IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.T.SANKARAN
&
THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

MONDAY, THE 19TH DAY OF DECEMBER 2016/28TH AGRAHAYANA, 1938

WP(Crl.).No. 333 of 2015 (S)

PETITIONER:

KISHIN S.LOUNGANI, AGED 67 YEARS,
PROPRIETOR, M/S.R.KISHIN & COMPANY,
ROOM NO.208, 2ND FLOOR,
BHERUMAL HOUSE, 149, ZWERO BAZAAR,
MUMBAI-400 002, NOW UNDER JUDICIAL CUSTODY
IN CENTRAL PRISON, VIYOOR.

BY ADVS. SRI.VIKRAM CHAUDHARI (SR)
SRI.P.A.AUGUSTIAN
SRI.M.A.BABY
SRI.T.S.BIJU

RESPONDENTS:

1. UNION OF INDIA
THROUGH ITS SECRETARY, MINISTRY OF FINANCE,
DEPARTMENT OF REVENUE, NEW DELHI.

2. SENIOR INTELLIGENCE OFFICER
DIRECTORATE OF REVENUE,
PALARIVATTOM, COCHIN-25.

3. STATE OF KERALA
REPRESENTED BY SECRETARY TO THE
GOVERNMENT OF KERALA,
DEPARTMENT OF HOME AFFAIRS, SECRETARIAT,
THIRUVANANTHAPURAM- 1.

SRI.K.M.NATARAJ, ADDITIONAL SOLICITOR GENERAL
R1 BY ADV. SRI.MANU.S, CGC
R2 BY ADV. SRI.C.P.UDAYABHANU
PUBLIC PROSECUTOR SMT.BINDHU GOPINATH
R3 BY ADV. ADDL.DIRECTOR GENERAL OF PROSECUTION
R3 BY ADV. DIRECTOR GENERAL OF PROSECUTION

THIS WRIT PETITION (CRIMINAL) HAVING BEEN FINALLY HEARD ON 14.12.2016, THE COURT ON 19.12.2016 DELIVERED THE FOLLOWING:

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APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1 TRUE COPY OF THE OPD SLIP DATED 17.6.2015 ISSUED BY THE MUNICIPAL CORPORATION OF GREATER MUMBAI HOSPITAL.

EXT.P2 TRUE COPY OF THE ARREST MEMO DATED 18.6.2015.

EXT.P3 TRUE COPY OF THE OCCURRENCE REPORT DATED 18.6.2015 SUBMITTED BEFORE THE COURT BY RESPONDENT NO.2.

EXT.P4 TRUE COPY OF THE ORDER SHEET REFLECTING ORDERS DATED 18.6.2015 AND 22.6.2015 PASSED BY THE LEARNED MAGISTRATE.

EXT.P5 TRUE COPY OF THE BAIL APPLICATION DATED 19.6.2015 FILED BY THE PETITIONER.

EXT.P6 TRUE COPY OF THE ORDER DATED 24.6.2015 BY THE ACJM (EO) COURT, ERNAKULAM.

EXT.P7 TRUE COPY OF THE WRITTEN OBJECTIONS DATED 26.6.2015 FILED BY RESPONDENT NO.2 TO THE PETITIONER'S BAIL APPLICATION.

EXT.P8 TRUE COPY OF THE ADDITIONAL SUBMISSIONS RE. OBJECTIONS TO THE PETITIONER'S BAIL APPLICATION FILED BY RESPONDENT NO.2 ON 27.6.2015.

EXT.P9 TRUE COPY OF THE FURTHER/ADDITIONAL SUBMISSIONS DATED 2.7.2015 WITHOUT ANNEXURES.

EXT.P10 TRUE COPY OF THE ORDER DATED 3.7.2015.

EXT.P11 TRUE COPY OF THE ORDER DATED 14.07.2015.

EXT.P12 TRUE COPY OF THE COMMUNICATION DATED 8.7.2015.

EXT.P13 TRUE COPY OF THE ORDER DATED 10.4.2015 PASSED BY THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH AT MUMBAI.

EXT.P14 TRUE COPY OF THE ORDER DATED 22.5.2015.

EXT.P15 TRUE COPY OF THE ORDER DATED 22.5.2015.

EXTP16 TRUE COPY OF THE ORDER DATED 19.9.2001 PASSED BY THE CUSTOMS, EXCISE GOLD TRIBUNAL MUMBAI.

EXT.P17 TRUE COPY OF THE CHART SHOWING THE DETAILS OF THE EXPORTS BY BOTH THE AFORESAID FIRMS AND THE AMOUNT OF THE DRAWBACK RECEIVED.

EXT.P18 TRUE COPY OF THE SUMMONS DATED 26.6.2015.

EXT.P19 TRUE COPY OF THE JUDGMENT PASSED BY THE HON'BLE SUPREME COURT IN OM PRAKASH AND ANOTHER VERSUS UNION OF INDIA AND ANOTHER 2011 (14) SCC 1.

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EXT.P20 TRUE COPY OF THE ORDER DATED 01.12.2011 PASSED BY THE HON'BLE SUPREME COURT IN WP(CRL) NO.237 OF 2011.

EXT.P21 TRUE COPY OF THE ORDER DATED 05.01.2012 PASSED BY THE HON'BLE SUPREME COURT IN WP(CRL) NO.247 OF 2011.

EXT.P22 TRUE COPY OF THE ORDER DATED 13.08.2013 PASSED BY THE HON'BLE SUPREME COURT IN REVIEW PETITION (CRL)97-98 OF 2013.

EXT.P23 TRUE COPY OF THE JUDGMENT PASSED BY THE HON'BLE SUPREME COURT IN "TOFAN SINGH VERSUS STATE OF TAMIL NADU REPORTED AS (2013) 16 SCC 31.

EXT.P24 TRUE COPY OF THE ORDER DATED 26.5.2015 ISSUED BY THE HIGH COURT OF PUNJAB AND HARYANA.

EXT.P25 TRUE COPY OF THE ORDER DATED 29.5.2015 ISSUED BY THE HIGH COURT OF PUNJAB AND HARYANA.

RESPONDENTS' EXHIBITS:

F.NO.394/71/97-CUS(AS) DATED 22.6.1999.

CIRCULAR NO.38/2013 - CUSTOMS DATED 17.9.2013.

CIRCULAR NO.27/2015 - CUSTOMS DATED 23.10.2015.

CIRCULAR NO.28/2015 - CUSTOMS DATED 23.10.2015.

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"C.R."

K.T.SANKARAN &
RAJA VIJAYARAGHAVAN V., JJ.

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W.P.(Crl.) No.333 of 2015 (S)

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Dated this the 19th day of December, 2016

JUDGMENT

K.T.Sankaran, J.

The main question to be decided in this Writ Petition is whether the provisions of Sections 154 to 157 and 173(2) of the Code of Criminal Procedure would apply in respect of the proceedings under the Customs Act, in view of Section 4(2) of the Cr.P.C. and whether in respect of offences under Sections 133 to 135 of the Customs Act registration of FIR is compulsory before the person concerned is arrested and produced before the Magistrate.

2. The Writ Petition is filed by the petitioner for the issue of a writ of habeas corpus directing release of the petitioner from custody pursuant to an arrest and detention for violation of the provisions of the Customs Act. In the Writ Petition eight reliefs have been prayed for, the 8th relief being a residuary one praying to pass any further

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orders which the Court may deem fit and proper to issue in the interests of justice. The learned senior counsel for the petitioner submitted that the petitioner is not pressing relief (VII) at this stage and that the questions involved with respect to reliefs (V) and (VI) may be kept open with liberty to the petitioner to invoke those reliefs at the appropriate stage. That means, for the purpose of disposal of this Writ Petition, we need to confine to reliefs (I) to (IV). For the sake of convenience, reliefs (I) to (IV) are extracted hereunder:

> "I. Issue appropriate Writ, Order or directions quashing and setting aside the Arrest Memo dated 18.6.2015 bearing No.O.R.No.4/15, whereby, Respondent No.2 has arrested the petitioner in purported exercise of powers under Section 104 of the Customs Act, 1962 and consequential proceedings arising therefrom including the orders dated 18.6.2015 (Exhibit P4) and 24.6.2015 (Exhibit P6) passed by the Learned Additional Chief Judicial Magistrate (Economic Offences), Ernakulam, whereby the petitioner was remanded to judicial custody as also to the custody of DRI as the entire proceedings are without jurisdiction; null and void ab initio and, therefore, vitiated by the application of the legal maxims; ***"Debile fundamentum fallit onus"***, meaning, thereby, that when the foundation falls, everything

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falls; and ***"sublato fundamento cadit opus"***; meaning thereby, in case a foundation is removed, the superstructure falls.

II. Issue appropriate writ, order or directions, especially in the nature of Habeas Corpus directing the forthwith release of the petitioner from custody as his arrest and subsequent incarceration is violative of his fundamental rights, inter alia, enshrined under Article 21 of the Constitution of India.

III. Issue appropriate writ, order or directions to the respondents to comply with the mandate of either Section 154 Cr.P.C. or Section 155 Cr.P.C. in the event of the specified offences under the Customs Act, 1962 being cognizable or non-cognizable in view of Section 104(4) & (5) thereof, in true spirit and compliance with the ratio of law laid down by the Hon'ble Supreme Court in "***Om Prakash and another Versus Union of India and another 2011 (14) SCC 1***", prior to summoning the petitioner or any other person for their appearance in any case or inquiry.

IV. Issue writ, order or directions holding the investigations into the non-cognizable offence(s)

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under Section 135 of the Customs Act, 1962 without seeking order of the Magistrate as per Section 155 Cr.P.C. to be to be null and void ab initio and/or in the alternative the investigation into the cognizable offence(s) under Section 135 of the Customs Act, 1962 without recording the FIR and following the procedure prescribed under Sections 154, 156, 157, 172 Cr.P.C. etc. to be illegal non-est, null and void ab initio; without jurisdiction; unconstitutional, arbitrary, violative of Article 14 and 21 of the Constitution of India."

3. The facts of the case, which are necessary for disposing of the Writ Petition are the following. Kishin S. Loungani (writ petitioner) is engaged in export business. The petitioner is the proprietor of M/s.R.Kishin & Company, Mumbai. On the basis of the intelligence gathered that M/s.R.Kishin & Co., 208, Bherumal House, 149, Zaveri Bazar, Mumbai had availed ineligible Drawback and other Export incentives by mis-declaring the material particulars whereby huge loss was caused to the government exchequer, the Directorate of Revenue Intelligence searched the office, godown and residence premises of M/s.R.Kishin & Co., Mumbai on 16.6.2015. Several incriminating documents were recovered during the search.

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Statements under Section 108 of the Customs Act, 1962 were recorded from the petitioner on 16.6.2015 and 18.6.2015 wherein he admitted that he had fraudulently availed drawback and other export incentives by mis-declaring the actual value and status of the goods exported. He admitted that he had imported Footballs, Gloves and Golf balls exported by him in the name of R.Kishin & Co., through Cochin Port under drawback scheme in the name of another company, M/s.Ambe Traders, Mumbai at a very low value through Nhava Sheva Port and which he had utilized for export again by repacking the goods at a godown at Panvel. He admitted the modus of rotating the same goods again and again for fraudulently availing ineligible drawback during the period 2012-2015.

4. In the occurrence report submitted by the Senior Intelligence Officer, D.R.I., Cochin before the Court of the Additional Chief Judicial Magistrate (Economic Offences), Ernakulam, it is stated as follows:

> "4. Investigations conducted so far has unearthed the goods so imported in the name of M/s.Ambe Traders at a godown in Panvel and also other documentary evidence including statements which corroborate the

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admissions of the exporter and the fact of rotating of the same goods again and again for availing ineligible drawback.

5. Shri. Kishin Loungani admitted to have availed around Rs.20 Crores as Drawback and Rs.15 Crores as other export incentives in a fraudulent manner.

6. The Directorate of Revenue Intelligence has seized export goods of M/s.R.Kishin & Co. valued at Rs.7.62 Crores and import goods of M/s.Ambe Traders valued at Rs.17.7 Lakhs in two different godowns at Panvel, Mumbai. 14 export consignments valued at Rs.4.72 Crores were seized by DRI at Cochin Port."

5. Ext.P2 arrest memo dated 18.6.2015 was issued by the Senior Intelligence Officer, D.R.I. Cochin against the petitioner. The petitioner was arrested on 18.6.2015. The petitioner was produced before the learned Magistrate and he was remanded to judicial custody on 19.6.2015. The petitioner moved a bail application before the Court of the Additional Chief Judicial Magistrate (Economic Offences), Ernakulam and it was dismissed as per Ext.P10 order dated 3.7.2015. He moved for bail again and that

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application was also dismissed as per Ext.P11 order dated 14.7.2015. Subsequently, the petitioner moved the Sessions Court for bail, but he did not press that application and in the meanwhile, he filed the present Writ Petition on 22.7.2015.

6. The Writ Petition was admitted on 24.7.2015. On 31.7.2015, before a Division Bench of this Court (in which Justice Raja Vijayaraghavan V. was a member) it was submitted on behalf of the Senior Intelligence Officer that the investigation revealed that during the period 2012-2015, sports goods, namely, footballs, gloves and golf balls valued at ₹240 crores were exported through the Port of Cochin by M/s.R.Kishin & Co.. An amount of ₹22.05 crores was claimed as drawback for the said exports, out of which ₹15.35 crores had already been disbursed to the petitioner. An amount of ₹6.69 crores was not disbursed as the drawback amount was restricted due to the issues on valuation and on which adjudications were carried out. Further, during 2007-2012, goods worth ₹440 crores were exported through the Port of Nhava Sheva. An amount of ₹35 crores approximately has been estimated to be the drawback. The benefits under the Focus Product Scheme to the tune of ₹32 crores

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were also availed by the petitioner through his firms M/s.R.Kishin & Co. and M/s.R.P.Trading Co. The Division Bench passed an order of interim bail dated 31.7.2015 in favour of the petitioner. For the sake of convenience, the relevant part of the order dated 31.7.2015 is extracted below:

> "6. Considering the nature of argument, we are of the view that by imposing certain conditions, interim bail can be granted to the petitioner, particularly, when the learned counsel for the 2nd respondent, on instructions, submitted that adequate conditions may be imposed.
>
> In the result, there will be an interim order granting interim bail to the petitioner and the Court of Additional Chief Judicial Magistrate (EO), Ernakulam, is directed to release the petitioner on bail on the following conditions:
>
> 1. The petitioner shall execute a bond for Rs.50,000/- with two solvent sureties each for the like amount to the satisfaction of the learned Chief Judicial Magistrate (EO), Ernakulam. The petitioner is permitted to provide sureties from his native place and the court shall not insist for local sureties from the State of Kerala.
>
> 2. The petitioner shall deposit a sum of Rs.5 Crores

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with the Commissioner of Customs, Cochin. The amount in the frozen accounts of the petitioner can be appropriated by the Commissioner of Customs towards the above sum of Rs.5 Crores. The balance amount shall be deposited by the petitioner within a period of 5 days from the date of his release on bail.

3. The petitioner shall not leave the territorial jurisdiction of the second respondent for a period of 1 month and he shall report before the Senior Intelligence Officer, DRI, Cochin, on every Mondays between 10 a.m. and 11 a.m. during that period.

4. Thereafter, on the expiry of the above one month period, the petitioner shall report on Mondays between 10 a.m. and 11 a.m. before the 2nd respondent once in a fortnight.

5. The petitioner shall ensure that the petitioner's firm permits the 2nd respondent to take full and free inspection of all the records of the firm especially the books of account including vouchers, challans, bills, and Bank books-records.

6. The petitioner and his wife agree to disclose their assets by filing an affidavit on the date of depositing the

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balance amount as aforesaid and to file an undertaking on the same day before the court below not to dispose of, alienate, encumber, part with possession of or create any third party right, title or interest in, to, upon on or in respect thereof.

7. The petitioner shall procure on affidavit an undertaking of the firm namely, M/s.Kishin and Company not to dispose of the immovable properties, any of its assets, that it will only make payments of statutory dues and dues of its workers and that it will incur any other expenses only after obtaining written permission of the 2nd respondent or with the leave of the court.

It is made clear that the amount which would be deposited under Clause No.2 will be subject to the final adjudication by the statutory authority in accordance with law and procedure and without prejudice to the contentions raised by the petitioner in this writ petition."

7. Heard Sri.Vikram Chowdhary, Senior Advocate appearing for the petitioner and Sri.Nataraj, the Additional Solicitor General of India.

8. Sri.Vikram Chowdhary submitted that under the Customs

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Act, there is no provision to file a complaint. If so, with respect to a non-cognizable offence, a complaint can be filed only under the Code of Criminal Procedure. In the case of a cognizable offence, the customs authorities have to register First Information Report under Section 154 of the Cr.P.C., send a copy of the FIR to the jurisdictional Magistrate under Section 157 of the Cr.P.C., conduct investigation, maintain case diary under Section 172 of the Cr.P.C. and file a final report under Section 173(2) of the Cr.P.C.

9. Sri.Vikram Chowdhary submitted that unless the Customs Act contain specific provisions to the contrary, the offences under the Act shall be investigated, inquired into, tried or otherwise dealt with according to the provisions contained in the Code of Criminal Procedure, as provided in Section 4 of the Cr.P.C. The learned counsel relied on the decisions of the Supreme Court in **Om Prakash and another v. Union of India and another ((2011) 14 SCC 1)**; **Lalitha Kumari v. Government of Uttar Pradesh and others ((2014) 2 SCC 1)**; **State of Haryana and others v. Bhajan Lal and others (1992 Supp.(1) SCC 335)**; **Subodh Singh Modak v. The State (1974 Crl.L.J. 185)**; **Union of India v. Thamisharasi and**

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others ((1995) 4 SCC 190); **Hussein Ghadially alias MHGA Shaik and others v. State of Gujarat ((2014) 8 SCC 425)**; **Jayantibhai Lalubhai Patel v. State of Gujarat (1992 Crl.L.J. 2377); Keshav Lal Thakur v. State of Bihar ((1996) 11 SCC 557); Mohindro v. State of Punjab and others ((2001) 9 SCC 581); State of Punjab v. Baldev Singh ((1999) 6 SCC 172)**; **D.K. Basu v. State of West Bengal ((1997) 1 SCC 416)**; **State of Haryana and others v. Bhajanlal and others ((1992) Supp (1) SCC 335)**; **Ramesh Chandra Mahta v. State of West Bengal (1999 110 ELT 324 (SC) = AIR 1970 SC 940); State of Punjab v. Baldev Singh ((1999) 6 SCC 172)**; and **Gorav Kathuria v. Union of India and others** (judgment of Punjab & Haryana High Court in CRWP 595 of 2016) and the judgment of the Supreme Court in Criminal Appeal No.737 of 2016 dismissing the Appeal therefrom.

10. Sri.Nataraj, the learned Additional Solicitor General submitted that the essential question to be considered is whether the Customs Officers are police officers and whether they are required to register FIR in respect of an offence under Section 135 of the

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Customs Act. He referred to the various provisions in the Customs Act and the Code of Criminal Procedure. He submitted that the Code of Criminal Procedure has very limited applicability in respect of matters covered by the Customs Act. The Code of Criminal Procedure applies only to the extent it is provided in the Customs Act. Registration of FIR is not a requirement under the Customs Act. Customs Officers are not police officers. The Customs Officers are at the stage of collecting materials to consider the question whether prosecution has to be launched and whether sanction is to be obtained under Section 137(1) of the Customs Act. Sri. Nataraj referred to the decisions in **Dhartipakar Madan Lal Agarwal v. Rajiv Gandhi** (**(1987) supp. SCC 93**); **Sanjeev Coke Manufacturing Co. v. M/s.Bharat Coking Coal Ltd. and another** (**(1983) 1 SCC 147**); **Union of India and another v. G.M.Kokil and others** **(AIR 1984 SC 1022)**; **Soni Vallabhdas Liladhar and another v. The Asst. Collector of Customs** **(AIR 1965 SC 481)**; **Ramesh Chandra Mehta v. The State of W.B.** **(AIR 1970 SC 940)**; **Illias v. The Collector of Customs, Madras** **(AIR 1970 SC 1065)**; **Badaku Joti Savant v. State of Mysore** **(AIR 1966 SC 1746)**; **Ayoob v. Superintendent, Customs Intelligence Unit** **(1984 KLT**

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215); **Superintendent of Customs v. Ummerkutty and others (1984 KLT 1)**; **Percy Rustomji Basta v. State of Maharashtra (AIR 1971 SC 1087); Poolpandi and others v. Superintendent of Central Excise and others ((1992) 3 SCC 259); Veera Ibrahim v. State of Maharashtra ((1976) 2 SCC 302)**; **Directorate of Enforcement v. Deepak Mahajan and another ((1994) 3 SCC 440)**; **Union of India v. Padam Narain Aggarwal (AIR 2009 SC 254)**; **Sunil Gupta v. Union of India (2000 (118) E.L.T. 8 (P & H))**; **Bhavin Impex Pvt. Ltd. v. State of Gujarat (2010 (260) E.L.T. 526); Prashant J. Mehta v. Directorate of Revenue Intelligence (2013 (3) KLT 764)**; **Noor Aga v. State of Punjab ((2008) 16 SCC 417); Tofan Singh v. State of Tamil Nadu ((2013) 16 SCC 31)**; **Nirmal Singh Pehlwan alias Nimma v. Inspector, Customs, Customs House, Punjab ((2011) 12 SCC 298)**; **State of Orissa v. Sudhansu Sekhar Mishra (AIR 1968 SC 647); Amrendra Pratap Singh v. Tej Bahadur Prajapati and others ((2004) 10 SCC 65)**; **Girnar Traders v. State of Maharashtra and others ((2007) 7 SCC 555); Arun Kumar Aggarwal v. State of M.P. and others ((2014) 13 SCC 707)**; **State of U.P. and another v. Synthetics and Chemicals Ltd. and**

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another ((1991) 4 SCC 139); **Anilkumar and others v. M.K.Aiyappa and another ((2013) 10 SCC 705); Subramanian Swamy v. Manmohan Singh and another ((2012) 3 SCC 64)**; **Asst. Collector of Central Excise v. Duncan Agro Industries Ltd. and another (AIR 2000 SC 2901); Union of India v. Manik Lal Banerjee (AIR 2006 SC 2844)** and **Divisional Controller, KSRTC v. Mahadeva Shetty and another ((2003) 7 SCC 197).**

11. To answer the questions involved in the Writ Petition, it is apposite to refer to the relevant portions in the Customs Act and the Code of Criminal Procedure. The Customs Act, 1962 is an Act to consolidate and amend the law relating to customs. The Customs Act aims to sternly and expeditiously deal with smuggling, evasion of customs duty etc. and to provide punishment for the offences and violations under the Act. It is intended to curb the dents on the revenue caused by smuggling, duty evasion etc.. The Act provides for confiscation of goods and imposition of penalties as well as for the prosecution for the offence. Section 4 of the Act provides for appointment of officers of customs. Section 5 provides the powers of the officers of customs. Section 104 of the Customs Act provides

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for the power to arrest. Every person arrested under sub-section (1) of Section 104 shall, without unnecessary delay, be taken to a Magistrate. Sub-section (3) of Section 104 reads thus:

> "**104. Power to arrest**.-- (1) ......
>
> (3) Where an officer of customs has arrested any person under sub-section (1), he shall, for the purpose of the releasing such person on bail or otherwise, have the same power 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)."

Sub-section (4) provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973, any offence relating to (a) prohibited goods; or (b) evasion or attempted evasion of duty exceeding fifty lakh rupees, shall be cognizable. Sub-section (4) was substituted by Act 23 of 2012. Before the amendment, the said sub-section provided that notwithstanding anything contained in the Code of Criminal Procedure, 1898, an offence under the Act shall not be cognizable. Sub-section (5) states that save as otherwise provided in sub-section (4), all other offences under the Act shall be non-cognizable. Sub-section (6) reads thus:

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> "(6) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an offence punishable under section 135 relating to --
>
> (a) evasion or attempted evasion of duty exceeding fifty lakh rupees; or
>
> (b) prohibited goods notified under section 11 which are also notified under sub-clause (C) of clause (i) of sub-section (1) of section 135; or
>
> (c) import or export of any goods which have not been declared in accordance with the provisions of this Act and the market price of which exceeds one crore rupees; or
>
> (d) fraudulently availing of or attempt to avail of drawback or any exemption from duty provided under this Act, if the amount of drawback or exemption from duty exceeds fifty lakh rupees,
>
> shall be non-bailable."

Sub-section (7) provides that save as otherwise provided in sub-section (6), all other offences under the Act shall be bailable.

12. The expression "any person" occurring in sub-section (1) of Section 104 indicates that he need not be an accused. It is

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sufficient that if an officer of the customs has reason to believe that the person concerned has committed an offence punishable under Section 132 or Section 133 or Section 135 or Section 135A or Section 136, he may arrest such person. Sub-section (3) of Section 104 makes specific provision regarding the power to release on bail. The power to arrest under sub-section (1) is not regulated by the Code of Criminal Procedure but in respect of bail, it is provided that an officer of the Customs shall have the same power and be subject to the same provisions as the officer-in-charge of a police station has. Section 104(1) does not make any distinction between cognizable and non-cognizable cases, whereas under Section 41 of the Code of Criminal Procedure, the power to arrest without warrant is with respect to cognizable offence and other enumerated categories of activities. It is clear from Section 104(3) of the Customs Act that the Customs Officer exercising power thereunder is not a police officer. Only the powers of a police officer in respect of specific matters are conferred on the Customs Officer. The language of sub-section (3) of Section 104 is clear and therefore, for understanding the scope and ambit of the same, no external aid is required. Sub-section (4) of Section 104 of the Customs Act

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contains a non-obstante clause which provides that notwithstanding anything contained in the Code of Criminal Procedure, any offence mentioned therein shall be cognizable. The provisions of the Code of Criminal Procedure are not applicable to sub-section (4) of Section 104 of the Customs Act.

13. Going by the Scheme of the Customs Act, arrest of a person need not necessarily lead to his prosecution for any offence. The purpose of arrest is also for the smooth conduct of the inquiry under the Customs Act. Section 108 of the Customs Act provides that any Gazetted Officer of customs shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making under the Act. Sub-section (3) of Section 108 states that all persons summoned shall be bound to attend and shall be bound to state the truth upon any subject respecting which they are examined or make statements and produce such documents and other things as may be required. Sub-section (4) of Section 108 provides that every such inquiry under the Section shall be deemed to be a judicial proceeding within the

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meaning of Sections 193 and 228 of the Indian Penal Code. Arrest under Section 104 can be made by any empowered customs officer whereas the evidence to be taken under Section 108 shall be by any Gazetted Officer of customs. The expression “to state the truth” occurring in sub-section (3) of Section 108 gives a clear indication that the person who is summoned is not an accused, since an accused cannot be compelled to state the truth. If he is so compelled, the theory of testimonial compulsion will apply. By the arrest under Section 104 alone, the person concerned does not become an accused. So also, even after arrest, the person concerned can be asked to give a statement under Section 108 of the Customs Act. If it is insisted that a First Information Report should be registered against the person concerned immediately on getting information of any violation, taking a statement under Section 108 thereafter would not be possible and it would be unconstitutional and illegal. On the other hand, even after arrest under Section 104, the person concerned can be directed to give a statement under Section 108 of the Customs Act.

14. The provision in Section 104(2) of the Customs Act that

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every person arrested shall, without unnecessary delay, be taken to a Magistrate safeguards the guarantee under Article 22(2) of the Constitution of India. An arrest under Section 104 of the Customs Act need not be preceded by a First Information Report and it need not end in a final report as provided under Section 173 (2) of the Code of Criminal Procedure. Arrest under Section 104 is only for the purpose of ensuring a proper inquiry under the provisions of the Customs Act. Section 137(1) of the Customs Act states that no court shall take cognizance of any offence under Sections 132, 133, 134, 135 or Section 135A, except with the previous sanction of the Principal Commissioner of Customs or Commissioner of Customs. Sub-section (3) of Section 137 provides for compounding an offence, either before or after the institution of the prosecution, by the officers empowered thereunder. Compounding of an offence has been made with inbuilt safeguards under Section 137 of the Customs Act. Section 2(r) of the Code of Criminal Procedure defines “police report” as a report forwarded by a police officer to a Magistrate under sub-section (2) of Section 173. Section 173(2) of the Code of Criminal Procedure provides that as soon as the investigation is completed, the officer in charge of the police station shall forward to a Magistrate

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empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating the details mentioned in the said sub-section. "Police Station" is defined under Section 2(s) as any post or place declared generally or specially by the State Government, to be a police station, and includes any local area specified by the State Government in this behalf. Section 2(o) of the Code of Criminal Procedure defines "officer in charge of a police station". A Customs Officer does not come either under Section 2(s) or under Section 2(o). The expressions "officer in charge of a police station", "on a police report" and "prescribed by the State Government" occurring in the Cr.P.C. give a clear indication that in respect of a proceeding under the Customs Act, Section 173(2) of the Code of Criminal Procedure does not apply. Sub-section (5) (b) of Section 173 of the Cr.P.C. also does not apply to a customs case since taking of such a statement is not contemplated under the Customs Act. While defining the "officer in charge of police station" in Section 2(o) of Cr.P.C., the power of the State Government in certain contingencies is contemplated. There is no such power for the State Government to issue such directions in a customs case.

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15. The learned senior counsel appearing for the petitioner heavily relies on Section 4(2) of Cr.P.C. which provides that all offences (other than offences under the Indian Penal Code) under any 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. The learned Additional Solicitor General submitted that under the Scheme of Section 104 of the Customs Act, a Customs Officer is invested with certain powers which a police officer has under the Code of Criminal Procedure and nothing more. In respect of Section 104(3) of the Customs Act, the provisions of the Code of Criminal Procedure are made applicable only for the purpose of releasing a person on bail or otherwise. For contravention of a provision under the Customs Act, a person can be arrested immediately. It is not necessary to register a FIR. If such an interpretation is made, it is submitted that it would defeat the very purpose of the Customs Act. It is also submitted that the arrest is for an immediate purpose to bring the person to book and to facilitate the inquiry as contemplated under the Customs Act. It is submitted

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that the mention of the application of Cr.P.C. in Section 104(3) would have the meaning of exclusion of the Cr.P.C. in respect of other matters in connection with the arrest of the person concerned. Section 104(1) and (2) would ensure procedural safeguards. It is submitted that Ext.P2 arrest memo and Ext.P3 occurrence report would satisfy the procedural safeguards of sub-sections (1) and (2) of Section 104 of the Customs Act. At the present stage of the case, no further information is required by the person who is arrested. It is submitted that the occurrence report produced before the learned Magistrate while producing the accused, by itself is a substitute for a FIR. It is also submitted that the protection guaranteed under Section 22 of the Constitution of India is adequately taken care of in the Customs Act itself. It is pointed out that there is no case for the petitioner that the constitutional safeguards under Article 22(1) and 22(2) of the Constitution of India have been transgressed.

16. Section 151 of the Customs Act provides that the officers mentioned therein are empowered and required to assist the officers of customs in the execution of the Customs Act. The category of officers include officers of police under clause (c) of Section 151.

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The expression “in the execution of this Act” occurring in Section 151 of the Customs Act means on execution by the Customs Officers the officers of police are “empowered and required” under Section 151 of the Customs Act to assist the officers of Customs. 'Empowered' means the police officers need not search for any power to do so under the Code of Criminal Procedure. The expression “are hereby required” means that the police officers are duty bound to assist the officers of Customs in the execution of the Customs Act. It is not possible to equate the officers of Customs with police officers. There is clear demarcation of powers of officers of customs and officers of police under the Customs Act.

17. Under Section 154 of the Code of Criminal Procedure, every information relating to the commission of a cognizable offence, if given to an officer in charge of a police station, shall be reduced to writing and shall be entered in a book to be kept by such officer in such form as the State Government may prescribe. On the other hand, Sections 104, 105 and 106 of the Customs Act use the expression “has reason to believe” in the matter of arrest, search of premises and search of conveyances. “The reason to believe” is

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with respect to commission of an offence under the Customs Act; or reason to believe that the goods are liable for confiscation; or has reason to believe that any aircraft, vehicle or animal or vessel is being or is about to be used in the smuggling of any goods or in the carriage of any goods which have been smuggled, as the case may be. Going by the Scheme of the Customs Act, a search or seizure or arrest of a person need not necessarily lead to the prosecution of the person concerned. It may end in confiscation of the goods, imposing a penalty in adjudication proceedings or it may end up in compounding of the offence. Only in a very few cases detected, it may end in prosecution of the offender. The machinery under the Customs Act is intended to check evasion of duty, smuggling and other activities which would affect the economic stability of the country, whereas an offence under the Indian Penal Code or other penal statutes may, generally speaking, affect an individual or a group of persons. The Customs Act deals with such offences which affect the State, whereas most of the offences under the Indian Penal Code and other penal statutes have impact on an individual or a group of individuals. The prosecuting agency in respect of an offence under the Indian Penal Code is the State. The aggrieved

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party may initiate prosecution as provided under the Code of Criminal Procedure. When the State is the prosecuting agency, the interest of the victim or other aggrieved person is safeguarded by the State. The redressal of the grievances by the victim or other aggrieved person is by providing punishment to the accused who committed the crime. In the case of an offence under the Customs Act, the aggrieved being the State and the offence being against the State, the State need not resort to prosecution in all cases. For every violation under the Customs Act, if First Information Report is to be registered and a final report is to be filed before the Court concerned, it would not serve the purpose for which the Act is intended. As stated earlier, only a very few out of several violations may lead to prosecution of the offender. Most of the cases would end in other measures under the Customs Act. If registration of a FIR is insisted in detection of every violation under the Customs Act, the machinery provided under the Customs Act would be paralyzed. Moreover, the people against whom violation is alleged would also be put to great trouble if FIR is to be registered for every violation. Sometimes, a violation may be of less magnitude while in some other cases organized and pre-concerted grave offence may be

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committed. The course of action to be adopted in different situations is to be decided at the discretion of the officers empowered under the Customs Act. There is built in safeguard for monitoring the situation in the different types of cases. If cognizance is to be taken in respect of an offence under Sections 132, 133, 134, 135 or 135A, previous sanction of the Principal Commissioner of Customs or the Commissioner of Customs is necessary. This is also a safeguard in favour of the person against whom the prosecution is launched under the Customs Act. Every offence under the aforesaid Sections, as a matter of course, does not lead to prosecution. Only if sanction is granted, a prosecution can be launched against an offender under the aforesaid Sections.

18. Offences under the Customs Act are committed or detected mainly at airports, seaports and other places where dutiable goods under the Customs Act are dealt with, whereas offence under the Indian Penal Code may take place at any place. An offence under the Customs Act mainly affects the economy whereas an offence under the Indian Penal Code mainly affects the person and property of individuals. That distinction also has to be borne in mind

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while considering the question whether all the provisions of the Code of Criminal Procedure should be followed in the matter of every customs offence and every customs violation.

19. After collecting all the materials with respect to the offence the officer of the Customs is not expected to file a final report before Court, as provided under Section 173(2) of Cr.P.C.. What is to be done by the officer of the Customs is to file a complaint before the Court concerned, going by the Scheme of the Customs Act. When a matter comes up before Court by way of prosecution, the procedure under the Cr.P.C. would apply to the extent it applies. The complaint filed by the officer under the Customs Act comes under Section 190 (1)(a) of Cr.P.C. and for the purpose of Section 200 of Cr.P.C., it shall be a complaint made in writing by a public servant acting or purporting to act in the discharge of his official duties. The stage of launching of prosecution or cognizance of offence has not reached in the present case. Since the evasion of customs duty in the present case is above Rupees fifty lakhs, the offence is certainly cognizable, as provided under Section 104(4) of the Customs Act.

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20. Now we shall discuss the decisions referred to by the counsel on either side, to the extent to which it is relevant. In **Om Prakash and another v. Union of India and another** **((2011) 14 SCC 1)**, the questions considered by the Supreme Court are stated in paragraphs 1 and 36 of the judgment. The common question posed in paragraph 1 is that since all offences under the Central Excise Act, 1944 or the Customs Act, 1962 are non-cognizable, are such offences bailable. The decision in ***Om Prakash and others v. Union of India and another ((2011) 14 SCC 1)*** was rendered before the insertion of sub-section (6) by Act 23 of 2012. By Act 23 of 2012, sub-section (6) was inserted which provided that notwithstanding anything contained in the Code of Criminal Procedure, 1973, all offences under the Act shall be bailable. Sub-section (6) was substituted by Act 17 of 2013 by which it is provided that the categories of cases covered by sub-section (6) are non-bailable. Sub-section (7) was inserted by Act 17 of 2013, which provides that save as otherwise provided in sub-section (6), all other offences under the Act shall be bailable. Since there was no provision in Section 104 of the Customs Act as to whether the offences are bailable or not, that question was considered by the Supreme Court

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in *Om Prakash's case* and it was held that the offences under the Customs Act are bailable. Sub-section (4) of Section 104 of the Customs Act was substituted by Act 23 of 2012. Before the substitution, sub-section (4) of Section 104 read as follows: "Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898), an offence under this Act shall not be cognizable." The amended Sub-section (4) make certain categories of offences as cognizable. Relying on **Ramesh Chandra Mehta v. The State of West Bengal (AIR 1970 SC 940)**, it was held that officers under the Customs Act are not police officers. It was also held that since all the offences under the Act are non-cognizable, the Customs Officer will have no authority to make arrest without obtaining a warrant. We do not think that the decision in *Om Prakash's case* would help the petitioner to contend that in a customs case it is necessary to register a FIR and after investigation, a final report should be filed under Section 173(2) of Cr.P.C. In the present case, the offence is a cognizable offence. At the time when the decision in *Om Prakash's case* was rendered, an offence under the Customs Act was not cognizable. So also, categorisation of cases which are non-bailable and cases which are bailable was not

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there before the amendment of Section 104 by Act 23 of 2012 and Act 17 of 2013. We do not think that the decision in *Om Prakash's case* would apply to the facts of the present case.

21. A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. It is not a profitable task to extract a sentence here and there from a judgment and to build upon it. A judicial decision is an authority for what it actually decides and not for what can be read into it by implication or by assigning an assumed intention to the Judges, and inferring from it a proposition of law which the Judges have not specifically laid down in the pronouncement. Only the ratio decidendi can act as the binding or authoritative precedent. General observation or casual expression of the Court is not of much avail. While applying a decision to a later case, the Court dealing with it should carefully try to ascertain the principle laid down by the previous decision. The scope and authority of a precedent should never be expanded unnecessarily beyond the needs of a given situation. The only thing binding as an

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authority upon a subsequent Judge is the principle upon which the case was decided. (See **State of Orissa v. Sudhansu Sekhar Misra (AIR 1968 SC 647)**, **Amrendra Pratap Singh v. Tej Bahadur Prajapati and others ((2004) 10 SCC 65)**, **Girnar Traders v. State of Maharashtra and others ((2007) 7 SCC 555)**, **Arun Kumar Aggarwal v. State of Madhya Pradesh and others ((2014) 13 SCC 707)**, **Union of India and another v. Manik Lal Banerjee (AIR 2006 SC 2844)** and **Divisional Controller, KSRTC v. Mahadeva Shetty and another ((2003) 7 SCC 197).**

22. In **Lalitha Kumari v. Government of Uttar Pradesh and others ((2014) 2 SCC 1)**, the issue which arose for consideration was whether a police officer was bound to register a First Information Report (FIR) upon receiving any information relating to commission of a cognizable offence under Section 154 of the Code of Criminal Procedure, 1973 and the police officer has the power to conduct a preliminary enquiry in order to test the veracity of such information before registering the same. The decision in ***Lalitha Kumari's case*** does not as such apply to the present case.

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23. The decision in **State of Haryana and others v. Bhajan Lal and others (1992 Supp.(1) SCC 335)** is also not helpful in resolving the question involved in the present case.

24. In **Soni Vallabhdas Liladhar and another v. The Assistant Collector of Customs, Jamnagar (AIR 1965 SC 481),** a constitution bench of the Supreme Court held that the Customs Officers are not police officers and the statements made to them were not inadmissible under Section 25 of the Indian Evidence Act. In **Ramesh Chandra Mehta v. The State of West Bengal (AIR 1970 SC 940),** a constitution bench of the Supreme Court held:

> "5. ……. For collecting evidence the Customs Officer is entitled to serve a summons to produce a document or other thing or to give evidence, and the person so summoned is bound to attend either in person or by an authorized agent, as such officer may direct, and the person so summoned is bound to state the truth upon any subject respecting which he is examined or makes a statement and to produce such documents and other things as may be required. The power to arrest, the power to detain, the power to search or obtain a

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search warrant and the power to collect evidence are vested in the Customs Officer for enforcing compliance with the provisions of the Sea Customs Act. For purpose of Sections 193 and 228 of the Indian Penal Code the enquiry made by a Customs Officer is a judicial proceeding. An order made by him is appealable to the Chief Customs- authority under Section 188 and against that order revisional jurisdiction may be exercised by the Chief Customs – authority and also by the Central Government at the instance of any person aggrieved by any decision or order passed under the Act. The Customs Officer does not exercise, when enquiring into a suspected infringement of the Sea Customs Act powers of investigation which a police officer may in investigating the commission of an offence. He is invested with the power to enquire into infringements of the Act primarily for the purpose of adjudicating forfeiture and penalty. He has no power to investigate an offence triable by a Magistrate, nor has he the power to submit a report under Section 173 of the Code of Criminal Procedure. He can only make a complaint in writing before a competent Magistrate.

………..

11. The remaining contention that a person against whom an enquiry is made by the Customs Officer under the Sea Customs Act is a person accused

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of an offence and on that account he cannot be compelled to be made a witness against himself, and the evidence if any collected by examining him under Section 171-A of the Sea Customs Act is inadmissible has, also no substance. Why Article 20(3) of the Constitution a person who is accused of any offence may not be compelled to be a witness against himself. The guarantee is, it is true, not restricted to statements made in the witness box. This Court in State of Bombay v. Kathi Kalu Oghad, 1962-3 SER 10 = (AIR 1961 SC 1808) observed at p.37 (of SCR) = (at p.1817 of AIR).

'To be a witness' means imparting knowledge in respect of relevant facts by oral statement or a statement in writing, made or given in Court or otherwise.

"'To be a witness' in its ordinary grammatical sense means giving oral testimony in Court. Case law has gone beyond its strict literal interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in Court or out of Court by a person accused of an offence, orally or in writing." But in order that the guarantee against testimonial compulsion incorporated in Article 20(3) may be claimed by a person it has to be established that when he made the

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statement sought to be tendered in evidence against him, he was a person accused of an offence. Under Section 171-A of the Sea Customs Act, a Customs Officer has power in an enquiry in connection with the smuggling of goods to summon any person whose attendance he considers necessary, to give evidence or to produce a document or any other thing, and by clause (3) the person so summoned is bound to state the truth upon any subject respecting which he is examined or makes statements and to produce such documents and other things as may be required. The expression "any person" includes a person who is suspected or believed to be concerned in the smuggling of goods. But a person arrested by a Customs Officer because he is found in possession of smuggled goods or on suspicion that he is concerned in smuggling is not, when called upon by the Customs Officer to make a statement or to produce a document or thing, a person accused of an offence within the meaning of Article 20(3) of the Constitution. The steps taken by the Customs Officer are for the purpose of holding an inquiry under the Sea Customs Act and for adjudging confiscation of goods dutiable or prohibited and imposing penalties. The Customs Officer does not at that stage accuse the person suspected of infringing the provision of the Sea Customs Act with the commission of any offence. His

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primary duty is to prevent smuggling and to recover duties of Customs: when collecting evidence in respect of smuggling against a person suspected of infringing the provisions of the Sea Customs Act, he is not accusing the person of any offence punishable at a trial before a Magistrate.

…………

23. ………. The Customs Act 52 of 1962 invests the Customs Officer with the power to search a person and to arrest him, to search premises, to stop and search conveyances, and to examine persons, and also with the power to summon persons, to give evidence and to produce documents and (SIC) seizure of goods, documents and things which are liable to confiscation. He is also invested with the power to release a person on bail. He is entitled to order confiscation of smuggled goods and impose penalty on persons proved to be guilty of infringing the provisions of the Act. It is implicit in the provisions of Section 137 that the proceedings before a Magistrate can only be commenced by way of a complaint and not on a report made by a Customs Officer.

24. In certain matters the Customs Act of 1962 differs from the Sea Customs Act of 1878. For instance, under the Sea Customs Act search of any place could

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not be made by a Customs Officer of his own accord: he had to apply for and obtain a search warrant from a Magistrate. Under Section 105 of the Customs Act, 1962, it is open to the Assistant Collector of Customs himself to issue a search warrant. A proper officer is also entitled under that Act to stop and search conveyances: he is entitled to release a person on bail, and for that purpose has the same powers and is subject to the same provisions as the officer in charge of a police station is. But these additional powers with which the Customs Officer is invested under the Act of 1962 do not, in our judgment, make him a police officer within the meaning of Section 25 of the Evidence Act. He is, it is true, invested with the powers of an officer-in-charge of a police station for the purpose of releasing any person on bail or otherwise. The expression "or otherwise" does not confer upon him the power to lodge a report before a Magistrate under Section 173 of the Code of Criminal Procedure. Power to grant bail, power to collect evidence, and power to search premise or conveyances without recourse to a Magistrate, do not make him an officer-in-charge of a police station. Proceedings taken by him are for the purpose of holding an enquiry into suspected cases of smuggling. His orders are appealable and are subject also to the revisional jurisdiction of the Central Board of Revenue and may be

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carried to the Central Government. Powers are conferred upon him primarily for collection of duty and prevention of smuggling. He is for all purposes an officer of the revenue.

25. For reasons set out in the judgment in Criminal Appeal No.27 of 1967 and the judgment of this Court in Badaku Joti Savant's case, 1966-3 SCR 698 = (AIR 1966 SC 1746), we are of the view that a Customs Officer is under the Act of 1962 not a police officer within the meaning of Section 25 of the Evidence Act and the statements made before him by a person who is arrested or against whom an inquiry is made are not covered by Section 25 of the Indian Evidence Act."

25. In **Illias v. The Collector of Customs, Madras (AIR 1970 SC 1065)**, a constitution bench of the Supreme Court held:

"12. ……. After examining the various provisions of the Central Excise Act and in particular Section 21 it was observed that a police officer for the purpose of clause (b) of Section 190 of the Code of Criminal Procedure could only be one properly so called. A Central Excise Officer had to make a complaint under Cl.(1) of Section 190 of the Code to a magistrate to enable him to take cognizance of an offence committed

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under the special statute. The argument that a Central Excise Officer under Section 21(2) of the Central Excise Act had all the powers of an officer-in-charge of a police station under Chapter XIV of the Code and therefore he must be considered to be a police officer within the meaning of those words in Sec. 25 of the Evidence Act was repelled for the reason that though such officer had the power of an officer-in-charge of a police station he did not have the power to submit a charge-sheet under Section 173 of the Code. …….”

26. In **Badaku Joti Savant v. State of Mysore (AIR 1966 SC 1746)**, a Constitution Bench of the Supreme Court held that a Central Excise Officer under the Central Excise and Salt Act, 1944 has no power to submit a charge sheet under Section 173 of the Code of Criminal Procedure. It was held that a police officer for the purposes of clause (b) of Section 190 of the Cr.P.C. can only be a police officer properly so-called. A Central Excise Officer will have to make a complaint under clause (a) of Section 190 of the Cr.P.C.

27. In **Superintendent of Customs v. Ummerkutty & others (1984 K.L.T.1)**, it was held that an officer acting under the provisions

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of the Customs Act is not a police officer or an officer-in-charge of a police station as contemplated in the Code of Criminal Procedure. Therefore, he cannot initiate action under Section 190(1)(b) of the Cr.P.C. He is entitled to submit a complaint under Section 190(1)(a) of the Code.

28. In **Percy Rustomji Basta** v. **The State of Maharashtra (AIR 1971 SC 1087),** following the decision in ***Ramesh Chandra Mehta v. The State of West Bengal (AIR 1970 SC 940)***, the Supreme Court held that a Customs Officer conducting an inquiry under Section 107 or Section 108 of the Customs Act is not a police officer and the person against whom inquiry is made is not an accused and the statement made by such person in that inquiry "is not a statement made by a person accused of an offence". The decision in **Illias v. The Collector of Customs, Madras (AIR 1970 SC 1065)** was also followed in the decision in **Percy Rustomji Basta v, The State of Maharashtra (AIR 1971 SC 1087)**.

29. In **Veera Ibrahim** v. **The State of Maharashtra ((1976) 2 SCC 302)**, the customs authorities called the appellant and his

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companion to the customs house, took them into custody, and after due compliance with the requirements of law, the Inspector of Customs questioned the appellant and recorded his statement under Section 108 of the Customs Act. The Supreme Court held that under the circumstances it was manifest that at the time when the customs officer recorded the statement of the appellant, he was not formally "accused of any offence" and therefore, his statement is not hit by Article 20(3) of the Constitution.

30. In **Directorate of Enforcement v. Deepak Mahajan and another ((1994) 3 SCC 440)**, the question of law raised for consideration by the Supreme Court was the following:

> "Whether a Magistrate before whom a person arrested under sub-section (1) of Section 35 of the Foreign Exchange Regulation Act of 1973 which is in pari materia with sub-section (1) of Section 104 of the Customs Act of 1962, is produced under sub-section (2) of Section 35 of the Foreign Exchange Regulation Act, has jurisdiction to authorise detention of that person under Section 167(2) of the Code of Criminal Procedure?"

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31. Answering the above question, the Supreme Court in ***Deepak Mahajan's case*** held thus:

> "116. It should not be lost sight of the fact that a police officer making an investigation of an offence representing the State files a report under Section 173 of the Code and becomes the complaint whereas the prosecuting agency under the special Acts files a complaint as a complainant i.e. under Section 61(*ii*) in the case of FERA and under Section 137 of the Customs Act. To say differently, the police officer after consummation of the investigation files a report under Section 173 of the Code upon which the Magistrate may take cognizance of any offence disclosed in the report under Section 190(1)(*b*) of the Code whereas the empowered or authorised officer of the special Acts has to file only a complaint of facts constituting any offence under the provisions of the Act on the receipt of which the Magistrate may take cognizance of the said offence under Section 190(1)(*a*) of the Code. After taking cognizance of the offence either upon a police report or upon receiving a complaint of facts, the Magistrate has to proceed with the case as per the procedure prescribed under the Code or under the special procedure, if any, prescribed under the special Acts. Therefore, the word 'investigation' cannot be limited only to police investigation but on the other hand, the said

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word is with wider connotation and flexible so as to include the investigation carried on by any agency whether he be a police officer or empowered or authorised officer or a person not being a police officer under the direction of a Magistrate to make an investigation vested with the power of investigation.

....

120. From the above discussion it cannot be said that either the Officer of Enforcement or the Customs Officer is not empowered with the power of investigation though not with the power of filing a final report as in the case of a police officer.

....

132. For the aforementioned reasons, we hold that the operation of Section 4(2) of the Code is straightaway attracted to the area of investigation, inquiry and trial of the offences under the special laws including the FERA and Customs Act and consequently Section 167 of the Code can be made applicable during the investigation or inquiry of an offence under the special Acts also inasmuch as there is no specific provision contrary to that excluding the operation of Section 167.

....

136. In the result, we hold that sub-sections (1) and (2) of Section 167 are squarely applicable with

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regard to the production and detention of a person arrested under the provisions of Section 35 of FERA and Section 104 of Customs Act and that the Magistrate has jurisdiction under Section 167(2) to authorise detention of a person arrested by any authorised officer of the Enforcement under FERA and taken to the Magistrate in compliance of Section 35(2) of FERA."

32. In **Union of India v. Padam Narain Aggarwal** **(AIR 2009 SC 254),** it was held that the power to arrest a person by a Customs Officer is statutory in character and cannot be interfered with. Referring to Section 108 of the Customs Act, it was held that Section 108 does not contemplate magisterial intervention. The power is exercised by a Gazetted Officer of the Department. It obliges the person summoned to state truth upon any subject respecting which he is examined. He is not absolved from speaking truth on the ground that such statement is admissible in evidence and could be used against him. Section 108 of the Customs Act enables the officer to elicit truth from the person examined. The underlying object of Section 108 is to ensure that the officer questioning the person gets all the truth concerning the incident. It was also held that the statements recorded under Section 108 of the Customs Act are

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distinct and different from the statements recorded by police officers during the course of investigation under the Code. The Supreme Court followed the decisions in **Ramesh Chandra Mehta v, The State of West Bengal (AIR 1970 SC 940)** and **Assistant Collector of Central Excise, Rajamundry v. Duncan Agro Industries Ltd. ((2000) 7 SCC 53)**.

33. Learned senior counsel for the petitioner placed reliance on the decision in **Prashant J.Mehta v. Directorate of Revenue Intelligence (2013 (3) K.L.T. 764).** After referring to the decision in ***Om Prakash and another v. Union of India and another ((2011) 14 SCC 1)*** and the amendments to the Customs Act made subsequently, it was held that "whether the offence is cognizable or non-cognizable, or bailable or non-bailable, all fall within the realm of procedure, and not under substantive law". The learned senior counsel for the petitioner relied on the decision of the Gujarat High Court in ***Rakesh Manekchand Kothari v. Union of India and others (Special Criminal Application (Habeas Corpus) No.4247 of 2015)***, a case under the Prevention of Money Laundering Act, 2002, wherein it was held:

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"20. Therefore, irrespective of whether the offence under PMLA is held to be cognizable or non-cognizable, we find that respective procedure prescribed under the Code ought to have been followed in absence or any inconsistent provision under the PMLA concerning investigation and arrest amongst other proceedings. If the offence under PMLA is held to be cognizable, it was mandatory to comply with sections 154 & 157 apart from sections 167(1) and 172 of the Code. If the offence under PMLA is held to be non-cognizable, it was mandatory to comply with section 155 apart from sections 167(1) and 172 of the Code. We are unable to find any merit in the contention of learned counsel for the respondents as well as their reply that those provisions of the Code are inapplicable merely because provisions of the Code used the word "police officer" and they are officers of Enforcement Directorate. Such interpretation as proposed by the respondents would render section 165 of PMLA meaningless and thus cannot be accepted as contrary to the ratio laid down in Om Prakash v. Union of India (supra) where Central Excise Officer was held to have no authority to arrest without warrant in non-cognizable offence under Central Excise Act 1944 in light of section 155 of the Code."

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34. The Gujarat High Court in **<u>Bhavin Impex Pvt. Ltd. v. State of Gujarat</u> (2010 (260) E.L.T. 526 (Guj.),** considered the question whether the authorities under the Central Excise Act, 1944 have the power to arrest a person under Section 13 of the said Act without a warrant and without filing an FIR or lodging a complaint before a Court of competent jurisdiction. The Gujarat High Court held that mere conferment of powers of investigation into criminal offences under the Central Excise Act does not make the Central Excise Officer a police officer. It was further held:

> "26, From the decisions referred to hereinabove, the following principles emerge:- ……..
>
> (v) Where a Customs Officer arrests a person and informs that person of the grounds of his arrest (which he is bound to do under Article 22(1) of the Constitution) for the purposes of holding an enquiry into the infringement of the provisions of the Customs Act which he has reason to believe has taken place, there is no formal accusation of an offence. In case of an offence by infringement of the 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.

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(vi) Arrest and detention are only for the purpose of holding effectively an inquiry under Sections 107 and 108 of the Customs Act with a view to adjudging confiscation of dutiable or prohibited goods and imposing penalty. At that stage there is no question of the offender against the Customs Act being charged before a Magistrate. Ordinarily, after adjudging penalty and confiscation of goods or without doing so, if the Customs Officer forms an opinion that the offender should be prosecuted, he may prefer a complaint in the manner provided under Section 137 with the sanction of the Collector of Customs and until a complaint is so filed, the person against whom an inquiry is commenced under the Customs Act does not stand in the character of a person accused of an offence under Section 135.

(vii) The Customs Officer is a revenue officer primarily concerned with the detection of smuggling and enforcement and levy of proper duties and prevention of entry into India of dutiable goods without payment of duty and of goods of which the entry is prohibited."

35. In ***Bhavin Impex pvt. Ltd.'s case***, the Gujarat High Court further held that:

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> "31. The above discussion leads to the inevitable conclusion that Section 13 of the Central Excise Act empowers the Central Excise Officers to arrest a person whom he has reason to believe to be liable to punishment under the Act without issuance of warrant and without registration of an FIR or a complaint before the Magistrate."

36. In **Sunil Gupta v. Union of India** **(2000 (118) E.L.T.8 (P&H)),** the Punjab & Haryana High Court held thus:

> "15. It is apparent that the proceedings conducted by an officer of the Central Excise are vitally different from the investigation by a police officer. It is implicit that a person who is making a statement before a Central Excise Officer can be called upon to sign the statement. On a combined reading of Sections 13 and 14, it is clear that an officer of the Central Excise is not a mere police officer. He is different. He is even more. A substantive power to arrest has been conferred on him under Section 13. The proceedings conducted by him are judicial. The person who is interrogated is bound to state the truth.
>
> 16. The main argument of the counsel for the

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petitioners was that despite the provisions of Section 9, it has been provided in Section 9A that the offences "shall be deemed to be non-cognizable …." Section 18 requires that arrest made under this Act shall be carried out in accordance with the provisions of the Code of Criminal Procedure ……." Thus, no arrest can be made by an officer of the Central Excise except by following the procedure applicable to the cases involving non-cognizable offences under the Code of Criminal Procedure. Is it so?

17. In terms of the provisions of Section 2(c) of the Code of Criminal Procedure, a cognizable offence is one "for which ……. a police officer may …… arrest without warrant." Similarly, according to Section 2(l), a non-cognizable offence is that "for which …… a police officer has no authority to arrest without warrant." Despite the fact that punishment for offences under Section 9 may extend to imprisonment for seven years, these are deemed to be non-cognizable within the meaning of Code of Criminal Procedure, 1898. When the provisions are literally construed, the implication is merely that a police officer shall not be able to arrest a person who has committed an offence under Section 9 without a warrant. However, the provision does not say that an "Excise Officer shall be debarred from arresting

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a person who has committed an offence under Section 9 without a warrant." Section 9A merely imports the provisions of Section 2(l) of the Code of Criminal Procedure into the Act and imposes a restriction on the power of the police officer. The authorized officer of the Central Excise being different from a police officer, such an embargo has not been placed by the Parliament on him. Otherwise, the legislature would have clearly said that no person who has committed an offence under Section 9 shall be arrested without a warrant by any one. It does not say so. The omission is not without significance."

37. We agree with the view taken by the Gujarat High Court in ***Bhavin Impex Pvt. Ltd. v. State of Gujarat (2010 (260) E.L.T. 526 (Guj.)*** and the view taken by the Punjab & Haryana High Court in ***Sunil Gupta v. Union of India (2000 (118) E.L.T. 8 (P&H)).*** We are not in agreement with the decision taken by the Gujarat High Court in ***Union of India and another v. Rakesh Manekchand Kothari & another***.

38. Learned senior counsel for the petitioner relied on the

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decision in ***Gorav Kathuria v. Union of India and others (CRWP No.595 of 2016 (O&M) dated 11.5.2016)*** rendered by the Punjab and Haryana High Court which arose under the Prevention of Money Laundering Act. In that case certain provisions of the PMLA and Section 145(ii) of the Finance Act were challenged. The Punjab and Haryana High Court held that subject to the overriding provisions of PMLA and Rules made thereunder, the provisions of the Code of Criminal Procedure would necessarily apply to arrest, search and seizure, attachment, confiscation, investigation, prosecution and all other proceedings under PMLA. It is also in consonance with Section 4(2) read with Section 5 of the Code of Criminal Procedure. The learned senior counsel for the petitioner submitted that Crl.A.No.737 of 2016 was filed before the Supreme Court against the judgment in ***Gorav Kathuria v. Union of India and others*** and the Supreme Court dismissed the appeal holding thus:

> "Though the High Court has granted certificate to appeal, we have heard the learned counsel for some time and are of the opinion that the impugned judgment of the High Court is correct.
>
> This appeal is, accordingly, dismissed."

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Learned Additional Solicitor General submitted that the principles laid down in ***Gorav Kathuria v. Union of India and others*** are against the several decisions of the Supreme Court and the decision of the Punjab and Haryana High Court in **Sunil Gupta v. Union of India (2000 (118) E.L.T. 8 (P&H))** and the decision of the Gujarat High Court in **Bhavin Impex Pvt. Ltd. v. State of Gujarat (2010 (260) E.L.T. 526 (Guj.).** The Additional Solicitor General also submitted that the Criminal Appeal filed before the Supreme Court was not by the Department but Gorav Kathuria, the petitioner in the writ petition. However, the Criminal Appeal was dismissed. It is submitted that there is no finding by the Supreme Court against Union of India. We are inclined to accept the submissions made by the learned Additional Solicitor General in this regard.

39. On applying the principles of law mentioned in the judgments of the Supreme Court and other High Courts mentioned above, we are of the view that registration of FIR is not necessary before arresting a person under Section 104 of the Customs Act. Sections 154 to 157 and Section 173(2) of the Code of Criminal Procedure do not apply to a case under the Customs Act, 1962. For

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the aforesaid reasons, the petitioner is not entitled to reliefs (I) to (IV) in the Writ Petition. Reliefs (V) and (VI) are left open. The petitioner did not press relief (VII) at this stage and prayed for liberty to challenge it at the appropriate stage.

40. In the written submissions made by the learned counsel for the petitioner dated 30.9.2016, it is stated as follows:

> "15. In the instant case, this Hon'ble Court was pleased to grant interim bail to the petitioner vide Order dated 31.7.2015. A copy of the said Interim Order is annexed at **Annexure-D (Pages 81 to 89)** for ready reference.
>
> 16. In view of the above, since the core issue is already decided and the Petitioner is on interim bail, he is also willing for not pressing the prayers and to even withdraw the instant Writ Petition, if the interim bail granted vide Order dated 31.07.2015 to the Petitioner is made absolute and the petitioner is granted liberty to file appropriate proceedings as and when required and if so advised, before lower courts/authorities."

This submission was made after the arguments were made in Court. Therefore, we thought that it would be proper to decide the case on the merits.

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41. Since a Division Bench of this Court granted an interim order of bail to the petitioner as per the order dated 31.7.2015, we do not think it proper to disturb the interim order.

Accordingly, the Writ Petition is dismissed in so far as it relates to reliefs (I) to (IV). Reliefs (V) and (VI) are left open. It is submitted that since the question involved in relief (VII) is pending before the Supreme Court, that relief is not pressed for the time being. Accordingly, we are not considering relief (VII) in the Writ Petition.

K.T.SANKARAN
Judge

RAJA VIJAYARAGHAVAN V.
Judge

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