the Judicial Magistrate (Special) Allahabad, the Legislature may not have intended that upon the application being rejected, by the trial court, the accused has to go round the State making his application to the Court of Session situate in far flung areas where he may have sought the remedy had there been no special court created. It was held that the Court of Session of the District Allahabad would be the Court of Session available

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for consideration of the bail application after its rejection by the court of Judicial Magistrate (Special), Allahabad.

69. The Supreme Court decision in A.R. Antulay Vs. R.S. Nayak and Another, on which reliance was next placed by the Learned Counsel for the Petitioners, also does not apply to the present case as in that case what was considered was that a case exclusively triable by a Special Court created under Criminal Law Amendment Act, 1962 could not be transferred, not even by the Supreme Court, from that court to the High Court even for the laudable object of a speedy trial. The Supreme Court, therefore, recalled its earlier order in R.S. Nayak v. A.R. Aotulay AIR 1984 SC 688 on the ground that it was passed by mistake and the mistake of the court, as set out in the maxim ?actus curia neminem gravabit? should not harm any one.

70. The decision does not deal with the question of remand or the further question whether in a case exclusively triable by the Special Court, an order of remand can be passed by a Magistrate before whom the accused or the person arrested without warrant is first produce.

71. The question that the bail application can be considered and disposed of u/s 437 of the Code of Criminal Procedure only by the Special Court is purely hypothetical as the question does not. arise in the present case. The Petitioners do not say in the petition that they had applied for bail or that their bail application was rejected, by a court which had no jurisdiction.

72. While considering the submissions of the Learned Counsel for the Petitioners that the Magistrate had no power to pass an order of remand in respect of a person arrested u/s 104 of the Customs Act, we had found that even if Sections 167 or 309 or 209 of the Code were not applicable, the court could still invoke the provisions of Section 437 and pass an order of remand. We had found that if power to direct arrest of a person (to whom bail might have granted) and comit him to custody was available to a Magistrate u/s 437(5), such power shall be treated to be avaliable to him at the earlier stage also, namely, when the arrested person is produced or brought or appears before the court u/s 437(1). It was in this context that the question of rejection of bail application was considered by us and it was found that the Magistrate at that stage, namely, at the stage of rejection of bail application, would be competent even in respect of person arrested u/s 104 of the Act to pass an order of remand.

73. Learned Counsel contended that Sri 3. L. Pandey, Addl. Chief Judicial Magistrate, Allahabad who had passed the order of remand on 18-10-1988 (upto 1-11-1988) had passed it as a link Magistrate as the Special Chief Judicial Magistrate was not available on that date, He contended that the link Magistrate had no jurisdiction to pass the remand order and for this purpose he placed reliance on Jagannath Misra and Others Vs. State of Orissa, .

74. This argument cannot be accepted now as the Petitioners have already been produced twice before the Special Chief Judicial Magistrate, Allahabad whose

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orders dated 1-11-1988 and 3-11-1988 remanding the Petitioners to further custody are not shown to suffer from jurisdictional infirmity.

75. In view of the above the Petitioners contention as to the jurisdiction of the Magistrate in passing the orders of remand cannot be accepted. In any case the Petitioners were subsequently produced before the Special Chief Judicial Magistrate (Allahabad) twice who passed the orders of remand on 1-11-1988 and 3-11-1988 and, therefore, upto 17-11-1988 (the remand on 3-11-1988 being for fourteen days only) the Petitioners? detention cannot be questioned on any defect in the remand order.

76. Learned Counsel for the Petitioner next complained of the infraction of the provisions of Article 22 of and contended that :

(i) Peiitioners were not produced within twenty four hours of their arrest before a Magistrate.

(ii) They were not produced before the ??nearest? Magistrate. (iii) They were not informed of the grounds of arrest.

77. Let us consider the first contention first.

78. The Petitioners in their writ petition have pleaded that they were arrested by the customs authorities on 1-10-1988 and since 4-10-1988 they were in illegal custody of opposite party No. 3, namely, Superintendent, Central Jail, Naini, Allahabad.

79. This is not accepted by the opposite parties in the various counter and supplementary counter affidavits filed on their behalf of which the relevant paras have either already been quoted or are being quoted herein below shortly.

80. Learned Counsel for the Petitioners asserted that the Petitioners were forced to take their truck to Gorakhpur where they reached on 2-10-1988. Since from the time their truck was detained at Cbakwa Barrier, the petiiioners had not been acting according to their own volition but were merely obeying the comands of the Customs Officer and had proceeded to Gorakhpur, not of their own volition, but, as directed by the Customs Officer, they shall be deemed to have been arrested on 1-10-1988 at the Chakwa Barrier. It is asserted that since the Petitioners were produced before the Magistrate on 4-10-1988 and the first order of remand was passed on that date, it cannot be said that they were produced before the Magistrate within twenty four hours or that their detention was duly authorised by an order of remand passed within twenty four hours of their arrest by a Magistrate.

81. The contention cannot be accepted for the reasons which we shall presently pen down.

82; It is not disputed that the Petitioners were detained at Chakwa Barrier. It is also not disputed, that they appeared before the Customs Officer at Gorakhpur and that an enquiry was held u/s 107/108 of the Act and that their statements

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were also recorded.

83. In the counter affidavit dated 3-11-1988 sworn by Sri B. Singh. Inspector of Customs, prevention Division, Gorakhpur it is stated that the Petitioners were arrested alongwith 5 others u/s 104 of the Customs Act but the Petitioners were not arrested at Chakwa Barrier where only trucks were apprehended.

84. In paras 2, 3, 4, 7, 10 and 25 of the aforesaid counter affidavit it is stated as under :

2. That paras 1 and 2 of the writ petition call for no comments except that the Petitioners were arrested alongwith 5 others while smuggling contraband foreign goods worth about Rs. 26,70,600/-.

3. That as already stated above, the Petitioners were found in possession of foreign goods concealed under beneath the budles of old gunny bags as such they committed an offence punishable u/s 135 of the Customs Act.

4. That in reply to the contents of para 4 of the writ petition under reply it is submitted that 3 trucks were apprehended on 1-10-1988 with foreign goods worth about Rs. 26, 70, 690/- and after hectic search of the trucks and the preliminary statements of the persons who were carrying and transporting those goods, the trucks and the goods were seized. Thereafter Superintendent at Gorakhpur summoned those 7 persons including the Petitioners No. 1 and 2, and recorded their statement on 3-10-1988 u/s 108 of the Custom Act, which completed at about 7 p.m. as such then there was found the prima facie guilt of an offence punishable u/s 135 of the Custom Act and they were put under arrest on 3-10-1988 at about 7 P.M. and they were produced before the learned Magistrate, Allahabad on 4-10-1988 within 24 hours and the Magistrate remanded them to judicial custody for 14 days upto 18-10-1988.

7. It is absolutely incorrect to say that any coercion, pressure or third degree method was applied in the case As a matter of fact after the recovery of the contraband foreign goods, the Petitioners had to admit their guilt without any pressure, coercion or harassment what to say of third degree method from the Cuitom authorities and they made their statement under their own hand writing and signatures confessing their guilt All the 7 persons know Hindi and also a bit English according to their own statement.

10. Para 10 is absolutely incorrect. The Petitioners were never arrested at Chakwa Barrier. Only trucks were apprehended as such DO question of violation of Article 22(1) of the Indian Constitution arises nor the Custom Officers exercise their power of arrest u/s 104 of the Custom Act at Chakwa Barrier. As a matter of fact as. already stated above they were arrested at Gorakhpur and at the time of arrest they were explained of the .grounds of their arrest as is evident from the memo of arrest itself, which also bears their signatures as well as their thumb impression.

25. Para 25 is incorrect. The Petitioners were arrested on 3-10-1988 at 7 P.M.

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and they were produced by 4 P.M. on 4-10-1988 in the court premises and not at the residence of any magistsate. The allegation that the documents were fabricated or the Petitioners were moltreated by the Custom authorities is fabricated herein for the purpose of the case only.

85. Paras 5, 6, 7 and 8 of the supplementary counter affidavit dated 1-12-1988 have already been quoted on page 29 of this judgment.

86. Since in the aforesaid counter affidavit dated 3-11-1988 and supplementary counter affidavit dated 17-11-1988 it was not indicated as to who was the arresting officer, another supplementary counter affidavit dated 1-12-1988 sworn by Sri G.S. Singh, Inspector of Customs (Prevention Division), Gorakhpur was filed and it was stated that he was the arresting officer of the Petitioners and that he being Inspector of Central Excise was also to act as Inspector of Customs under notification No. 38-CUS-1.2/1983 issued u/s 4(1) of the Customs Act and as such he had the authority and power to make arrest u/s 104 of the Customs Act, particularly in view of the further notification No. 4/CUS/63 dated 1-2-1963 issued by the Collector.

87. Para 4 of the counter affidavit of Sri G.S. Singh is reproduced below :

That the Petitioners Amar Nath and Shiv Raj Singh were arretted by the deponent at 7.00 p.m. on 3-10-1988 at Goraknpur. It may be added that the grounds of arrest were fully explained to the Petitioners as it is evident from the arrest memos which were served on them and the same were received by them under their signature in English. Photostate copies of the two separate arrest memos are thed herewith as Annexure No. SSC-II and III in respect of the Petitioner Sri Amar Nath and Shri Shiv Raj Singh respectively. Further, it is submitted that ihe copy of the Panchnama (Recovery Memo) had already been served to the Petitioner on 2-10-1988. This Panchnama contains the details of the contraband goods and the trucks which were carrying these contraband goods. Still, it is submitted that the statements of the Petitioners were also recorded on 3-10-1988.

88. In view of the above, the question which requires to be considered and decided is whether the Petitioners were arrested on 1-10-1988 as alleged by them or on 3-10-1988 as asserted by the opposite parties.

89. We have already reproduced the relevant paras of the counter affidavit which indicate that the Petitioners were arrested on 3-10-1988 after an enquiry was completed u/s 107/108 of the Customs Act.

90. The fact that the Petitioners? trucks were apprehended at Chakwa Barrier on 1-1U-1988 or that there was search and seizure of the contraband goods at Gorakhpur where the trucks were taken with which the Petitioners also went and ultimately gave their statements in the enquiry conducted u/s 108 of the Customs Act, would not mean that the Petitioners were arrested on 1-10-1988 at Chakwa Barrier.

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91. It is contended by the Learned Counsel for the Petitioners that since the movements of the Petitioners were restricted and they were required to attend the Customs Office at Gorakhpur, they would be treated to have been arrested on 1-10-1988.

92. The word ?arrest? has not been defined either in the Code of Criminal Procedure or in the Indian Penal Code, or, for that matter, in the Customs Act. Section 46 of the Code of Criminal Procedure, however, provides the procedure of arrest.

93. The word ?arrest? is an ordinary English word which, in its ordinary sense, means restraint on or deprivation of personal liberty.

94. In The State of Punjab Vs. Ajaib Singh and Another, , it was held that taking into custody of an abducted person by a police officer u/s 4 of the Abducted persons (Recovery and Restoration) Act, 1949 and delivery of such person into custody of the Officer-in-charge of the nearest Camp, would not mean ?arrest and detention? within the meaning of Article 22 (1) and (2) of the Constitution.

95. In Harbansingh Sardar Lenasingh and Another Vs. The State, , their Lordships of the Bombay High Court while considering the meaning of the terms ? arrest? and ?custody? in a case u/s 104 of the Customs Act, held that the concept of ?being in custody? cannot be equaled with the concept of ?formal arrest.? It was further observed that;

arrest is a made of formally taking a person in police custody but a person may be in the custody of the Police in either ways. What amounts to arrest is laid down by the Legislature in express terms in Section 47 Code of Criminal Procedure. whereas the words ?in custody? which are to be found in certain Sections of the Evidence Act only denote surveillance or restriction on the movement of the person concerned which may be complete, as, for instance, in the case of an arrested person, or may be partial.

96. It may be pointed out that mere voluntary attendance at a police station is not an arrest (see Campbell v. Tormey, 1969 1 WLR 189 . In M.C. Pally Vs. B. Kambil and Others, it was held that mere surrounding of a person by the police does not amount to his arrest.

97. There was once a concept that there can be no lawful arrest unless there was an actual seizure or touching the body but this is no longer the law. As pointed out earlier, the modalities of arrest have been indicated in Section 46 of the Code. In State of U.P. Vs. Deoman Upadhyaya, it was pointed out as under :

Section 46 Code of Criminal Procedure provides that in making an arrest, the police officer or other person making the sane, shall actually touch or confine the body of the persons to be arrested unless there be a submission to the custody by word or action.

98. There can, therefore, be an arrest by mere words without touching of the

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body. This would be the case where the accused submits and goes with the police officer.

99. As against the above decisions, Learned Counsel for the Petitioner has cited before us a decision of the Supreme Court in Niranjan Singh v. Prabhakar AIR 1980 SC 585 to contend that when a person is taken into custody he would be deemed to be under arrest.

100. This decision of the Supreme Court relates to the consideration of the word ? custody? as used in Section 439 of the Code. It will be noticed that their Lordships in Niranjan Singh?s case do not say that mere taking of a person into custody by the authority empowered to arrest or the mere presence of the accused is enough to constitute arrest.

101. The decision of the Supreme Court in Niranjan Singh?s case (supra) also came to be considered by a Full Bench of the Madras High Court in Roshan Beebi v. Joint Secretary to Government of Tamil Nadu 1984 CriLJ 134, and was distinguished with the observations that their Lordships of the, Supreme Court in Niranjan Singh?s case only emphasised that- the Physical control, or, atleast, physical appearance of the accused in court should be coupled with the submission to the jurisdiction and orders of the court. It was observed by the Madras High Court that ?in other words, a person who is accused of an offence should submit himself to the jurisdiction or orders of the authority empowered to arrest.?

102. The decision of the Full Bench of Madras High Court in Roshan Beebi?s case (supra) is a complete answer to the contention raised by the Learned Counsel for the Petitioner in the present case, as the Madras High Court has dealt the question of arrest u/s 104 vis-a-vis the enquiry u/s 107 and 108 of the Customs Act and has ultimately held that a person who was required to attend the enquiry proceedings u/s 107/108 of the Customs Act cannot be said to be under arrest at that stage. The question was also examined by the Madras High Court in the light of the provisions of Article 22 of the Constitution.

103. We are in respectful agreement with the decision of the Madras High Court in Roshan Beebi?s case (supra) and are of the opinion that the Petitioners, in the instant case, were not arrested on 1-10-1988, but, as pleaded by the opposite parties, they were arrested on 3-10-1988 at 7.00 p.m. after completion of the enquiry u/s 107 and 108 in which it was, prima facie, established, that a case u/s 104/135 of the Customs Act was made out. The fact that the Petitioners went to Gorakhpur or that they attended the enquiry and gave their statements to the customs authorities, would not mean that they were under arrest. As pointed out earlier, they were arrested on 3-10-1988 and not on 1-10-1988 as alleged by them. They were produced before the Magistrate on 4-10-1988 at Allahabad and the Magistrate before whom they were produced passed the order of remand. Once it is established that the Petitioners were arrested on 3-10-1988, it comas out that they were produced before the Magistrate within 24 hours of their arrest

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and therefore the provisions of Article 22 of the Constitution were not violated.

104. It is then contended by the Learned Counsel for the Petitioner that even if the Petitioners are found to have been produced within 24 hours of their arrest before the Magistrate, the provisions of Article 22 of the Constitution would still be found to have been violated, as the Petitioners were not 654 Amar Nath v. Union of India (S. Saghir Ahmad, J.) (L.B.) [1990 produced before the ?nearest? Magistrate. It is contended by the Learned Counsel for the Petitioners that while being taken from Gorakhpur to Allahabad, the Petitioners has to pass tnrough several other districts and in each of these districts, Judicial Magistrates were available before whom the Petitioners could have been conveniently produced but the opposite parties ignored those Magistrates and took them to Allahabad where they were produced before the Judicial Magistrate, who, ultimately passed the order of remand.

105. The contention, in our opinion, has no merits.

106. The requirement under Article 22 of the Constitution is that the Petitioners should have been produced within 24 hours which has been done in the instant case. It is only when the person arrested are not produced within 24 hours of their arrest before a Magistrate as required by Article 22 that the question of ? nerrest Magistrate? would become relevant, and it would be legally permissible to contend that the ?nearest Magistrate? being available before whom the arrested person could have possibly been produced within 24 hours, there was no occasion to take them to another Magistrate before whom they were produced after the expiry of 24 hours In a situation of this nature it may not be open to the detaining/arresting authority to claim exclusion of the time spent in journey and contend that if the journey time was excluded, the production before the Magistrate would still be found to have been made within 24 hours.

107. Article 22(2) of the Constitution provides as under :

22 (2). Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period within the authority of a magistrate.

108 Before proceeding to consider the true meaning of Article 22(2), we may observe that the principles contained in Article 22(2) are also the principles contained in Section 57 of the Code of Criminal Procedure.

109. A perusa 1 of the above provision would indicate that the mandatory requirement is that the person arrested and detained in cutsody shall be produced before the nearest Magistrate within 24 hours of his arrest. The further requirement which is also imperative and mandatory is that no person shall be detained in custody by and the said period without the authority of a Magistrate The words ?said period? refer obviously to the period of 24 hours. But while

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speaking of the ?authority of a Magistrate?, the words ?nearest Magistrate? have not been used which is indicative of the fact that the authority for further detention beyond the period of 24 hours need not necessarily be that of the ? nearest? Magistrate but can be that of a Magistrate who may or may not be the ? nearest? Magistrate

110. The provisions of Article 22 quoted above further indicate that exclusion of time spent in journey can be claimed only for the production of the person arrested and detained in custody before the ?nearest? Magistrate.

111. Since the Petitioners, as pointed out eariier, were produced well within 24 hours of their arrest before a Magistrate, at Allahabad, though not before a Magistrate available in any of the intervenieg aod nearer districts, the Petitioners cannot claim that their arrest was vitiated on account of their non production before the ?nearest? magistrate.

112. We have already found above that the Petitioners were arrested on 3-10-1988 in the evening and not on 1-10-1988 as claimed by them. Their production, therefore, before the Judicial Magistrate at Allahabad on 4-10-1988 being well within 24 hours of their arrest, was fully in consonance with the requirements of Article 22(2) of the Constitution.

113 Before winding up our discussion on this question, we may point out that although the requirement under Article 22(2) is that a person arrested and detained in custody has to be produced before the Magistrate within 24 hours and that he cannot be kept in custody for even a single moment beyond 24 hours without the authority of the Magistrate, it does not mean that the police, or, for that matter, the arresting officer, has the right to keep that person in custody till 24 hours and to produce him before the Magistrate just on the stroke of 24 hours. The detention must be for a purpose. Investigation of an offence involving the person arrested may be a valid purpose for detention in custody. The provisions contained in Article 22(2) or Section 57 of the Code of Criminal Procedure do not give a licence to a police officer to keep a person in custody for atieast 24 hours, as the detention even for 24 hours would be permissible only for a purpose sufficient in law to justify the detention in police custody. The intention of the Legislature and the framers of the Constitution is that an accused person should be brought before the Magistrate with as little delay as possible.

114. We may now take up the third ground raised by the Petitioners which relates to non-communication of the grounds of arrest.

115. Article 22(1) of the Constitution provides as under :

22 (1). No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

116. The principles contained in Article 22(1) are also contained in Section 50 of

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the Code of Criminal Procedure which is reproduced below :

50 (1). Every police officer or other person arresting any person without warrant shall forthwith communicate to him full praticulars of the offence for which he is arrested or other grounds for such arrest.

(2) Where a police officer arrests without warrant any person other than a person accused of a non-bailable offence, he shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf.

117. The object of the safeguard provided by Article 22(1) and Section 50 of the Code is to enable to arrested person to understand why he has been arrested.

118. The provisions are mandatory and the courts have always insisted on the strict compliance of this provisions specially those of Article 22(1) which constitute a part of (he fundamental rights available under the Constitution.

119 While the Petitioners contend that they were not informed of the grounds of arrest at the time of their arrest, the opposite parties in their counter affidavits have asserted that the grounds were communicated to them.

120. The opposite parties in the first counter affidavit dated 3-11-1988 pointed out that the grounds of arrest were explained to the Petitioners at the time of arrest. They further stated that the fact that grounds of arrest were explained to them at the time of their [arrest would be clear from the memo of arrest itself which contain their signatures and thumb impressions. A copy of each of the memo of arrest pertaining to the Petitioners 1 and 2 has been filed in the instant case as Annexures SSC -- 2 and SSC -- 3 to the supplementary counter affidavit dated 1-12-1988 in which it has. been indicated that ?grounds of arrest has been explained to the offender.? It has also been indicated in the counter affidavit that prior to the arrest of the Petitioners, there was an enquiry made u/s 107/108 of the Customs Act during the course of which the Petitioners themselves admitted their guilt without any pressure, coercion or harassment and that the Petitioners made their statements in their own handwriting and signatures confessing their guilt.

121. We have already quoted the relevant paras of the counter and supplementary counter affidavits filed on behalf of the opposite parties. The remand file which was summoned, produced and perused by us contained copies of the statements of the Petitioners. Said to be ?in their own handwriting?, which indicate that the Petitioners were informed of the grounds of arrest and that they were aware of the grounds and reasons for which they were arrested by the opposite parties. In a situation as obtaining in the present case, the law declared by their Lordships of the Suprrme Court in Gouri Shankar Jha Vs. The State of Bihar and Others, would be fully applicable wherein their Lordships of the Supreme Court laid down that the court will not interfere where it was apparent from the material produced that reasons were disclosed to the arrested person at

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the time of the arrest.

122. In view of the above decision of the Supreme Court, the contention that mere mention that ?grounds of arrest have been explained to the offender? in the memo cannot be treated to be sufficient compliance of the requirement of Article 22(1) and sectton 50 of the Code, need not be examined.

123. We are conscious of the fact that the legal position is well settled that the grounds have to indicate substance of the allegations against the arrested person so that he may immediately come to know of the reasons why he was arrested and that a mere sentence that ?grounds of arrest were explained? would not by itself be sufficient to indicate, in a given case, that the substance of the allegations were made known to the arrested person. This, however, does not alter the legal position as set out by their Lordships of the Supreme Court in Gauri Shanker Jha?s case (supra) that where it appears from the circumstances disclosed or material produced before the court that the grounds were disclosed to the accused at the time of his arrest, the court will not interfere.

124. On the basis of the affidavits filed before us in the instant case as also on the basis of the material contained in the remand file produced before us we are satisfied that the reasons for the arrest of the Petitioners were disclosed to them at the time of the arrest and they fully knew the grounds and reasons for which they were arrested. We are, therefore, fully satisfied that the Petitioners? right guaranteed to them under Article 22(1) or Section 50 of the Code were not, in any way, violated or infringed and the contention of the Petitioners in this regard must fail.

125. The matter does not end here.

126. On account of the supplementray counter affidavit filed by the opposite parties, there has arisen a new ground on the basis of which it is claimed by the Petitioners that their continued detention has become illegal.

127. We have set out the dates on which the Petitioners were produced either before the Judicial Magistrate or Addl. Chief Judicial Magistrate, Allahabad, as also the dates on which they were produced before the Special Chief Judicial Magistrate, Allahabad.

128. When the Petitioners were produced before Sri A.K. Kakkar, Special Chief Judicial Magistrate, Allahabad, they were remanded to judicial custody till 17-11-1988. In the meantime, the State Government passed an order of detention u/s 3 of the Cofeposa on 15-11-1988 which, admittedly, was served on the Petitioners. On 17-11-1988 when the Petitioners were produced before Sri A.K. Kakkar, Special Chief Judicial Magistrate, Allahabad he did not pass an order of remand. Instead, he passed the following order :

Aaj abhiyukt Rafiq Ahmad, Amar Nath, Shiv Raj Singh, Ramesh Kumar, Rakesh Kumar, Virendra Kumar, Ashok Kumar jail se talab hokar nyayalaya ke samaksh pesh kiye gaye. Abhiyuktgan per aaj hi Cofeposa tameel ho chuka hai.

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Atah aadesh hua ki abhiyuktgan ke vaste remand nyayalaya me talab na kiya jai.

Sd/- Special C.J.M. 17-11-1988

129. These facts are contained in the supplementary counter affidavit dated 11-12-1988

130. The contention of the Learned Counsel for the Petitioners is that the Petitioners haying been arrested u/s 104/135 of the Customs Act, it was incumbent upon the opposite parties to produce the Petitioners before the court on every date on which the remand was expiring so as to obtain further order of remand justifying their detention in custody u/s 104/135 of the Customs Act.

131, It may be pointed out that offences under the Customs Act for which a person is liable to be arrested and tried, and, if the guilt is established, to be punished, is entirely different from the process of detention under the Cofeposa under which the order of detention is passed to prevent a person from carrying on his smuggling activities. While the detention under the Cofeposa permissible without trial, a person, under the Customs Act, has to be specifically tried in accordance with the procedure established by law, for the offences committed by him.

132. We have already seen above that during the pendency of the investigation of offences u/s 104/135 of the Customs Act, a person can be arrested and produced before the Magistrate who can also pass orders remanding the accused to judicial custody. The detention in custody of a person arrested under sectioa 104 is dependant entirely on the orders of remand passed by the concerned Magistrate and such detention in custody would become bad on the expiry of the period of remand, if that period is not, in the meantime, extended by a fresh order of remand. The detention under Cofeposa, as pointed out earlier, is not dependant upon investigation or order of remand. It is a detention under an order passed by the competent authority in exercise of his power under a law made by Parliament. This detention has nothing to do with the arrest in exercise of the power under the Code of Criminal Procedure or other statutory powers for offences mentioned in the Indian Penal Code or any other law for the time being in force. The custody under Cofeposa being different from custody under arrest made by the custom authorities u/s 104 of the Customs Act, it was not open to the Special Chief Judicial Magistrate, Allahabad to say that the Petitioners having been detained under an order passed under Cofeposa need not be produced before him for the purposes of remand. Sinse the period of remand which expired on 17-11-1988 was not further extended by the Magistrate, the detention in custody of the Petitioners u/s 104/135 of the Customs Act became bad from that moment. We have, therefore, no option but to direct that the Petitioners shall be set at liberty forthwith unless their detention is required in connection with some other case.

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