
(1990) 01 MAD CK 0054
In the Madras High Court

Directorate of Revenue Intelligence

APPELLANT

Vs

M.K.S. Abu Bucker

RESPONDENT

Date of Decision : 01-01-1990

Acts Referred:

Constitution of India, 1950 — Article 20, 22
Criminal Procedure Code, 1973 (CrPC) — Section 167, 173, 4, 43, 437
Customs Act, 1962 — Section 103, 104, 107, 108, 135
Evidence Act, 1872 — Section 25

Citation : (1990) 45 ELT 51

Hon'ble Judges : Arunachalam, J

Bench : Single Bench

Judgement

Arunachalam, J.—[Crl. M. P. 11117/88]. - Petitions praying that in the circumstances stated therein and in the affidavit filed therewith the

High Court will be pleased to set aside the order directing the release of the respondent on bail in Crl. M. P. No. 6945/88 on the file of the Court

of the Sessions Judge, Madras and cancel the bail.

Crl. M. P. No. 254/89. - Presented to call for the records relating to the arrest of the petitioner in F. No. VIII/48/65/88-DRI and R. R. No.

174/88 on the file of the Court of the Additional Chief Metropolitan Magistrate (E. O. I.) Egmore, Madras and quash the order of arrest made by

the respondent as illegal and set the petitioner at liberty forthwith.

Crl. M. P. No. 407/79. - Petition presented to call for the records relating to the Medical treatment of the petitioner and M. V. Kader Mohammed

and Mammutti at Jail Hospital Central Prison, Madras before this Court in order to decide the issue of the legality of the arrest of the petitioner by

the respondent in F. No. VIII/48/65/88-DRI and R. R. No. 174/88 on the file of

the Court of the Additional Chief Metropolitan Magistrate (E. O.

I.) Egmore, Madras pending the said Crl. M. P. No. 254/89 on the file of this Court.

[Order]

These petitions coming on for hearing on Monday, 30th day of January, 1989, Wednesday, the 1st Monday, the 6th Thursday, the 9th

Wednesday, the 15th March the 20th day of February, 1989, Thursday, the 16th day of March, 1989 and on this day, upon perusing the petitions

and the affidavit filed in support of Crl. M. P. No. 11117/88 and common counter affidavit filed with Crl. M. P. Nos. 254 and 407 of 1989 and

upon hearing the arguments of Mr. P. Rajamanickam, Central Government Public Prosecutor on behalf of the petitioner in Crl. M. P. No.

11117/88 and for the respondent in Crl. M. P. Nos. 254 and 407 of 1989 and of Mr. M. R. M. Abdul Kareem for Mr. M. Abdul Nazeer,

Advocate for the respondent in Crl. M. P. No. 11117/88 and for the petitioner in Crl. M. P. Nos. 254 and 407 of 1989, the Court made the

following Order:-

Crl. M. P. No. 11117 of 1988 has been filed u/s 482 Code of Criminal Procedure by the Senior Intelligence Officer, Directorate of Revenue

Intelligence, seeking setting aside of the order of the Court of Sessions, Madras, releasing the respondent M. K. S. Abu Bucker, on bail in Crl. M.

P. No. 6945 of 1988 on his file.

2. The grounds put forth for seeking such a direction are that the Sessions Court had not taken into consideration the nature and gravity of the

offence the stage of investigation and the interests of the society as against the right of the individual, and that free and fair investigation will be

polluted by outside influence by the presence of the respondent, who is an influential person and who has already been involved in smuggling

activities, if he is allowed to remain at large.

3. Crl. M. P. No. 254 of 1989 has been filed by the respondent in Crl. M. P. No. 11117 of 1988 to call for the records relating to his arrest and

quash the order of arrest made by the respondent, who is the petitioner in Crl. M. P. No. 11117 of 1988. According to the petitioner in Crl. M. P.

No. 254 of 1989, the arrest made u/s 104 of the Customs Act on the basis of the statement obtained u/s 108 of the said Act was illegal and such

statements were not admissible in any proceedings under the Customs Act or the COFEPOSA Act.

4. Crl. M. P. No. 407 of 1989 has been filed by the petitioner in Crl. M. P. No. 254 of 1989 to call for the records relating to the medical

treatment of the petitioner and two others from the Jail Hospital, Central Prison, Madras, to decide the issue of the legality of the arrest of the

petitioner, which is the subject matter of Crl. M. P. No. 254 of 1989.

5. All these three petitions were taken up together for hearing. For convenience sake, the parties are referred to as the ranking in Crl. M. P. Nos.

254 and 407 of 1989.

6. Before setting out the ground of challenge placed before me by the respective counsel, it is better that the facts necessary for the disposal of

these petitions be narrated initially.

7. The respondent, Directorate of Revenue Intelligence, Madras had definite information that three Kerala Muslims along with the petitioner, M. K.

S. Abu Bucker, had entered into a criminal conspiracy to smuggle foreign gold biscuits into India through the Chidambaram Coast and to bring the

gold so smuggled into the City of Madras and dispose of the same to one Sharma of Delhi. It is also the case of the respondent that two cars

bearing Registration Nos. DAQ 1894 and TMG 4652 were to be used for this nefarious purpose. One batch of the Revenue Intelligence

Directorate was keeping track of the three Kerala Muslims, while another batch was keeping surveillance on the roads leading into the city and its

exits, on information that the three Kerala Muslims were staying in Hotel New Woodlands, Madras. They found one of them, later ascertained to

be M. V. Khader, proceeding towards Valluvar Kottam, where the petitioner met the said Khader and another person. The car bearing

Registration No. DAQ 1894 was also found. The three persons were sent talking together, which was unobtrusively watched by the respondent

officials. Some time later, the petitioner Abu Bucker left the place in his car and soon thereafter, the car DAQ 1894 also left the scene. This car

was followed by the Intelligence Unit Officials and its destination was No. 10 Vandikkaran Street, Maduvankarai, Gundy, Madras. The Officials

rushed to the said house but to their dismay found some persons running out of the house and escaping into darkness. However, the house were

searched in the presence of independent witnesses. Twelve cloth belts and eleven cloth jackets with gold biscuits containing foreign markings were found. In all, 2250 gold biscuits with foreign markings, weighing 2,62,125 gms. and valued at Rs. 8,74 crores were seized under a mahazar. After seizure, message were passed on to the other batch of officials. The petitioner came to his house at about 10p.m. and some time later, he was taken to the office of the Revenue Intelligence for interrogation. It is the case of the respondent that the petitioner had given a statement u/s 108 of the Customs Act on his own volition in which he has stated that he was involved in this case of large scale smuggling with a few others. The further details in the alleged statement said to have been given by the petitioner may not loom large for consideration now. In short, the case of the respondent/Department is that the petitioner is involved in a deliberately planned smuggling activity of gold with foreign markings on a very large scale, running to more than eight crores of rupees, with a view to obtain for himself and others illegal profits and in this process impairing the economy of the country.

8. Mr. P. Rajamanickam, learned counsel appearing for the Directorate of Revenue Intelligence, which is referred to as the respondent, challenged the order of the Principal Sessions Judge, Madras, directing the release of the petitioner, M. K. S. Abu Bucker, on bail at the very threshold of investigation, without considering the effect of such release which would hamper the investigation. In the process of his arguments, learned counsel referred to various decisions regarding the scope and ambit of release of offenders, similarly placed.

9. The arguments of Mr. Rajamanickam were countered by Mr. M. R. M. Abdul Karim, learned Senior Counsel, appearing for the petitioner. Mr.

Abdul Karim while countering the arguments of Mr. Rajamanickam, put forth his arguments in CrI. M. P. Nos. 254 and 407 of 1989 as well.

According to Mr. Abdul Karim, the entire arrest proceedings and every step in that direction was illegal, null and void. The earlier custody, prior to arrest, was also illegal and the Department had no jurisdiction to either make domiciliary visits or knock the door of the petitioner at night-time and take him to the office of the Directorate. He would further contend that even at the pre-trial stage, the illegality of the arrest and remand can be

questioned and in this process, he commented about the non-furnishing of the remand report in writing which would indisputably indicate that the basic facts and the grounds of arrest had not been made known to the petitioner at the earlier stages. He would also comment about the right of the petitioner to the services of a lawyer even at that stage. It was also submitted that the statement said to have been made by the petitioner was barred u/s 138B of the Customs Act. The last ground of attack was that the Magistrate had no power to remand a person produced before him in accordance with Sec. 104 of the Customs Act.

10. Mr. P. Rajamanickam, learned counsel for the respondent/ Department, countered all these submissions and both the counsel have placed before me several decisions of the Supreme Court and the other High Courts, drawing support for their respective contentions. These petitions were heard on several dates and elaborate arguments were advanced by either side. However, ultimately, Mr. Abdul Karim did not press any of his arguments except the one relating to the power of remand by a Magistrate regarding persons produced in accordance with Section 104 of the Customs Act. This giving up of other arguments was due to a Division Bench of this Court considering the detention of the petitioner under the COFEPOSA Act in W. P. No. 53 of 1989, which is said to be ripe for hearing. These contentions form part of the submissions to be made before the Division Bench and, therefore, Mr. Abdul Karim was anxious that no findings need be given by me at this stage.

11. At this juncture Mr. P. Rajamanickam, learned counsel, submitted that in view of the circumstances then prevailing, Crl. M. P. No. 11117 of 1988 was filed, but in the present situation, in view of the detention of the petitioner under the COFEPOSA Act, this petition has become infructuous and could, therefore, be dismissed without any further discussion. In view of the submissions of the learned counsel on either side, Crl. M. P. No. 11117 of 1988 is dismissed.

12. I will venture to consider only the power of remand of a Magistrate regarding persons produced before him in accordance with the provision of Section 104 of the Customs Act. Before doing so, it may be pointed out though there cannot be any doubt that the illegality of the arrest of a person could be challenged, there would be no useful purpose served in

considering the same u/s 482 Cr. P. C. after the person has been released on bail, since the whole question was open for consideration during the trial arising out of his arrest. Further, the very arrest is being challenged in the detention case and there will be no significance in going into it independently, which necessarily requires, on the facts recording of some evidence. The question of arrest can be left at this stage.

13. As has been observed by me earlier, both the counsel have relied upon certain decisions of the Supreme Court and the other High Courts, on

the aspect of remand by a magistrate in a Customs case. Mr. Abdul Karim relied on *Dalam Chand Baid v. Union of India and Others* 1982 CrL L.

J. 747 a judgment of the Division Bench of the Delhi High Court, for the proposition that the Magistrate has no power to remand a person,

accused of an offence punishable under the Customs Act, to judicial custody, after refusing him bail. The Delhi High Court took the view that

Section 167(2) Cr. P .C. did not apply to an arrest made by a Customs Officer of a person accused of an offence punishable under the Act on the

ground that the Court will have no inherent power of remand of an accused to any custody, unless the power had been conferred by law. The

Delhi High Court placed reliance on *Matabar Parida, Bisnu Charan Parida, Batakrushna Parida and Babaji Parida Vs. The State of Orissa*,

wherein the Supreme Court had made the following observation :

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".

Mr. Abdul Karim also referred to *N.H. Dave, Inspector of Customs Vs. Mohmed Akhtar Hussain Ibrahim Iqbal Kadar Amad Wagher (Bhatti)*

Ors., wherein a Division Bench of the Gujarat High Court had taken the view that the provision of produce an arrested person before the

Magistrate u/s 104 of the Customs Act would be meaningless and futile, if the Magistrate did not have power of remand directing release of such

person on bail.

14. Mr. Rajamanickam brought to my notice that the decision of the Division Bench in *Dalam Chand Baid*'s case had been overruled by a Full

Bench of the same Court in *Union of India v. O. P. Gupta and others* (CrL Writ Nos. 116 and 104 of 1984 dated 19-7-1985). He has also

brought to my notice the decisions of the Kerala High Court in the Superintendent of Customs Vs. Ummerkutty and Others, and N. K. Ayoob v.

The Superintendent, C. I. W., Cochin 1984 CrL. J. 949 wherein U. L. Bhat, J. of the Kerala High Court has taken the view for an arrest under

the Customs Act, the provisions of Sections 167 and 437 of the Code of Criminal Procedure were available. For the limited purpose of the

applicability of Section 4 Cr. P. C. Mr. Rajamanickam would refer to the observations of the Supreme Court in A.R. Antulay Vs. Ramdas

Sriniwas Nayak and Another,

15. Before proceeding to consider the rival contentions put forth by either counsel us look into Section 103 of the Customs Act which provides for

the screening or taking of X-ray of bodies of suspected person for detecting secreted goods. Sub-Clause (7) thereof authorises the Magistrate to

order such person brought before him to be kept in such custody and for such period as he may direct for the purpose of enforcing the provisions

of this section. Such power not having been provided under the Criminal Procedure Code, specifically, the Special Act, had invested it. Except

Sections 53 and 54 of the Code, referable to the examination of the accused by a Medical Practitioner, the power contemplated u/s 103 of the

Act does not appear to form part of the Code. That such power has been given in the Special Act, when it was not available in the Code, portrays

that the provisions of the Code generally apply, unless specifically provided for or prohibited by the Special Act.

16. Now, a reference to Section 43 Cr. P. C. may be useful. This section provides for the arrest by a private and procedure on such arrest, in

certain circumstances. The private person who arrests shall have to make over or cause to be made over any person so arrested to a police

officer, or in the absence of a Police officer, take such person or cause him to be taken in custody to the nearest police station. The private person

is not authorised to take the person arrested, to a Magistrate.

17. Therefore, whenever a person arrested is produced before a Magistrate, if the Special Act provides for remand and or bail, those provisions

apply and in the absence thereof, Section 4(2) Cr. P. C. steps in to provide such power.

18. Section 104 of the Customs Act reads as under : -

POWER TO ARREST - (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 an offence punishable u/s 135, he may arrest such

person and shall, as soon as may be inform him of the 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 sub- section (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 (5 of 1898).

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

It is seen that an empowered Officer of Customs, if he has reason to believe that any person was guilty of an offence punishable u/s 135 of the Act,

he may arrest such person and shall inform him the grounds of arrest, as soon as may be. Every person so arrested will have to be taken to a

Magistrate without unnecessary delay. This part of the section will have to be read with Article 22(2) of the Constitution of India which would

require the arrest or to produce the arrested before a Magistrate within twenty four hours. u/s 104(3) of the Act, the Officer of the Customs has

the power to release the person arrested on bail and towards that end he has the same powers as the Officer-in-charge of a police station under

the Code Criminal Procedure. Though the offence under the Customs Act are not cognizable they are non-bailable, by virtue of classification of

offences in the Cr. P. C. First Schedule Entry II, in respect of offences against other laws, the other laws being other than Indian Penal Code and

the offence being punishable with imprisonment for a period of three years or more, which are classified as non-bailable. An offence u/s 135 of the

Customs Act is punishable with a sentence of imprisonment exceeding three years and naturally it is a non-bailable offence.

19. Section 167 Cr. P. C. as far as is relevant reads as under :-

Procedure when investigation cannot be completed in twenty-four hours.

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

the investigation cannot be completed within the period of twenty-four hours fixed by Section 57, and there are grounds for believing that the accusation 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 to such Magistrate thinks it, 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 Magistrate 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 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 sub-section 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;

20. So far as the Code of Criminal Procedure is concerned, the person arrested and detained in custody u/s 167(1) of the Code, is required to be

produced before a Magistrate. The person so produced is dealt with by the Magistrate u/s 167(2) and (3) of the said Code. It is, therefore, clear

that Section 167(1) of the Code concerns itself with the duties of the police forwarding the accused to the Magistrate, whereas section 167(2)

concerns itself with the powers of the Magistrate to deal with an offender judicially, regarding the nature of the custody to be ordered. It is no

doubt true that Section 167(1) Cr. P. C. refers to a person arrested and detained in custody by the Officer-in-charge of a police station or Police

Officer making the investigation and does not speak of any Officers of any other agency. To my mind, Section 104(1) and (2) of the Customs Act

virtually take the place of Section 167(1) Cr. P. C. A look at Section 104(3) of the Customs Act, postulates the power of the Customs Officer to

release an arrested person on bail. It also contemplates the non- release of a person on bail by the Customs Officer who has the same power as

that of an Officer-in-charge of a police station and subject to the provisions of the Code of Criminal Procedure. That the word ""otherwise"" in sub-

section (3) of Section 104 of the Customs Act relates to the releasing of a person who has been arrested and has no reference to investment of the

Customs Officer with all the powers which an Officer-in-charge of the police station has under Chapter XV of the Code, has been enunciated by

the Supreme Court in Illias Vs. Collector of Customs, Madras, . Therefore, this section postulates the release of an arrested person on bail or not

to release such person on bail (otherwise). This necessarily takes us to the next position of the arrested person being produced before a Magistrate

u/s 104(2) of the Customs Act read with the constitutional mandate provided under Article 22(2) of the Constitution. When a person is so

produced before a Magistrate and the Custom Officer had not released such person on bail, what will be the effect of the production of a person

arrested u/s 104(1) of the Act before the Magistrate ? There can be no doubt that u/s 437(1) Cr. P. C. A. Magistrate will have the power to

release him on bail which naturally implies the power not to release a person on bail. If it were to be constructed that the power of remand will not

be available u/s 167(2) Cr. P. C. for a person arrested and produced by a Customs Officer before a Magistrate, then there is bound to be a

vacuum. In that case, the Magistrate will have to necessarily release the person arrested in a Customs case, on his production, which cannot be the

intendment of the legislature, when we take into consideration that the offence is non-bailable and the offence under the Act can affect the economy

of the nation. Naturally, therefore, the powers of the Magistrate u/s 437 Cr. P. C. will include the non-release of such a person on bail which is

necessarily leads to the corollary of remanding the person to such custody as the Magistrate may judicially deem fit. It is in this context, that the

applicability of the provision of Sec. 167(2) Cr. P. C. may have to be considered.

21. Before embarking on such consideration, it is relevant to quote at this stage the observations of the Supreme Court in *ANTULAY*'s case,

while dealing with Section 4 Cr. P. C.

In the absence of specific provision made in the statute indicating that officer will have to be investigated, inquired into, tried and otherwise dealt

with according to the Code of Criminal Procedure. In other words, Code of Criminal Procedure is the parent statute which provides for

investigation, inquiring into and trial of cases by Criminal Courts of various designations.

In this context, it is worthwhile extracting Section 4 Cr. P. C. :

Trial of offences under the Indian Penal Code and other laws : - (1) All offences under the Indian Penal Code (45 of 1860) shall be investigated,

inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, 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.

It is in the context of Section 4(2) Cr. P. C. the applicability of the provisions of Section 167(2) Cr. P. C. to the person arrested under the

Customs Act and produced before a Magistrate, will have to be considered. A reading of Section 4(2) Cr. P. C. renders the provisions of the

Code applicable in the field not covered by the provisions of the Customs Act. The Code of Criminal Procedure primarily deals with the offences

under the Indian Penal Code and the investigation by Police Officers or Officers-in-charge of police station. This cannot straight away lead to the

conclusion that the provisions of section 167 Cr. P. C. cannot be applied to cases

under the Customs Act. Obviously, in relation to matters of investigation, inquiry, trial or dealing otherwise not covered by the provisions of the Customs Act, the parallel provisions of the Code of Criminal Procedure necessarily will have to be applied and that is the observation of the Supreme Court extracted earlier in ANTULAY's case. Such operation of Section 4 of the Code, cannot be just rejected merely because the Code uses expressions which are compatible with offences under the Indian Penal Code and investigation being conducted by a police officer. Obviously in relation to a person arrested under the Customs Act, Section 167(1) Cr. P. C. is covered suitably by Section 104 (1) and (2) of the Customs Act. In that even, the application of Section 167(2) of the Code can pose no difficulty, except the consideration of the words "'accused person'" used in that sub- section.

22. It should be noticed that Section 167(2) Cr. P. C. does not mention of the officer-in-charge of the police station or the police officer. The power of the Court u/s 167(2) Cr. P. C. is not dependent on a person being produced by a police officer.

23. The Supreme Court, while considering the position and character of a person arrested under the Sea Customs Act or Customs Act vis-a-vis

Article 20(3) of the Constitution and the questions whether a Customs Officer was a police officer for the purpose of Section 25 of the India

Evidence Act and whether any person making statement to a Customs Officer under Sections 107 and 108 of the Customs Officer under Sections

107 and 108 of Customs Act can be said to be a person "'accused of any offence'" within the meaning of the said article, held that a person so

arrested was not an accused within the meaning of Article 20(3) of the Constitution and the Customs Officer acting under the Customs Act was

not a police officer for the purpose of Sec. 25 of the Indian Evidence Act, vide Illias Vs. Collector of Customs, Madras, and Romesh Chandra

Mehta Vs. State of West Bengal, In both the cases, it is nowhere mentioned that the provisions of Chapter XII of the Code and the provision of

Sec. 167(2) thereof, would not be available when the person is detained under the Customs Act and produced before the Magistrate by the

Officer appointed under the said Act this stage, an useful reference could be made to the observations of the Supreme Court in The State of

Punjab Vs. Barkat Ram, .

A police officer is that officer who has the power to submit a report u/s 173 of the Code and since the Customs Officer has no such power for

submitting a report u/s 173(4) of the Code, he is not a police officer and consequential Section 25 of the Indian Evidence Act does not come into play.

The view taken by the Supreme Court was in the context of persons arrested under the Customs Act, not being a person accused for the purpose

of Article 20(3) of the Constitution till a complaint is filed against him, and the Magistrate then taking cognizance, and not in the context 167 (2) Cr.

P. C. If the view of the Supreme Court in Balkishan A. Devidayal Vs. State of Maharashtra, is taken note of, it will be clear that the Supreme

Court in IllAS's case was not excluding the entire Chapter XII Code of Criminal Procedure, from its applicability to Customs Officers. Interpreting

similar provisions, in the Railway Property (Unlawful Possession) Act, 1956, Sarkaria, J in BALAKRISHNAN's case has observed as follows :-

It may be noted that in spite of the provisions in the Code of Criminal Procedure to the contrary, offences under this Act have been made non-

cognizable and, as such, cannot be investigated by a police officer under the Code. It follows that the initiation of the prosecution for an offence

inquired into under this Act can only be on the basis of a complaint by an officer of the Railway Protection Force and not on the report of a police

officer u/s 173(4) of the Criminal Procedure Code, 1898.

This very case also noticed in Paragraph 22, while the powers of Officers of Railway Protection Force, that the legislature's main purpose for

passing the Railway Property (Unlawful Possession) Act 1966, was to invest powers of investigation and prosecutions of offences relating to

railway property in the Railway Protection Force in the same manner as in Excise and Customs (Underlining mine). Therefore, it is patent that the

observations may have to be read in the context of the facts and it cannot be stated that the Customs Officers have no power whatsoever to

investigate into the complaint before the Magistrates.

24. In this background, if we construe the words ""an accused person"" in Section 167(2) of the Code, it will be clear that the words take in the

person who is arrested or detained in custody by the Customs Officer who had

reason to believe that such the provision u/s 4(2) of the Code steps

in and the expression ""an accused person"" would then surely refer to a person arrested and detained under the Customs Act. It

appears to my mind that the word `accused" in Section 167(2) of the Code must be taken in the background of a person suspected of having

committed an offence and not in the Supreme Court, can be a person against whom cognizance had been taken by the Magistrate on the filing of

the complaint.

25. It may be relevant to notice that in the report of the Select Committee on the proposed section in the Bill and the objects and reasons for

enacting Section 104 in the present form in the Customs Act, this very point was noticed in the following terms :

The Committee are of the view that an Officer of the Customs arresting a person under the clause should have the power to release the arrested

person on bail or otherwise similar to the power conferred on the officer in charge of a police station under the Code of Criminal Procedure, 1898,

so as to obviate the necessity of detaining an arrested person till he could be taken to a Magistrate.

The Committee felt that sub-clause (ii) which read as under :-

In addition to the power to commit an arrested person to jail or order him to be kept in police custody, the Magistrate is empowered to order

the arrested person to be kept in such other custody as he seems fit.

being merely a repetition of the provision of the Code of Criminal Procedure, 1898, should be omitted. This further affirms that there is no lacuna

for not providing a power of remand under the Customs Act, for, it is inherent in the Criminal Procedure Code, the applicability of which is patent

in the area not provided by the said Act. Looked at in this background, the word accused in its widest connotation meaning ""one who has been

arrested and detained"" which will include even a person suspected of having committed an offence.

26. This conclusion next takes us to consideration of the observation of the Supreme Court in *Matabar Parida, Bisnu Charan Parida, Batakrushna*

Parida and Babaji Parida Vs. The State of Orissa, , that the power of remand is not inherent in the Court. This question does not appear to pose

any difficulty or even arise, for in the said case, the Supreme Court has observed

that the Code knows only of two custodies, police custody or judicial custody, as it was a case of prosecution on the basis of a police report. The observation of the S. C. may not affect this decision, once the provisions of Section 104 (1)(2) of the Customs Act are put in the place of Section 167(1) of the Code, when the power of remand automatically is derived from the provisions of Section 167(2) in the background of Section 4(2) of the Code.

27. As stated earlier, if the Customs Officer has the power to release a person on bail, it implies that he has the power to refuse bail as well, which requires the Customs Officer to produce the detained person before the Magistrate and then could it be said, if the Magistrate decides to refuse bail, the person will have to be left in the lurch ? The power of bail, refusal of bail and remand are automatically attracted in view of the provisions of Section 4(2) of the Code, the parent Act, which steps in the area not provided for under the Customs Act. A look at the provisions u/s 437 CrP.

P. C. clearly visualise the possibility of not only a person accused of an offence, but also a suspected of the commission of any non-bailable offence being brought before the court and the powers of the Court to release such person on bail. It cannot also be overlooked that Section 437 CrP takes in its sweep release on bail of a person accused of or suspected of the commission of any non-cognizable offence who is arrested or detained without a warrant and is brought before the Court other than the High Court or Court of Session.

Similarly, the provisions of Sections 438 CrP. C. point out the reasonable belief of a person that he may be arrested on an accusation of having committed a non-cognizable offence, praying for release in the event of arrest. All this will put an end to the fallacy that the Customs Officer will have to produce any person arrested before a Magistrate only for being released, without any other power being exercised by the Magistrate. The absence of the provisions in the Customs Act for remand and bail necessarily involves the application of Section 4(2) CrP. C. and in that view there cannot be any doubt whatsoever that a Magistrate has power not only to remand the person produced by the Customs Officer, but also to release him on bail. One cannot overlook that the object and scope of production of the persons arrested before a Magistrate with the least

possible delay is not only for the application of the judicial mind relating to the custody to be ordered, but also to enable such persons to make any

representation in the matter. At this stage contemplated u/s 167 Criminal Procedure Code, a Magistrate does not take cognizance of a case when

the object appears to be a prevent buses by the investigating agency.

28. The view of the Delhi High Court in Dalam Chand Baid's case (1982 CrL. L. J. 747) having been overruled by a Full Bench of the same Court

in Union of India v. O. P. Gupta and Others CrL. Writ Nos.116 and 104 and 104 of 1984, judgment dated 19-7-1985) and there being no other

judgment of any other High Court having taken a different view on the power of remand by a Magistrate in a Customs case, I am in respectful

agreement with the views expressed by the High Courts of Kerala and Gujarat and the Full Bench of the Delhi High Court. I hold that the

Magistrate has the power to remand a person produced before him in accordance with Section 104 of the Customs Act by virtue of the powers of

the remand u/s 167 (2) and (3) of the Code and could further exercise the powers u/s 437 of the Code.

29. CrL. M. P. No. 254 of 1989, is, therefore, dismissed. Through the records in CrL. M. P. No. 407 of 1989 had been recalled for to consider

the legality of the arrest of the petitioner, this aspect having not been pressed, this petition is also dismissed.