

(1989) 04 MAD CK 0059

In the Madras High Court

Case No : Criminal Miscellaneous Petition No's. 11117 of 1988 and 254 and 407 of 1989

The Senior Intelligence Officer, Directorate of Revenue
Intelligence, Madras

APPELLANT

Vs

M.K.S. Abu Bucker

RESPONDENT

Date of Decision : 05-04-1989

Acts Referred:

Constitution of India, 1950 — Article 20(3), 22(2)
Criminal Procedure Code, 1973 (CrPC) — Section 167, 167(1), 167(2), 167(3), 173
Customs Act, 1962 — Section 103, 104, 104(2), 104(3), 135
Evidence Act, 1872 — Section 25

Citation : (1990) CriLJ 704

Hon'ble Judges : T.S. Arunachalam, J

Bench : Single Bench

Advocate : P. Rajamanickam, Central Govt. Public Prosecutor, for the Appellant;
M.R.M. Abdul Kareem, for M. Abdul Nazeer, for the Respondent

Judgement

1. CrI.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 Session, Madras, releasing the respondent M. K. S. Abu Bucker, on bail in CrI.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. CrI.M.P. No. 254 of 1989 has filed by the respondent in CrI.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 CrI.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 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 per the ranking in Crl.M.P. Nos. 254 and 407 of 1989.

6. Before setting out the grounds 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 N. 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 seen talking together, which was unobtrusively watched by the respondent officials. Sometime 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, Guindy, 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 10 p.m. and some time latter, 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 Crl.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 138-B 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 Section 104 of the Customs Act.

10. Mr. 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 this 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* 1982 CLJ 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. Mohamed 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 to 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 and 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 1982 CLJ 747 (Delhi) had been overruled by

a Full Bench of the same Court in *Union of India v. O. P. Gupta* (Crl. Writ Nos. 116 and 104 of 1984 dt. 19-7-1985). He has also brought to my notice the decisions of the Kerala High Court in the *Superintendent of Customs, The Superintendent of Customs, C.I.U. Vs. P.K. Ummerkutty and Others*, and *M.K. Ayooob and Others Vs. Superintendent, Customs Intelligence Unit and Another*, wherein U. L. Bhat, J. of the Kerala High Court has taken the view that 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 Srinivas Nayak and Another*, .

15. Before proceeding to consider the rival contentions put forth by either counsel let us look into Section 103 of the Customs Act which provides for the screening or taking of X-ray of bodies of suspected persons 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, portends 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 person 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 officers 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 arrestee 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 of Criminal Procedure. Though the offences 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 custody to be ordered. It is no doubt true that Section 167(1) Cr.P.C. refers to a person arrested and detained under custody by the Officer-in-charge of a police station or Police Officer making the investigation and does not speak of 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 the Magistrate, and the Customs 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 construed 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 necessarily leads to the corollary or 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 Section 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 *A.R. Antulay Vs. Ramdas Srinivas Nayak and Another*, while dealing with Section 4 Cr.P.C. (at p. 658 of Cri LJ.).

"In the absence of specific provision made in the statute indicating that offence will have to be investigated, inquired into, tried and otherwise dealt with according to that statute, the same 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 investigation, 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 straightway lead to the conclusion that the provision 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 A.R. Antulay Vs. Ramdas Srinivas Nayak and Another, . 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 event, 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 Indian Evidence Act. and whether any person making a 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 Section 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 Section 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. At 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 to 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 consequently 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 of Section 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 Illias Vs. Collector of Customs, Madras, 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 (Para 28) :-

"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 dealing with the powers of Officers 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 prosecution of offences relating to railway property in the Railway Protection Force in the same manner as in Excise and Customs. 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 offences under the Customs Act when they are the only persons competent to file the complaint before the Magistrates.

24. In this background, if we construe that words "an accused person" in Section 167(2) of the Code, it will be clear that the words would take in, the person who is arrested or detained in custody by the Customs Officer who had reason to believe that such person was guilty of an offence punishable u/s 135 of the Act. It is at this stage, 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 sense of an accused person under the Customs Act, since that person, according to 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 also 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 who could be taken to a Magistrate."

The Committee felt that sub-clause (iii) 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 deems fit."

Being merely a repetition of the provisions 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 back ground, 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 the 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 Supreme Court 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 Cr.P.C. clearly visualises the possibility of not only a person accused of an offence, but also a person 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 Criminal Procedure Code 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 Section 438 Cr.P.C. point out the reasonable belief of a person that he may be arrested of 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) Cr.P.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 to prevent abuses by the investigating agency.

28. The view of the Delhi High Court in *Dalam Chand Baid Vs. Union of India and Others*, having been overruled by a Full Bench of the same Court in *Union of India v. O. P. Gupta* (Crl. Writ Nos. 116 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 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 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. Though the records in Crl.M.P. No. 407 of 1989 had been called for to consider the legality of the arrest of the petitioner, this aspect having not been pressed, this petition is also dismissed.

30. Petition dismissed.