IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 8669 of 2020

FOR APPROVAL AND SIGNATURE:

HONOURABLE THE CHIEF JUSTICE MR. VIKRAM NATH Sd/-
and
HONOURABLE MR. JUSTICE J.B.PARDIWALA Sd/-

==========

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO
	CIRCULATE THIS JUDGMENT IN THE SUBORDINATE COURTS.	

==========

SUNDEEP MAHENDRAKUMAR SANGHAVI
Versus
UNION OF INDIA

==========

Appearance:
MR CHETAN K PANDYA, ADVOCATE, for the Petitioner.
MR DEVANG VYAS, ASSISTANT SOLICITOR GENERAL OF INDIA, for the Respondents.

==========

CORAM: **HONOURABLE THE CHIEF JUSTICE MR. VIKRAM NATH**
and
HONOURABLE MR. JUSTICE J.B.PARDIWALA

Date : 04/08/2020

ORAL JUDGMENT
(PER : HONOURABLE MR. JUSTICE J.B.PARDIWALA)

1. By this writ-application under Article 226 of the Constitution of India, the writ-applicant, apprehending arrest pursuant to the summons issued to him by the Directorate of

Revenue Intelligence under Section 108 of the Customs Act, 1962, has prayed for the following reliefs :

> *"(A) Issue Writ of Mandamus or Writ of Prohibition or any other order or directions holding that the investigations into the non-cognizable offence(s) under the Customs Act, 1962 without seeking order of the Magistrate under Section 155 Code of Criminal Procedure, 1973 to be null and void ab initio;*
>
> *(B) Issue Writ of Mandamus or Writ of Prohibition or any other order or directions holding that the investigations into the Cognizable offence(s) under the Customs Act, 1962 shall not be done without complying Sections 154, 156, 157 & 172 Code of Criminal Procedure, 1973 and the investigation carried out for the cognizable offence(s) under the Customs Act, 1962 without be illegal, non-est, null and void ab initio as also without jurisdiction; unconstitutional, arbitrary, violative of Article 14 and 21 of the Constitution of India.*
>
> *(C) Issue Writ of Mandamus or Writ of Prohibition or any other appropriate Writ, Order or Directions and thereby this Hon'ble Court may Read Down, Expound, Elaborate and Delineate the Scope and ambit of provisions of Customs Act, 1962 (as amended) especially those relating to Chapter XIII (Searches, Seizure and Arrest) especially Section 104; Chapter XVI (Offences and Prosecutions) especially Section 135 thereof (Evasion of duty or prohibitions), Section 137 (Cognizance of offences) etc. in harmony as well as in juxtaposition with Article 21 of the Constitution of India*

while striking balance with the individual right for fair procedure as also to ensure that resort to the penal action is taken by the Authorities within the sweep of such legal parameters.

(D) Issue Writ of Mandamus or Writ of Prohibition or any other appropriate Writ, Order or Directions deliberating and interpreting the scope as well as perspective of Section 108 of the Customs Act, 1962 since the said sacrosanct provision has become a subject of abuse and misuse by the Respondents who are adopting arm Misting and browbeating methods to extort and extract self-incriminating statements on the pretext of the same being 'admissible in evidence', as the manner of invocation of Section 108 Customs Act,1962 and the interpretation of the same being accorded by the Respondents is completely in contravention to the settled law of the land including the ratio of law laid down by the Hon'ble Supreme Court, Inter alia. in "Noor Aga Vs. State of Punjab, (2008) 16 SCC 417"; "Nirmal Singh Pehalwan @ Nimma v. Inspector, Customs, Customs House, Punjab; (2011) 12 SCC 298"; "Vinod Solanki v. Union of India; (2008) 16 SCC 537" as well as the recent judgment rendered by an Hon'ble Two Judges Bench of the Hon'ble Supreme Court in "Tofan Singh Versus State of Tamil Nadu (2013) 16 Supreme Court Cases 31", whereby, the matter has been referred to a larger bench in a case relating to NDPS Act (provisions contained in Section 67 of NDPS Act), inter alia, to resolve the issue as to whether such a statement is to be treated as statement under Section 161 of the Code of Criminal 'Procedure,1973 or it partakes the

character of a statement under Section 164 of the of the Code of Criminal Procedure,1973 as also whether the officer investigating the matter under these special enactments would qualify as a police officer or not.

(E) At the interim/ad interim stage, pending final disposal of the present petition, the Respondent No.2 may please be refrained from taking any coercive steps interfering with the personal liberty of the Petitioner in File No. DRI/AZU/ SRUNSU/INV-02/2018(151);

(F) At the interim/ad interim stage, pending final disposal of the present petition, permit the Petitioner to accompany an Advocate at visible but not audible distances, during his Interrogation by the officers of the Respondents, in accordance with the general direction given by the Hon'ble Supreme Court in the matter of Vijay Sajnani v. UOI in Crl.M.P. No.10117/2012 in WP (Crl) No.29/2012.

(G) Pass any other or further orders which this Hon'ble Court may deem fit and proper in the interest of justice."

The case put up by the writ-applicant may be summarised as under :

2. The writ-applicant is one of the Directors of a company running in the name of Mahavir Polyfilms Private Limited. The company is engaged in the business of import of plastics past ten years. It is the case of the writ-applicant that he acts as a high-sea seller to a partnership firm running in the name of

Ramniklal & Sons.

3. The respondent no.2 – Senior Intelligence Officer, Directorate of Revenue Intelligence, Sub-Regional Unit at Vapi, has initiated an inquiry against M/s.Ramniklal & Sons in connection with the alleged evasion of duty in the import of goods under the duty free scheme.

4. It is the case of the writ-applicant that he is just a high-sea seller to M/s.Ramniklal & Sons and is not aware about the transactions of duty free imports.

5. It appears from the materials on record and the pleadings that the respondent no.2 is also contemplating to institute criminal prosecution for the offences punishable under Sections 132 and 135 respectively of the Customs Act, 1962.

6. The respondent no.2 issued summons dated 11th April 2018 to the writ-applicant herein asking the writ-applicant to remain present in his office at Vapi on 16th April 2018.

7. Pursuant to the summons dated 11th April 2018, the writ-applicant appeared before the respondent no.2 on 16th April 2018 for the purpose of interrogation. It is the case of the writ-applicant that on that date, he was thoroughly interrogated by the respondent no.2 and lot of harassment was caused to him in the course of the interrogation.

8. It is also the case of the writ-applicant that while he was abroad, the officers of the respondent no.2 raided and carried

out search of his company premises on 11th April 2018. In the course of the search, the officers of the respondent no.2 collected few documents and a hard-drive of the office computer.

9. On 7th December 2018, the writ-applicant received a phone-call from the office of the respondent no.2 at Vapi, asking him to remain present before the respondent no.2 at Vapi. At that point of time, the writ-applicant informed that he has undergone open heart surgery on 18th October 2018 and was just recovering from the same. The respondent no.2 declined to accede to the request made by the writ-applicant and was forced to visit the office at Vapi.

10. It is the case of the writ-applicant that in December 2018, when he attended the office of the respondent no.2 at Vapi, his statement was recorded after being interrogated for more than ten hours and was forced to sign the statement. Later, the writ-applicant retracted the statement being forcibly obtained.

11. It is alleged by the writ-applicant that during each of his visits to the office of the respondent no.2, he was subjected to lot of physical as well as mental torture. In this regard, the writ-applicant has also filed a complaint before the Human Rights Commission and the same is being investigated as on date.

12. It is the case of the writ-applicant that once again he received a summons dated 17th February 2020 to remain present before the respondent no.2 on 25th February 2020. Thereafter, the respondent no.2 again issued a summons dated 6th March 2020, asking the writ-applicant to remain present in his office on

17th March 2020.

13. It is the case of the writ-applicant that having realised that the respondent no.2 is hell bent upon harassing him, he had no other option but to come before this Court with the present writ-application.

SUBMISSIONS ON BEHALF OF THE WRIT-APPLICANT :

14. Mr.Chetan Pandya, the learned counsel appearing for the writ-applicant, has raised the following questions of law for the consideration of this Court :

(1) Can arrest be made exercising powers under Section 104 of the Customs Act, 1962 without following the due procedure as envisaged under Section 28 of the Act, 1962 ?

(2) Whether a person can be arrested for any cognizable offence under the Customs Act, 1962, without following the dictum of the Supreme Court as laid in the case of Lalitha Kumari v. Government of Uttar Pradesh and others, reported in (2014)2 SCC 1 ?

In other words, whether a person can be arrested in connection with any cognizable offence alleged to have been committed under the Customs Act, 1962 without following or complying with the provisions of Sections 154 to 157 of the Code of Criminal Procedure, 1973 ?

(3) Whether the officials of the Directorate of Revenue

Intelligence at Vapi have the jurisdiction to initiate and continue with the investigation though no cause of action and/or offence under the Customs Act, 1962, could be said to have been committed within their territorial jurisdiction ?

(4) Whether a DRI officer falls within the ambit of a 'proper officer' ?

15. Mr.Pandya has significantly pressed into service the decision of the Supreme Court in the case of Om Prakash v. Union of India, reported in (2011)14 SCC 1, to make good his submission that no arrest can be effected under Section 104 of the Customs Act, 1962, without complying with the provisions of Sections 154 to 157 of the Code of Criminal Procedure, 1973. We may observe that the entire petition is based on the decision of the Supreme Court rendered in Om Prakash (supra). While elaborating further with his submissions, Mr.Pandya would submit that the Supreme Court in Om Prakash (supra) has held that if the offence is punishable with imprisonment for less than three years or with fine only, such offence would be bailable. He would submit that under the Customs 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 provisions of the Code of Criminal Procedure. In the case of a cognizable offence, the Customs authorities have to register a First Information Report under Section 154 of the Code and forward a copy of the FIR to the jurisdictional Magistrate under Section 172 of the Code and file a final report under Section 173(2) of the Code.

16. By placing significant reliance on Om Prakash (supra), Mr.Pandya would submit that unless the Customs Act contained specific provisions to the contrary, the offences under the Act shall be investigated, inquired into and tried or otherwise dealt with according to the provisions contained in the Code as provided in Section 4 of the Code of Criminal Procedure, 1973.

17. Mr.Pandya brought to our notice that the specific offences referred to under clause (a) or clause (b) in sub-section (4) of Section 104 of the Act, 1962, which were earlier 'non-cognizable' requiring compliance with Section 155 of the Code of Criminal Procedure, 1973, as held in Om Prakash (supra), were made 'cognizable' with effect from 28th May 2012. All other offences, however, remain 'bailable' irrespective of whether they were cognizable or non-cognizable. It is pointed out that thereafter the Finance Act, 2003, came into force with effect from 10th May 2013. Section 75 thereof substituted sub-section (6) of Section 104 of the Customs Act, 1962, with the following :

> *"(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.

(7) Save as otherwise provided in sub-section (6), all other offences under this Act shall be bailable."

18. Thus, the 'classification of offences' under Section 135 of the Customs Act, 1962, again came to be amended with effect from 10th May 2013 and the offences committed under Section 135 of the Customs Act, 1962, on or after 10th May 2013 relating to the four clauses under the substituted sub-section (6) were made 'non-bailable' and the rest remained 'bailable' under sub-section (7) of Section 104 of the Customs Act, 1962.

19. In the aforesaid context, Mr.Pandya vehemently submitted that there is no specific or contrary provision in the Act, 1962, to exclude the operation and implementation of Sections 154 to 157 of the Code of Criminal Procedure, 1973, and other consequent provisions. It is only if a specific procedure is provided under the Customs Act, 1962, the same may prevail over the specified provisions in the Code of Criminal Procedure, 1973.

20. Mr.Pandya would submit that in Om Prakash (supra), the Supreme Court considered various statutory provisions, more particularly Sections 2(a), 2(c), 2(l), 41, 42, 155, 436 and the First Schedule appended to the Code of Criminal Procedure, 1973. All these provisions were considered by the Supreme Court in the context of the Central Excise Act, 1944, as well as the Customs Act, 1962.

21. Mr.Pandya vehemently submitted that the issue of summons under Section 108 of the Customs Act, 1962, without complying with the mandatory provisions of Sections 154, 155 and 157 of the Code of Criminal Procedure, 1973, could be termed as without jurisdiction.

22. Referring to the decisions of the Supreme Court in Noor Aga v. State of Punjab, AIR 2009 SC (Supp) 852; Vinod Solanki v. Union of India and another, 2009 (233) ELT 157 (S.C.) and Nirmal Singh Pehlwan alias Nimma v. Inspector, Customs, Customs House, Punjab, (2011)12 SCC 298, Mr.Pandya would submit that the statement recorded by the Customs Officer while the person is in custody of such officer is inadmissible in evidence and clearly hit by Section 25 of the Evidence Act, 1872.

23. Mr.Pandya thereafter proceeded to make his submissions on the territorial jurisdiction of the officials of the Directorate of Revenue Intelligence to issue summons to the writ-applicant under Section 108 of the Customs Act, 1962. Mr.Pandya would submit that his client is a resident of Mumbai and is engaged in the business at Mumbai. The writ-applicant sold goods under

the high-sea sale agreement and did not import any goods. He would argue that the jurisdiction of the officials to invoke the power under the Customs Act, 1962 would be dependent on the cause of action for the evasion of the Customs duty. He would argue that such cause of action so far as the case on hand is concerned, could be said to have arose at the port of discharge. In other words, the officials under the Customs Act, 1962, can initiate the proceedings for evasion of the Customs duty within the territorial jurisdiction where the goods are imported or to be utilized if exempted from the payment of duty under any license or exemption circular/notification or scheme. Referring to the decision of the Supreme Court in the matter of Union of India and others v. Ram Narain Bhiswanath and others, reported in (1998)9 SCC 285, Mr.Pandya would argue that the cause of action for initiating the proceedings for evasion of the Customs duty arises at the port of discharge. In other words, once the goods are assessed by the Customs Officer, the cause of action arises within the jurisdiction of the Customs Officer who, at the first initial stage, assessed the goods, because while passing an assessment order, the officer would be exercising quasi-judicial power.

24. Mr.Pandya thereafter argued that the DRI officer is not a 'proper officer' as held by the Supreme Court in the case of Commissioner of Customs v. Sayed Ali and another, reported in (2011)3 SCC 537. It is argued that in view of the same, the officers of the DRI have no jurisdiction to issue show-cause notice or summons under Section 108 of the Customs Act, 1962.

25. In the last, Mr.Pandya submitted as regards the undue harassment caused by the officials in the name of interrogation pursuant to the summons issued under Section 108 of the Customs Act, 1962. He would submit that the DRI, Vapi, has no territorial jurisdiction to investigate as the entire cause of action if at all could be said to have arose in Mumbai. Despite the same, the DRI officials have issued various summons under Section 108 of the Customs Act, 1962, over a period of time to the writ-applicant.

26. In such circumstances referred to above, Mr.Pandya would submit that this Court may issue a declaration that the DRI, Vapi, has no jurisdiction to investigate into the alleged illegal import transaction. Mr.Pandya would submit that there being merit in his application, the same be allowed and the reliefs prayed for may be granted.

SUBMISSIONS ON BEHALF OF THE RESPONDENTS :

27. Mr.Devang Vyas, the learned Assistant Solicitor General of India, appearing on behalf of the respondents, has vehemently opposed this writ-application. Mr.Vyas would submit that there is no merit in any of the submissions canvased on behalf of the writ-applicant.

28. The first submission of Mr.Vyas is that the reliance placed on the decision of Om Prakash (supra) is absolutely misplaced. Mr.Vyas would submit that the ratio as discernible from Om Prakash (supra) has no application worth the name to the case

on hand. Mr.Vyas would submit that the issue raised before the Supreme Court in Om Prakash (supra) was relating to the provisions of the Customs Act, 1962 and the provisions of the Central Excise Act, 1944. The common question in these two sets of matters was, as stated by the Supreme Court - "since all the offences under the Central Excise Act, 1944 and the Customs Act, 1962 are non-cognizable, are such offences bailable ?" Mr.Vyas would argue that in that context, it was found that the provisions of both these Acts were in *pari materia* to each other and the provisions of both the Acts provided that certain offences therein were non-cognizable.

29. Mr.Vyas would submit that the essential question to be considered in the present case is, whether the Customs Officers/ DRI Officers are police officers and whether they are required to register FIR in respect of an offence under Section 135 of the Customs Act. While referring to the various provisions in the Customs Act and the Code of Criminal Procedure, Mr.Vyas submitted that the Code has very limited applicability in respect of the matters covered by the Customs Act. Mr.Vyas would argue that the Code applies only to the extent it is provided in the Customs Act. The registration of FIR is not a requirement under the Customs Act. He would vehemently argue that the Customs/ DRI officers are not the police officers.

30. Mr.Vyas would argue that Sections 154 to 157 and 173(2) of the Code of Criminal Procedure, 1973, do not apply to a case under the Customs Act, 1962.

31. Mr.Vyas would submit that the allegations of harassment at the end of the DRI officials at Vapi are without any foundation. He would submit that this Court may not take cognizance of such stray allegations of harassment. Mr.Vyas would argue that the DRI officials intend to interrogate the writ-applicant in connection with a very serious economic offence and it is expected of the writ-applicant to cooperate in such investigation. Mr.Vyas would submit that there is no merit in the submissions canvassed on behalf of the writ-applicant that the DRI officials at Vapi have no territorial jurisdiction to investigate into the matter.

32. In the last, Mr.Vyas submitted that the DRI officer is a 'proper officer'. Mr.Vyas invited the attention of this Court to the amended Section 28 of the Customs Act, 1962, which says that the DRI officer is a 'proper officer'. Mr.Vyas pointed out that the decision rendered by the Delhi High Court in the case of Mangali Impex v. Union of India, reported in (2016) 335 ELT 605 (Delhi), taking the view that even after the amendment in the Customs Act, 1962, the DRI officer is not a 'proper officer' has been stayed by the Supreme Court in the SLP filed by the Union of India. The order is reported in (2016) 339 ELT A49 (SC).

33. In such circumstances referred to above, Mr.Vyas prays that there being no merit in this writ-application, the same may be rejected.

ANALYSIS :

34. Having heard the learned counsel appearing for the parties and having gone through the materials on record, we formulate

the following questions of law for due consideration of the various issues raised in the present litigation :

(1) Whether the provisions of Sections 154 to 157 and 173(2) of the Code of Criminal Procedure, 1973, would apply in respect of the proceedings under the Customs Act, 1962, in view of Section 4(2) of the Code, and whether in respect of the offences under Sections 133 to 135 of the Customs Act, 1962, the registration of the FIR is mandatory before the person concerned is arrested and produced before the Magistrate ?

(2) Whether the Customs/DRI officers are police officers and, therefore, are required to register FIR in respect of an offence under Sections 133 to 135 of the Customs Act, 1962 ?

(3) Whether the summons issued by the DRI officer to the writ-applicant under Section 108 of the Customs Act, 1962, could be said to be without jurisdiction ?

(4) Whether a DRI officer is a 'proper officer' for the purposes of Section 28 of the Customs Act, 1962 ?

(5) Whether the decision of the Supreme Court in the case of Om Prakash (supra) has any bearing in the present case ?

(6) Whether the writ-applicant has made out a prima facie case to substantiate his allegation of undue harassment being caused by the DRI officials in the name of investigation ?

35. Before adverting to the rival contentions canvassed on either side and the above referred questions, we must look into few relevant provisions of the Customs Act, 1962, as well as the Code of Criminal Procedure, 1973.

36. The Customs Act consolidates and amends the law relating to Customs.

Chapter IV empowers the Central Government to prohibit import or export of goods of specified description.

Chapters IVA to IVC relate to detection of illegally imported goods, prevention of disposal thereof, etc. Chapter XIII (Sections 100-110) is an important chapter and deals with search, seizure and arrest. Sections 100-103 authorise the Customs Officers to search suspected persons. Section 104 enables the Customs Officers to arrest a person. Similarly, the power to search premises and conveyances is found in Sections 105 to 106A. Sections 107-09 empower the Customs Officers to examine persons and summon them to give evidence and produce documents. Seizure of goods, documents and things can be effected under Section 110.

Chapter XIV provides for confiscation of goods and conveyances as also imposition of penalties. Chapter XVI (Sections 132-140A) deals with offences and prosecutions.

37. Having noticed the relevant provisions of the Customs Act, let us now consider the ambit and scope of the power of arrest.

The term 'arrest' has neither been defined in the Code of Criminal Procedure, 1973, nor in the Indian Penal Code, 1860, nor in any other enactment dealing with offences. The word 'arrest' is derived from the French word 'arrater' meaning "to stop or stay". It signifies a restraint of a person. 'Arrest' is thus a restraint of a man's person, obliging him to be obedient to law. 'Arrest' then may be defined as "the execution of the command of a Court of Law or of a duly authorized officer".

Sections 41-44 and 46 of the Code of Criminal Procedure, 1973, deal with the arrest of a person. Section 41 empowers a Police Officer to arrest any person without warrant. Section 42 deals with the power of a Police Officer to arrest any person who, in the presence of such Police Officer, has committed or has been accused of committing a non-cognizable offence and refuses to give his name and residence or gives a name or residence which such officer has reason to believe to be false. Section 43 enables a private person to arrest any person who, in his presence, commits a non-cognizable offence, or is a proclaimed offender. Section 44 deals with cases of arrest by a Magistrate. Section 46 lays down manner of arrest.

38. So far as the Customs Act, 1962, is concerned, the power to arrest is contained in Section 104 thereof. It reads thus;

"Power to arrest.--(1) If an officer of Customs empowered in this behalf by general or special order of the Commissioner

of Customs has reason to believe that any person in India or within the Indian Customs waters 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 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 (5 of 1898), an offence under this Act shall not be cognizable."

39. Section 104 thus empowers a Customs Officer to arrest a person if he has 'reason to believe' that such person has committed any offence mentioned therein. It also enjoins the officer to take the arrested person to a Magistrate 'without unnecessary delay'. The section also provides for release of such person on bail.

40. As we are dealing with the subject of Section 108 of the Customs Act, 1962, we may remind ourselves that the

constitutional validity of Section 108 of the Act, 1962, came to be challenged before this High Court in the case of Rajnishkumar Tuli Proprietor and another v. State of Gujarat and another, reported in MANU/GJ/7361/2007. A coordinate bench of this Court, while upholding the validity of Section 108 of the Customs Act, 1962, held as under :

> *"25. After having heard learned advocates appearing for the respective parties and after having gone through the memo of petitions, affidavit-in-reply, rejoinder affidavit as well as documents attached therewith, we are of the view that there is no substance or merits in the arguments canvassed on behalf of the petitioners. We could have summarily dismissed these petitions without entering into such elaborate discussion. It is only because of the fact that constitutional validity of Section 108 of the Customs Act is sought to be challenged by the petitioners, several aspects of the issue are taken into consideration. As far as vires of Section 108 of the Customs Act is concerned, the main argument of Mr. Raju is that though there is specific provision under Section 160(1) of the Code of Criminal Procedure 1973, with regard to recording of statements of the witnesses by the Police Officers of the adjoining police station and also there is specific provision to provide expenses if such statements are recorded at the Police Station which is far away from the residence of the deponent no such provisions are made under Section 108 of the Act. To deal with this argument, it is to be seen that there is always a presumption in favour of the constitutionality of a statute and the burden is upon the*

person who attacks it to show that there has been a clear transgression of the constitutional principles. This burden cannot be discharged by pointing out a provision contained in Section 160 of the Criminal Procedure Code. As a matter of fact, similar provisions are found in Section 11(3) of the Industrial Disputes Act, Section 33(3) of Insurance Act, Sections 27, 474 and 498 of the Companies Act and Sections 454(6) and (7) of the Banking Companies Act. All these sections provide for recording of evidence with due formality and these provisions are used against the deponent in any civil or criminal proceedings. It is further to be seen that petitioners have challenged the constitutional validity of Section 108 on the touchstone of Article 14 & 20(3) of the Constitution of India. However, there is no violation of any of these constitutional provisions. There is no discrimination at all. All are treated in a like manner and there is no hostile discrimination while dealing with the persons whose statements are to be recorded under Section 108 of the Act. There is no dispute about the fact that the object of recording the statement under Section 108 of the Act is to collect information in relation to the contravention of the provisions of the Act. These proceedings are judicial proceedings and the inquiry contemplated therein is only for the purpose of preventing the contravention or detection of offences and the legislative intention behind it is to safeguard the revenue and reimburse the Government which are not essentially powers of a criminal prosecution. It is also to be seen that it is not a solitary case of the petitioners that they have been summoned to Ahmedabad to give their evidence. Many of the High Seas sellers from Mumbai who

had sold the imported goods to Tarachand Group of Companies were summoned to Ahmedabad to give their evidence and their confessional statements were recorded under Section 108 of the Customs Act. It is also relevant consideration to decide the issue that there is serious allegation against the petitioners to the effect that they are consciously involved in the diversion of the duty free raw material of Tarachand Group of Companies. It is, therefore, not feasible for a Gazetted Officer to carry all the records to each and every place to record the evidences of various persons involved in the investigation. It is also clear from the very nature of proceedings that the Customs Officers are not Police Officers and only for limited purposes in relation to the Criminal Procedure Code, provisions had been made in some cases for the Customs Officers to act as Police Officers. Summons under Section 108 of the Act have been issued to record the evidence of the petitioners and to produce documents relating to the inquiry being conducted by the department and hence, it may not be possible to state what would be the questions to be put forth to the petitioners and what are the evidences available with the department. The challenge to the provision of Section 108 on the ground that the same being violative of Article 20(3) of the Constitution of India is also devoid of any merits.

26. The Hon'ble Supreme Court has considered this aspect in the case of Veera Ibrahim v. The State of Maharashtra and observed that when the statement of a person was recorded by the Customs Officer under Section 108, that person was not a person 'accused of any offence' under the

Customs Act. An accusation which would stamp him with the character of such a person was levelled only when the complaint was filed against him, by the Assistant Collector of Customs complaining of the commission of offences under Section 135(1) and Section 135(2) of the Customs Act. It is, therefore, clear that when the Summons is issued under Section 108, he is merely called upon to give his evidence for departmental proceedings and, therefore, there is no question of it being in violation of Article 20(3) of the Constitution of India. Similarly, provisions of Section 108 of the Customs Act have also come up for consideration before the Hon'ble Supreme Court in the case of Assistant Collector of Central Excise, Rajamundry v. Duncan Agro Industries Ltd. and Ors. wherein it is held that Section 108 of the Customs Act does not contemplate any magisterial intervention. The power under the said Section is intended to be exercised by a Gazetted Officer of the Customs department. Sub-section (3) enjoins on the person summoned by the Officer to state the truth upon any subject respecting which he is examined. He is not excused from speaking the truth on the premise that such statement could be used against him. The said requirement is included in the provision for the purpose of enabling the Gazetted Officer to elicit the truth from the persons interrogated. Therefore, the challenge on the ground of violation of Article 20(3) is equally untenable. Support can also be derived from the decision of the Hon'ble Supreme Court in the case of Percy Rustomji Basta v. The State of Maharashtra wherein it is held that a person summoned under Section 108 of the Customs Act is bound to appear and state the truth when giving evidence.

The fact that the petitioners have chosen not to appear itself is indicative of the intention of the petitioners to evade participating in the investigation process. It cannot be expected that the department should adopt a system or practice of going to different places for the purposes of recording the statements of the persons under Section 108 of the Act during the course of investigation. For all these reasons, we are of the view that the provisions contained in Section 108 of the Customs Act are in accordance with the constitutional principles and they are not violative of either Article 14 or 20(3) of the Constitution of India."

41. We may also quickly answer the question as the same is no longer *res integra*, whether the Customs/DRI officers are police officers and whether they are required to register FIR in respect of an offence under Sections 133 to 135 of the Customs Act, 1962.

42. 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 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.

43. 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 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 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-Aof 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, 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 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 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 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 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, 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."

44. 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 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. ....."

45. 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 Code 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 Code.

46. In Superintendent of Customs v. Ummerkutty & others, 1984 K.L.T. 1, it was held that an officer acting under the provisions 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 Code. He is entitled to submit a complaint under Section 190(1)(a) of the Code.

47. 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.

48. In Veera Ibrahim v. The State of Maharashtra, (1976) 2 SCC 302), the Customs authorities called the appellant and his 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 of India.

49. 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?"*

50. 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 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 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."

51. 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 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).

52. This Court, in Bhavin Impex Pvt. Ltd. v. State of Gujarat, 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. This 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.*
>
> *(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."

53. In Bhavin Impex Pvt. Ltd.'s case, this Court further held that:

"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."

54. 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 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 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."

55. Thus, the above referred case-law makes it abundantly clear that the Customs/DRI officers are not police officers. 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 such inquiry is made is not an accused. The power to arrest a person by a Customs officer is statutory in character and ordinarily should not be interfered with by the court unless compelling circumstances are made out. The statements recorded under Section 108 of the Customs Act are

distinct and different from the statements recorded by the police officers under Section 161 of the Code of Criminal Procedure during the course of investigation under the Code.

56. In the State of Punjab v. Barkat Ram, [1962]3 SCR 338, the question of applicability of Section 25 of the Evidence Act to the statements made before the Customs officers was raised. In this case, the Supreme Court said that the words 'police officer' are not to be construed in a narrow way, but should be construed in a wide and popular sense, with a further rider that the expression should not be given such a wide meaning as to include persons on whom certain police powers are conferred. The Supreme Court, observing that the Customs officer is not primarily concerned with the detection and punishment of crime committed by a person, but is mainly interested in the detection and prevention of smuggling of goods and safeguarding the recovery of customs duties and that he is more concerned with the goods and customs duty than with the offender, held that the duties of the Customs officers are very much different from those of the Police officers, and therefore, Section 25 of the Evidence Act cannot apply to the statements recorded by them. The ratio of this decision is that though a Customs officer may, in order to enable him to discharge his duties efficiently, be invested with some powers, which may have similarity with those of the Police officers, yet since the primary purpose of investing of such powers in him is not for the purpose of maintaining law and order but for a specific purpose such as, safeguarding the revenues of the State or its economy, he will not fall within the expression 'police officer' and the statement recorded by him would not be hit by Section 25 of the Evidence

Act. This view has been later reaffirmed in the case of Badaku Joti v. State of Mysore, 1966 CriLJ 1353, by a bench of five Judges.

57. We may also look into the decision of the Supreme Court in the case of Raja Ram v. State of Bihar, 1964 CriLJ 705. That case arose under the Bihar and Orissa Excise Act, 1915, where it was strenuously argued that the earlier view had been modified. In this case, a statement was recorded by the Sub-Inspector of Excise, and at the time of the trial, a contention was raised that Section 25 of the Indian Evidence Act was applicable inasmuch as his powers were those of a Police officer, therefore, he fell within the expression 'police officer'. This case was heard by a bench of three Judges and was decided by majority of two. Raghubar Dayal J. differed from the majority view. Section 78, as quoted in paragraph (36) of the dissenting judgment indicates that any Collector or any Excise Officer who is empowered under Section 77(2) of that Act would exercise any of the powers conferred upon a Police officer making an investigation or upon an officer in charge of a police station by Sections 160 to 171 of the Code of Criminal Procedure, and in respect of certain offences punishable under Sections 47, 49, 55 or 56 of the said Act any of the powers conferred upon the Police officers in respect of cognizable offences by the clause first of sub-section (1) of Section 54 and by Section 56 of the Code. It makes applicable the provisions of the Code to all such investigations subject to any restrictions imposed by the State Government under its rule-making powers. Sub-section (3) of Section 77 of the said Act further provides that the area in respect of the area

to which an Excise Officer is appointed shall be deemed to be a police station and such officer shall be deemed to be the officer in charge of such station. Sub-section (4) also further provides that after the investigation is completed by such officer he has to send a report to the Magistrate and that report is deemed to be a police report for the purpose of Section 190 of the Code. In the majority judgment Mudholkar J. clearly brings out the fine distinction between the provisions of the Sea Customs Act of 1878 and the Excise Act with which Their Lordships were dealing, saying (p. 833) :

> *".....The position of an Excise officer empowered under S. 77 (2) of the Bihar and Orissa Excise Act is not analogous to that of a Customs Officer for two reasons. One is that the Excise officer does not exercise any judicial powers just as the Customs officer does under the Sea Customs Act, 1878. Secondly, the Customs officer is not deemed to be an officer in charge of a police station and therefore, can exercise no powers under the Code of Criminal Procedure and certainly not those of an officer in charge of a police Station."*

58. His Lordship points out that though the officers under the Sea Customs Act have some powers analogous to those of the police officers under the Code, yet they are not identical with those of the police officers as they are not derived from or by reference to the Code. Their Lordships distinguished Barkat Ram's case, [1962]3 SCR 338 and held that the statement recorded by the Excise officer was hit by Section 25 of the Evidence Act.

59. A similar case again came up before the Supreme Court in Badaku Joti (supra) which has been referred to above by us. As we have stated, the case was decided by a bench of five Judges. Both Barkat Ram's case, [1962]3 SCR 338 and Raja Ram's case, 1964 CriLJ 705, were referred to. The question as to whether Section 25 of the Evidence Act should be construed in a narrow way as was done in Radha Kishun Marwari, v. Emperor, ILR 12 Pat 46 = AIR 1932 Pat 293, or liberally as was done in Nanoo Sheikh Ahmed v. Emperor, AIR 1927 Bom 4, was left open. The case arose under the Central Excise and Salt Act, 1944, and Their Lordships held that even if the wider meaning of the expression 'Police Officer' were adopted, the officer under the Central Excises and Salt Act could not be regarded as a police officer and Section 25 of the Evidence Act would not apply to a statement recorded by such an officer. In this case the test of main purpose of giving of the powers was again adopted. Their Lordships pointed out that the main purpose of that Act was to levy and collect excise duties and that the Central Excise officers have been appointed under the Act for that purpose and in order that they may efficiently discharge their duties and prevent evasion of the duty certain powers of investigation, search and seizure are vested in them. It was further emphasized that after the investigation, the officer had not to submit a report to the Magistrate unlike a police officer, and this very clearly distinguished an Excise Officer from a Police Officer. Having regard to this decision, it seems to us that it is difficult to hold that the test laid down in Barkat Ram's case, [1962]3 SCR 338, viz., the primary purpose of investing the officers with the

powers of search and seizure and others powers, was given up and the new test accepted. The Larger Bench in Badaku Joti's case, 1966 CriLJ 1353, reaffirmed the test laid down in Barkat Ram's case, [1962]3 SCR 338, and distinguished Raja Ram's case, 1964 CriLJ 705, on the construction of the Bihar and Orissa Excise Act, 1915, only.

60. We are not satisfied that under the Act of 1962 such powers have been vested in the Customs officers that they must be regarded as police officers. A close reading of the provisions shows that the powers that are conferred upon them do not make them police officers or bring them to the level of police officers and are merely intended to avoid certain inconveniences in the discharge of their duties. When we say inconveniences; inconveniences both to the citizen and to the department. The powers of search, seizure and arrest are contained in Chapter 13 of the Act of 1962.

61. Much reliance is, however, placed by Mr.Pandya on the provisions of Section 104 of the Customs Act, 1962 which contains the power of arrest. Section 104 is equivalent to Sections 173 to 175 of the old Act. Under those sections if a reasonable suspicion existed against any person that he was guilty of an offence under that Act, he could be arrested in any place by any officer of the Customs or other person duly employed for the prevention of smuggling. Under Section 174 of the old Act every person arrested had forthwith to be taken before the nearest Magistrate or Customs Collector. If he was taken to a Magistrate, then the Magistrate under Section 175

could direct him to be committed to jail or to be kept in the custody of a Police for such time as was necessary to enable the Magistrate to communicate with the proper officers of the Customs and it provided that the Magistrate should release any such person on his giving satisfactory security. Section 104 of the Customs Act, 1962 restricts the exercise of the power of arrest to officers who are either generally or specially authorised by the Collector of Customs only if they have reason to believe that an offence has been committed. The marked difference between Section 173 of the old Act and Section 104 of the Act, 1962 is that, under the old Act he could arrest on a reasonable suspicion, while under the new section he must have reasonable belief that the person has been guilty of an offence. Certainly, the provision is for the benefit of the citizen and it is not intended to invest the Customs officers with larger powers. Sub-section (2) of Section 104 of the Act, 1962, is practically similar to Section 174 of the old Act except that the word 'forthwith' has been substituted with the words 'without unnecessary delay'. This, however, means the same thing. It is intended to meet an inconvenience of a temporary duration. Sub-section (3), however, is very much relied for it provides:

> *"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."*

62. Now, it is true that there is a reference to an 'officer-in-charge of a police station' in this sub-section. But then the question is what powers of the police officer are given to the Customs officers. The provision does not give the Customs officers the powers of the officer-in-charge of a police station in respect of the investigation and report. Instead of defining power to grant bail in detail saying as to what they should do or should not do, the short and expedient way of referring to the powers of another officer when placed in somewhat similar circumstances has been adopted. By its language the sub-section does not equate the officers of the Customs with an officer-in-charge of a police station, nor does it make him one by implication. It only, therefore, means that he has got powers as defined in the Code of Criminal Procedure for the purpose of releasing such person on bail or otherwise.

63. Mr.Pandya contended that by reason of the provisions of Section 4(2) of the Code of Criminal Procedure, 1973, an inquiry by the Customs officer becomes an inquiry under Chapter 12 of the Code of Criminal Procedure and, therefore, Section 162 of the Code would be attracted and the statement would not be admissible. In the first place, a Customs officer is not a Police officer. As Section 162, Cr. P. C., by its terms requires that the statement must be made to a Police officer in an investigation under the said Chapter. Section 4(2) of the Code which provides that offences under other laws shall be investigated under the Code, is subject to the qualification '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 offence'. In our view, the Customs Act, 1962, is such an enactment which has provided its own procedure for investigating into the offences committed under it and the provisions of Chapter 12 of the Code, therefore, would not apply to such investigations.

64. In Illias v. Collector of Customs, reported in (1969) 2 SCR 613, the Supreme Court summarized the comparison made between the duties and powers of Police Officers and Customs Officers made in Barkat Ram's case as follows:

> (1) The police is the instrument for the prevention and detection of crime which can be said to be the main object of having the police. The powers of Customs Officers are really not for such purpose and are meant for checking the smuggling of goods and due realization of Customs duties and for determining the action to be taken in the interest of the revenue country by way of confiscation of goods on which no duty had been paid and by imposing penalties and fines.
>
> (2) The Customs staff has merely to make a report in relation to offences which are to be dealt with by a Magistrate. The Customs Officer, therefore, is not primarily concerned with the detection and punishment of crime but he is merely interested in the detection and prevention of smuggling of goods and safeguarding the recovery of Customs duties.

(3) The powers of search etc. conferred on the Customs Officers are of a limited character and have a limited object of safeguarding the revenues of the State and the statute itself refers to police officers in contradiction to Customs Officers;

(4) If a Customs Officer takes evidence under Section 171-A and there is an admission of guilt, it will be too much to say that that statement is a confession to a police officer as a police officer never acts judicially and no proceeding before him is deemed to be a judicial proceeding for the purpose of Sections 193 and 228 of the Indian Penal Code or for any other purpose.

65. A Division Bench of this Court in N.H.Dave, Inspector of Customs v. Mohmed Akhtar, reported in 1984 (15) E.L.T. 353 (Guj), while dealing with the question as regards the manner in which a person arrested under the provisions of Section 104 of the Customs Act is required to be dealt with by the Magistrate before whom he is taken in obedience to the mandate contained in Section 104(2), adverted to the following propositions which emerge from the provisions of the Act and the Code, namely :-

(1) That an offence under Section 135 of the Customs Act is a non-cognizable offence, that is to say it is an offence which cannot be investigated by the police;

(2) The Code of Criminal Procedure is applicable mutatis

mutandis to proceedings in relation to offences other than an offence under Indian Penal Code to the extent specified in sub-section (2) of Section 4 of the Code and that the Code would be applicable to this extent even in respect of an offence under Section 135 of the Customs Act. The Court referred to the provision contained in Part II of the First Schedule to the Code and more particularly to the first and second entries therein. The Court found that by virtue of the first entry in respect of offences against other laws, that is to say, laws other than Indian Penal Code, an offence punishable with imprisonment for a period of three years and upwards but not exceeding seven years is also classified as non-bailable. So also by virtue of Entry No.2 an offence punishable with imprisonment for a period of three years and upwards but not exceeding seven years is also classified as non-bailable. An offence under Section 135 of the Customs Act is in any event punishable with imprisonment of three years and upwards but not exceeding three years. Regardless of the value of goods in any event the offence is punishable with imprisonment for three years. Such being the position the offence is non-bailable.

66. The court held that sub-section (2) of Section 4 provides that all offences under any law other than the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions (that is to say provisions of the Code of Criminal Procedure), subject to two limitations. In case there is some enactment regulating the manner or place of

investigating, inquiring into, trying or otherwise dealing with such offences, the provisions contained in the said enactment would prevail against the corresponding provisions of the Code. In the matter of the provisions of the Code of Criminal Procedure as to bails and bonds embodied in Chapter XXXIII of the Code, the provisions would be attracted even in regard to offences under the Customs Act by virtue of sub- section (2) of Section 4 of the Code. The court was of the view that a person arrested under Section 104(1) of the Customs Act would certainly fall within the orbit of the expression 'Suspected of the commission of any non-bailable offence'. The court held that a person arrested by a Customs Officer under Section 104 would be a person suspected of the commission of such an offence inasmuch as the arrest itself is made when the officer of Customs has reason to believe that such a person has been guilty of an offence punishable under Section 135. Thus, Section 437(1) in terms is applicable when any person arrested under Section 104 by an officer of Customs is brought before the Magistrate.

67. From the above, the following is discernible :

(i) The main purpose of the provisions of the Customs Act is levy and collection of duty on imports and exports, import export procedures, prohibitions on imports and exports of goods, penalties, offences, etc. and the customs officers have been appointed thereunder for this main purpose. In order that they may carry out their duties in this behalf, powers have been conferred on them to see

that duty is not evaded and persons guilty of evasion of duty are brought to book.

(ii) A Customs Officer is not a member of the police force. He is not entrusted with the duty of maintaining law and order. He is entrusted with powers that specifically relate to the collection of customs duty and prevention of smuggling. The power to arrest, the power to detain, the power to search or obtain a search warrant and the power to collect evidence are vested in the Customs Officer for enforcing compliance of the provisions of the Sea Customs 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 investing 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 the competent Magistrate.

(iii) 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 goods 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 enquiry under the Customs Act and for adjudging confiscation of goods dutiable or prohibited and imposing penalties. The Customs Officer Officer does not at that stage accuse the person suspected of infringing the provision of the Customs Act with the commission of any offence. His 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 Customs Act, he is not accusing the person of any offence punishable at a trial before a Magistrate.

(iv) 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 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.

(v) 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 offender should be prosecuted, he may prefer 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.

(vi) The Customs Officer is a revenue officer primarily concerned with the detection of smuggling an 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.

(vii) A person arrested under Section 104 (1) of Customs Act would fall within the ambit of the expression 'suspected of the commission of any non-bailable offence'. A person arrested by a Customs Officer under Section 104 would be a person suspected of the commission of such an offence inasmuch as the arrest itself is made when the officer of customs has reason to believe that such person has been

guilty of an offence punishable under Section 135 of the Customs Act.

(viii) The police is the instrument for the prevention and detection of crime which can be said to be the main object of having the police. The powers of the customs officers are really not for such purpose and are meant for checking the smuggling of goods and due realization of customs duties and determining the action to be taken in the interest of the revenue of the country by way of confiscation of goods of which no duty has been paid and by imposing penalties and fine.

OM PRAKASH'S CASE :

68. We shall now look into the decision of the Supreme Court in the case of Om Prakash (supra). A three Judge Bench of the Supreme Court, considering the distinction between the offences punishable under the Indian Penal Code and that under the Central Excise Act, 1944, and the Customs Act, 1962, held as under :

"16. As has been indicated hereinbefore in this judgment, Section 2(a) of the Code defines 'bailable offence' to be an offence shown as bailable in the First Schedule to the Code or which is made bailable by any other law for the time being in force. The First Schedule to the Code which deals with classification of offences is in two parts. The first part

deals with offences under the Penal Code, while the second part deals with classification of offences in respect of other laws. Inasmuch as, the offences relate to the offences under the 1944 Act, it is the second part of the First Schedule which will have application to the cases in hand. The last item in the list of offences provides that if the offence is punishable with imprisonment for less than three years or with fine only, the offence will be non-cognizable and bailable. Accordingly, if the offences come under the said category, they would be both non-cognizable as well as bailable offences. However, in the case of the 1944 Act, in view of Section 9-A, all offences under the Act have been made non-cognizable and having regard to the provisions of Section 155, neither could any investigation be commenced in such cases, nor could a person be arrested in respect of such offence, without a warrant for such arrest.

34. Mr.Parasaran's next submission was with regard to the provisions of Part II of the First Schedule to the Code of Criminal Procedure and it was submitted that the same has to be given a meaningful interpretation. It was urged that merely because a discretion had been given to the Magistrate to award punishment of less than three years, it must fall under the third head of the said Schedule and, therefore, be non-cognizable and bailable. On the other hand, as long as the Magistrate had the power to sentence a person for imprisonment of three years or more, notwithstanding the fact that he has discretion to provide a sentence of less than three years, the same will make the

offence fall under the second head thereby making such offence non-bailable. It was submitted that in essence it is the maximum punishment which has to determine the head under which the offence falls in Part II of the First Schedule to the Code and not the use of discretion by the Magistrate to award a lesser sentence.

35. In support of his submissions, Mr.Parasaran referred to the decisions of this Court in CBI v. Tapan Kumar Singh [(2003) 6 SCC 175 : 2003 SCC (Cri) 1305] and Bhupinder Singh v. Jarnail Singh [(2006) 6 SCC 277 : (2006) 3 SCC (Cri) 101] , to which reference will be made, if necessary.

36. As we have indicated in the first paragraph of this judgment, the question which we are required to answer in this batch of matters relating to the Central Excise Act, 1944, is whether all offences under the said Act are non-cognizable and, if so, whether such offences are bailable ? In order to answer the said question, it would be necessary to first of all look into the provisions of the said Act on the said question.

37. Sub-section (1) of Section 9-A, which has been extracted hereinbefore, states in completely unambiguous terms that notwithstanding anything contained in the Code of Criminal Procedure, offences under Section 9 shall be deemed to be non- cognizable within the meaning of that Code. There is,

therefore, no scope to hold otherwise. It is in the said context that we will have to consider the submissions made by Mr.Rohatgi that since all offences under Section 9 are to be deemed to be non-cognizable within the meaning of the Code of Criminal Procedure, such offences must also be held to be bailable.

38. The expression "bailable offence" has been defined in Section 2(a) of the Code and set out hereinabove in para 6 of the judgment, to mean an offence which is either shown to be bailable in the First Schedule to the Code or which is made bailable by any other law for the time being in force. As noticed earlier, the First Schedule to the Code consists of Part I and Part II. While Part I deals with offences under the Penal Code, Part II deals with offences under other laws. Accordingly, if the provisions of Part II of the First Schedule are to be applied, an offence in order to be cognizable (sic non-cognizable) and bailable would have to be an offence which is punishable with imprisonment for less than three years or with fine only, being the third item under the category of offences indicated in the said Part. An offence punishable with imprisonment for three years and upwards, but not more than seven years, has been shown to be cognizable and non-bailable. If, however, all offences under Section 9 of the 1944 Act are deemed to be non-cognizable, then, in such event, even the second item of offences in Part II could be attracted for the purpose of granting bail since, as indicated above, all offences under Section 9 of the 1944 Act are deemed to be non-cognizable."

69. It is, thus, evident from the above that the main thrust of the Om Prakash decision to ascertain whether the offence was bailable or non-bailable, was on the point that the offence being non-cognizable, it had to be bailable.

70. In Om Prakash (supra), the question arose, with respect to the investigation in the cases relating to the Central Excise Act, 1944, and the Customs Act, 1962, as to whether the officers under the said Act could arrest without a warrant in connection with those offences which were non-cognizable and bailable. The powers of the officers of the Excise or the Customs to initiate investigation and to arrest without warrant has been discussed and whether the officers have the powers akin to that of a Police Officer was also looked into. It was held that an offence, in order to be cognizable and bailable, would have to be an offence which is punishable with imprisonment for less than three years. Further, for all those offences which are punishable for a period of three to seven years can be considered as cognizable and non-bailable. The Supreme Court held that the offences under the Indian Penal Code cannot be equated with those listed in the Central Excise Act to draw a conclusion as to which of those offences are non-cognizable and non-bailable. It was held that in view of the Central Excise Act, 1944, the non-cognizable offences are bailable in nature and if a person is arrested, he shall be released on bail. The Supreme Court held that the offences under the Customs Act are bailable and the officers have the same powers as that of a Police Officer.

71. We take notice of the various decisions of different High Courts explaining the true purport of the ratio of Om Prakash (supra).

72. We have to our advantage a very exhaustive judgment delivered by a Division Bench of the Bombay High Court in the case of Chhagan Chandrakant Bhujbal v. Union of india and others, reported in 2016 SCC Online Bom 9938. The Division Bench of the Bombay High Court was dealing with a matter under the PMLA Act. The Bombay High Court considered the decision of Om Prakash (supra) and also the question whether the arresting authority under the PMLA Act was required to follow the procedure laid down under Section 155(1) of the Code of Criminal Procedure, 1973. We quote the relevant observations thus :

> *"124. In our considered view, for the same reason the question, 'whether the arresting authority was required to follow the procedure laid down in Section 155(1) of the Code', becomes redundant.*
>
> *125. Section 155(1) of the Code falls in Chapter XII of the Code, which pertains to the "information given to the Police and their powers to investigate". Section 154 of the Code deals with "information in cognizable offences", where Police are required to register the offence when any information relating to commission of cognizable offence is given orally or in writing; whereas, Section 155 of the Code deals with "Information Relating to Non-Cognizable Offence". As per*

Section 155(1) of the Code, whenever the information as to non-cognizable offence is given, then, the Police Officer cannot investigate into the same without the order of the Magistrate, having power to try such case or commit such case for trial. Much emphasis is led by learned Senior Counsel for the Petitioner on the provisions of Section 155(1) of the Code to submit that, if the offence is non-cognizable, then, even the authorities under the PML Act could not have carried out investigation and arrested the Petitioner without the order of the Magistrate.

126. As a corollary thereto, it is also argued that, even if the offences under PML Act are held to be cognizable, then, in view of the decision of the Apex Court in the case of Lalita Kumari (supra), whenever information related to cognizable offence is given, the Police is bound to register the offence and follow the procedure laid down in the said Chapter. Hence, the moment such information of the cognizable offence was received, FIR should have been registered first and then only the Petitioner could have been arrested. In the instant case, it is submitted that on the date of arrest of the Petitioner, neither the FIR was registered, nor its copy was sent to the Magistrate or the Special Court, nor any permission was obtained from the Special Court for arrest of the Petitioner. Hence, according to learned Senior Counsel for the Petitioner, on this count also, the arrest of the Petitioner is required to be held as illegal.

127. In our considered opinion, however, the reliance placed by learned Senior Counsel for the Petitioner, on the

provisions contained in Sections 154 to 173 in Chapter XII of the Code, is also misplaced. These provisions in the Code are clearly made to be applicable to the Police Officers, when they receive any information relating to cognizable and non-cognizable offences. The very title of Chapter XII of the Code states that "Police and Their Powers to Investigate", thereby meaning that this Chapter concerns to the restrictions on the powers of Police in respect of the information received by them about commission of cognizable or non-cognizable offence and, depending thereon, arrest of the concerned accused. The provisions of this Chapter of the Code can be applied to the offences punishable under the provisions of PML Act, only if the provisions in PML Act are silent as regards the investigation and arrest of person, who has been found to be guilty of committing the offences punishable under the PML Act.

128. This is for the reason that of the PML Act gives overriding effect to the provisions of PML Act. Section 71 of the PML Act clearly lays down that, "the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force". Section 65 of PML Act further makes the position clear by stating that, "the provisions of the Code shall apply, only if they are not inconsistent with the provisions of PML Act, even as regards arrest, search and seizure, attachment, confiscation, investigation, prosecution and all other proceedings under the PML Act".

129. Therefore, if PML Act contains certain provisions

relating to arrest, then, the PML Act being a complete Code in itself and also being a special law enacted with a particular object, in view of Section 5 of the Code, the provisions of PML Act will prevail and will have overriding effect on the provisions of the Code. The provisions of the Code will apply, only if they are not inconsistent with the provisions of PML Act.

130. Now the definition of the term 'investigation' as given in Section 2 (na) of the PML Act includes all the proceedings under the Act conducted by the Director by an Authority Authorised by the Central Government under this Act for the collection of evidence. Thus, investigation under this Act does not given any role to the Police. It is to be conducted by the Authorities under the Act. Hence as far as investigation is concerned, there is no scope for importing the provisions of the Code, which apply to the Police Officers. Section 19 of the PML Act exclusively and specifically deals with the "power to arrest" of the Authorised Officers for the offences punishable under the PML Act. Therefore, when there are specific provisions dealing with the investigation and power to arrest under the PML Act itself, the provisions of the Code will not have any application.

131. At the costs of repetition also, it has to be stated that Section 19 of the PML Act does not contemplate either registration of FIR, on receipt of information relating to cognizable offence or of obtaining permission of the Magistrate in case of non-cognizable offence before taking cognizance or before effecting arrest of the accused in

respect of any offence punishable under this Act. The only conditions, which are laid down under Section 19 of PML Act, pertain to the reasonable belief of the authority, which is on the basis of the material in its possession. As a result, when there are no such restrictions on the "power to arrest", as laid down under Section 19 of PML Act, it cannot be accepted that the officer authorized to arrest under the PML Act was, in addition to the procedure laid down in PML Act, expected to follow the procedure laid down in the Code also, of registering FIR or seeking permission of the Court in respect of non-cognizable offence for arrest of the accused under this Act. If those provisions of Chapter XII of the Code are to be read even in respect of these offences, then, it follows that Section 19 of PML Act would be rendered nugatory and that cannot be the intention of the Legislature. The Court cannot make any special provision in the Act as nugatory or in fructuous by giving the interpretation which is not warranted by the Legislature. As a matter of fact, the endeavour of the Court should always be to ensure that the provisions enacted by the Legislature are not rendered nugatory in any way.

132. It is pertinent to note that Section 19 of PML Act, which does not contemplate the compliance with the procedure required to be followed by the Police Officer under Chapter XII of the Code, is not challenged in this Petition, as being ultra vires. In the absence of such challenge raised and in view of the clear provision laid down in Section 19 of PML Act, it cannot be accepted that the officer authorized under the PML Act should have followed the procedure laid down

in Chapter XII of the Code, which is meant for Police Officers, to be followed in respect of the information's received by them.

133. Section 19(1) of the PML Act, at the cost of repetition, it has to be stated that, does not contemplate lodging of complaint before effecting arrest. It only contemplates the reason to believe, which should be on the basis of material in possession. Here in the case, there was ample material in possession of the arresting authority, on the basis of which there was reason to believe that the Petitioner has been guilty of an offence punishable under Section 4 read with Section 3 of the PML Act. It is not controverted that after the arrest, the copy of the order, along with the material in possession, was forwarded to the executing authority in a sealed envelope and, as stated above, it is also not disputed that immediately on the next day, the Petitioner was produced before the Special Court.

134. In the instant case, what is pertinent to note is that the Rules framed under PML Act, in detail, lay down the procedure to be followed when the arrest is to be effected under Section 19 of the PML Act. Those Rules are called as "The Prevention of Money-Laundering (the Forms, Search and Seizure [or Freezing] and the Manner of Forwarding the Reasons and Material to the Adjudicating Authority, Impounding and Custody of Records and the Period of Retention) Rules, 2005."

135. It is not disputed that the summons issued to the

Petitioner was as per Form 'V' as given in Rule 11. The Petitioner has also not challenged any of the Rules or the Sections of PML Act and neither any challenge has been made to the vires of PML Act, that it is violative of any procedure established by law and that it is also violative of the fundamental rights guaranteed under the Constitution. Whatever challenge was raised to the provisions of Sections 19 and 45 of PML Act in the earlier Petition has been given up in this Petition and, therefore, when the procedure, as laid down in these Rules, has been not disputed to be valid and there is no challenge to the said Rules, then, there remains hardly any substance in the grievance raised by the Petitioner that his fundamental rights have been violated. The arrest order, as prescribed in 'Form III' under Rule 6, and the manner of forwarding the copy of the order of arrest and material to the adjudicating authority as laid down in the Rules is complied with in this case.

136. Once it is held that the Act itself provides for a complete procedure to be followed whenever the arrest is to be effected and such procedure being followed in the instant case, it can hardly be accepted that the arrest or detention of the Petitioner is, in any way, illegal or without jurisdiction, so as to invoke the extra-ordinary writ remedy and that too of a habeas corpus; especially when the writ of habeas corpus is to lie whenever there is reason to believe that the person is in illegal detention; whereas, in the instant case, the Petitioner is arrested and detained for commission of specific offences. His detention is also validated by the order passed by the Special Court and as such, his detention

cannot be called as illegal, far remain null and void, so as, for the Constitutional Court to exercise its extra-ordinary powers under writ jurisdiction; especially, when the Petitioner has already approached the competent Special Court and this Court also, for his release on bail and the said relief having been rejected with valid reasons by both the Courts.

137. As regards the reliance placed by learned Senior Counsel for the Petitioner on the landmark decision of the Hon'ble Apex Court in the case of Lalita Kumari (supra), it is also pertinent to note that the important issue, which was raised for consideration in the said decision, was, "whether a Police Officer is bound to register an FIR upon receiving any information relating to commission of a cognizable offence under Section 154 of Cr.P.C. or the Police Officer has the power to conduct a preliminary inquiry in order to test the veracity of such information before registering the same?" Therefore, it is apparent that the issue raised before the Constitutional Bench of the Hon'ble Apex Court in this Judgment was totally different, which pertained to the bounden duty of the Police Officer of registration of the FIR on receipt of the information of cognizable offence and in that context, in paragraph No. 120 of its Judgment, it was laid down by the Hon'ble Supreme Court that, "the registration of FIR is mandatory under Section 154 of the Code, if information discloses commission of cognizable offence and no preliminary inquiry is permissible in such situation". This decision nowhere deals with the powers of the authorities established under Section 19 of PML Act or

the procedure, which is laid down in PML Act, in respect of arrest of the accused person.

138. As to the reliance placed by learned Senior Counsel for the Petitioner on the Judgment of Om Prakash (supra), again the issue raised before the Hon'ble Apex Court in the said Judgment was totally different. As can be seen from the opening paragraph of the said Judgment, the issue raised before the Apex Court was relating to the provisions of the Customs Act, 1962 and the provisions of Central Excise Act, 1944. The common question in these two sets of matters was, as stated by the Hon'ble Apex Court, 'since all the offences under the Central Excise Act, 1944 and the Customs Act, 1962 are non-cognizable, are such offences bailable?'

139. In that context, it was found that the provisions of both these Acts in that regard were in pari materia to each other and provisions of both the Acts provided that certain offences therein were non-cognizable. While dealing with the contentions raised before it, the Hon'ble Apex Court has considered relevant provision of Section 9-A(1) of the Central Excise Act, 1944, which reads as follows :-

"9A. Certain Offences to be Non-Cognizable.-

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898), offences under Section 9 shall be deemed to be non-cognizable within the meaning of that Code."

140. In view thereof, it was held that, this "non-obstante clause", with which the Section begins, in very categorical terms, makes it clear that "notwithstanding anything" contained in the Code, offences under Section 9 of Central Excise Act, 1944 would be deemed to be non-cognizable within the meaning of the Code. As against it, in the case of PML Act there is no such section containing positive assertion that the offences under the Act are non-cognizable, notwithstanding anything contained in the Code. There is also no judicial pronouncement to that effect from the Hon'ble Apex Court. As pointed out by learned Senior Counsel for the Petitioner that issue is pending for consideration before the Hon'ble Apex Court.

141. The Hon'ble Apex Court has in this judgment of Omprakash (supra), then also dealt with Sections 13, 18, 19, 20 and 21 of the said Central Excise Act, 1944, which read follows :-

"13. Power to Arrest -

(1) Any Central Excise Officer not below the rank of Inspector of Central Excise may, with the prior approval of the Commissioner of Central Excise may, arrest any person whom he has reason to believe to be liable to punishment under this Act or the Rules made thereunder."

18. Searches and Arrests How to be Made -

All searches made under this Act or any Rule made thereunder and all arrests made under this Act shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), relating respectively to searches and arrests made under that Code."

19. Disposal of Persons Arrested -

Every person arrested under this Act shall be forwarded without delay to the nearest Central Excise Officer empowered to send persons so arrested to a Magistrate, or, if there is no such Central Excise Officer within a reasonable distance, to the officer-in-charge of the nearest police station."

20. Procedure to be followed by officer-in-charge of police station.-

The officer-in-charge of a police station to whom any person is forwarded under Section 19 shall either admit him to bail to appear before the Magistrate having jurisdiction, or in default of bail forward him in custody to such Magistrate."

21. Inquiry how to be made by Central Excise Officers against arrested persons forwarded to them under Section 19. -

(1) When any person is forwarded under Section 19 to

a Central Excise Officer empowered to send persons so arrested to a Magistrate, the Central Excise Officer shall proceed to inquire into the charge against him.

(2) For this purpose the Central Excise Officer may exercise the same powers and shall be subject to the same provisions as the officer-in-charge of a police station may exercise and is subject to under the Code of Criminal Procedure, 1898 (5 of 1898), when investigating a cognizable case:

Provided that -

(a) if the Central Excise Officer is of opinion that there is sufficient evidence or reasonable ground of suspicion against the accused person, he shall either admit him to bail to appear before a Magistrate having jurisdiction in the case, or forward him in custody to such Magistrate;

(b) if it appears to the Central Excise Officer that there is no sufficient evidence or reasonable ground of suspicion against the accused person, he shall release the accused person on his executing a bond, with or without sureties as the Central Excise Officer may direct, to appear, if and when so required, before the Magistrate having jurisdiction, and shall make a full report of all the particulars of the case to his official superior."

142. In the light of all these relevant provisions of Section 9A making the offences non-cognizable, notwithstanding anything contained in the Code and Section 18 making it mandatory, as use of the word "shall" denote, that all the arrests made under those Act's shall be carried out in accordance with the provisions of the Code and Section 19 of the said Act providing that the person arrested shall be forwarded to the Officer-in-Charge of nearest Police Station, it was held by the Hon'ble Apex Court that; as all the searches and arrests made under the said Act has to be carried out in accordance with the provisions of the Code, the provision of Section 155 of the Code, which deals with information relating to non-cognizable offences also becomes applicable and hence it was held that in respect of the information relating to non-cognizable offences, in view of Section 155(1) of the Code, investigation cannot be commenced or a person cannot be arrested without a warrant for such arrest. In the light thereof, the provisions of Section 41 of the Code, wherein the Police Officer cannot arrest without an order from the Magistrate and without a warrant, were dealt with. In this context, it was held, in paragraph No. 41, that, "in respect of a non-cognizable offence, a Police Officer and, in the instant case, an Excise Officer, will have no authority to make arrest without obtaining a warrant for the said purpose. The same provision is contained in Section 41 of the Code, which specifies that, when a Police Officer may arrest without an order from a Magistrate and without a warrant, having regard to the specific provisions of Section 18 of the Central Excise Act, 1944, which mandated that all arrests made

under the said Act shall be carried out in accordance with the provisions of the Code."

143. It thus needs to be emphasized that in view of Section 9A of the Central Excise Act making all the offences under the said Act as non-cognizable and in view of Section 18 of the said Act positively making the provisions of the Code relating to arrest being made applicable to arrest under the said Act, it was held in the case of Om Prakash (supra) that Excise Officer has to follow those provisions. There are no such pari materia provisions in PML Act. The PML Act does not make the offences there under 'non-cognizable', notwithstanding anything contained in the Criminal Procedure Code, nor PML Act provides that all the arrests under the Act are to be made in accordance with the provisions of the Code. Conversely in PML Act, there is separate Section 19 relating to arrest and Section 71 giving overriding effect to the provisions of PML Act above the provisions of the Code or any other law.

144. According to learned Senior Counsel for the Petitioner, in the case of Om Prakash (supra), the argument advanced by learned Additional Solicitor General therein, that as the authorities under the Customs Act, 1962 and Central Excise Act, 1944 do not derive their powers from the Code, but under the Special Statutes, such as Central Excise Act and Customs Act, hence they are not bound by the provisions of the Code, was rejected. The Review Petition preferred against the said Judgment also came to be rejected. Hence, according to him, the provisions in the Code relating to arrest

of accused in case of non-bailable offence are applicable not only to Police Officers, but to the authorities established under other Acts also, like, Customs Act, 1962, Central Excise Act, 1944 and in this Petition, the authorities under PML Act also. According to him, in this case, as these provisions of the Code were not followed in effecting the arrest of the Petitioner, arrest of the Petitioner is illegal.

145. However, in our considered opinion, this line of argument is misconceived as in the PML Act, there is no such provision, like Section 18 of the Central Excise Act, 1944, laying down that arrest under PML Act shall be carried out in accordance with the provisions of the Code. The conspicuous absence of such provision like Section 18 of the Central Excise Act, 1944 in PML Act, is a very relevant aspect for deciding the issue, 'whether the authorities under the PML Act, like the authorities under the Customs Act, 1962 and Central Excise Act, 1944, are also bound by the provisions of the Code relating to arrest and investigation?'

146. In our considered opinion, therefore, once it is held that such provision like Section 18 of the Central Excise Act, 1944, is not appearing and is conspicuous by its absence in PML Act, then, one has to go by the provisions of the PML Act only, as Section 71 thereof is giving overriding effect to the said provisions. Section 19 of the PML Act, as stated above, does not contemplate at all the procedure, as laid down in Sections 18 to 21 of the Central Excise Act, 1944. The only two conditions contemplated under Section 19 of PML Act, being the reasonable belief, based on the material in

possession of the authorized officer, on the satisfaction of which the authorized officer can arrest. In such situation, importing the provisions of the Central Excise Act, 1944 or Customs Act, 1962 in PML Act, would be reading something which is not there in the Statute itself. Such interpretation, therefore, cannot be accepted. In our considered opinion, therefore, this Judgment in the case of Om Prakash (supra) cannot be of any avail to the Petitioner, as, in the first place, it deals with the question, "whether the offences under the Customs Act, 1962 and Central Excise Act, 1944, are bailable or not?", and, secondly, the provisions of Customs Act, 1962 and Central Excise Act, 1944, are totally different from the provisions of PML Act, as the objects and reasons for bringing these Statutes are also different. "

73. The Kerala High Court, in the case of Kishin S.Loungani v. Union of India and others, reported in 2016 SCC Online Ker 30732, observed in paragraph 22 as under :

"22. 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 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 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."

74. The Madhya Pradesh High Court, in the case of Vijay Madanlal Choudhary v. Union of India, reported in 2015 SCC Online M.P. 7466, observed in paragraph 14 as under :

"Learned counsel for the petitioner has placed reliance upon the judgment of the Supreme Court in the matter of Om Prakash and another v. Union of India and another, reported in (2011) 14 SCC 1, in support of his submission that the offences under PMLA are non-cognizable offences but in the case of Om Prakash (supra) the Supreme Court considering the provisions contained in Section 9-A(1) of Central Excise Act, 1944 which in clear terms provides that the offences under section 9 are deemed to be non-cognizable within the meaning of the Criminal Procedure Code as also considering Section 20 of the Act and the object of the Excise Act relating to recovery of excise duty and not to punish for infringement of provisions of the Act, has held that the offences under the

Excise Act are not cognizable offences but in the PMLA no such deeming fiction as contained in section 9-A of the Central Excise Act, 1944 is available and the object of PMLA is also different, therefore, the reasoning given in the judgment of the Supreme Court in the matter of Om Prakash (supra) cannot be applied in the present case and the benefit of the said judgment cannot be granted to the petitioner."

75. The Jharkhand High Court, in the case of Rajesh Kumar Prasad @ Rajesh Kumar v. State of Jharkhand, reported in 2015 SCC Online Jhar 2358, has observed in paragraphs 8 and 11 respectively as under :

"8. Same issue did crop up before the Hon'ble Supreme Court in a case of Om Prakash and Another Vs. Union of India (UOI) and Another, (2011)14 SCC 1 as to whether offences under the Customs Act, 1962 and the Central Excise Act, 1944, being non-cognizable, are bailable or non-bailable ? Their Lordships, after having regard to certain provisions of Central Excise Act, 1944, relating to the power to arrest as contained in Section 13; provisions relating to searches and arrest; disposal of persons arrested; procedure to be followed by the Officer In-charge; inquiry how to be made by the Central Excise Officer as contained in Sections 18, 19, 20 and 21 of the Central Excise Act, 1944 and also the provisions contained in Sections 41 and 155 of the Code of Criminal Procedure, were pleased to hold that the punishment though has been prescribed under the Excise Act up to seven years but those have been intended by the legislature to be bailable. On similar analogy. Their

Lordships have also held the offences under the Custom Act to be bailable. While holding so, one of the considerations was there that the legislature have made offence under both the Acts, non-cognizable.

11. Thus, the contention, which has been made on behalf of the petitioner in reference to the provisions as contained in Section 62 of the FERA, declaring the offences under the FERA being non-cognizable, be taken to be bailable keeping in view the main objective of the Act, never putting emphasis on the prosecution, rather emphasis is over the regulation of the Foreign Exchange and, thereby, the offence being held to be bailable keeping in view that in a similar situation, the offences under the Central Excise Act and the Custom Act, have been declared to be bailable by the Hon'ble Supreme Court in a case of Om Prakash and others) (supra)."

76. A Division Bench of the Bombay High Court, in the case of Intelligence Officer, DRI v. Amjad Huseein Khan and another, reported in 2003 (3) MhLJ 954, has drawn a fine distinction between the scheme of Section 108 of the Customs Act and Section 67 of the NDPS Act. We should look into the observations of the Bombay High Court as regards the difference between the two schemes :

"13. The question is whether in the present case by virtue of issuing summons in the above form the respondent-accused was called upon to give evidence against himself. No doubt, there is a different between the scheme of Section 108 of the

Customs Act and Sections 67 of the NDPS Act. While under the Customs Act, the Customs Officer is empowered to summon a person to give evidence and produce documents, under Section 67 of the NDPS Act the power is given to the empowered officer to call for information for which purpose he can examine any person acquainted with the facts and circumstances of the case and no specific power is given to him to record evidence. Secondly, under Section 108 of the Customs Act inquiry held by an officer of the rank of a Gazetted Officer shall be deemed to be a judicial proceeding, but the inquiry held under Section67 of the NDPS Act is not stated to be a judicial proceeding. Thus, the Officer who is entitled to hold inquiry under Section 67 of NDPS Act is not empowered to record the evidence but only record the statement after examining the person. Under the provisions of NDPS Act, though the power is given to investigate and prosecute the person violating the provisions of NDPS Act to both the Police Officer as well as to an Empowered Officer who may be other than a Police Officer, in the present case, admittedly, the person investigating the case, is an Intelligence Officer from the Directorate of Revenue Intelligence (DRI) and not a Police Officer to whom the provisions of Section 25 of the Evidence Act are applicable.

14. The powers for the purpose of search, seizure, arrest i.e. investigation and prosecution have been given to certain officers mentioned in Section 42 of the NDPS Act if the officer has reason to believe either from personal knowledge or information given by any person that any offence under the provisions of this Act has been committed. The powers of

inquiry, investigation and recording a statement under Section 67 of the NDPS Act and to call for information by requiring any person to deliver or produce any document or any thing or examining any person acquainted with the facts and circumstances of the case is also given to an empowered officer referred in Section 42 of the NDPS Act. No doubt, the offences committed under the provisions of this Act are cognizable and the persons involved in such offences can be arrested without warrant from a Magistrate. But on the basis of the information or personal knowledge the empowered officer is given power to inquire and investigate in the matter even before a formal accusation is made against a person or FIR is lodged against him. After the seizure of the contraband and the arrest of the person the officer is duty bound under Section 57 of the NDPS Act to make full report of all the particulars of arrest and seizure to his immediate official superior. It is only after the full investigation is made, that the complaint is lodged before the Special Court by the empowered officer who is not a police officer. Looking to scheme of the NDPS Act and the powers of DRI officers it is clear that the summons was issued only for the purpose of making an inquiry. The said inquiry was being made before the complaint was filed and the inquiry was being made from a person who was not "an accused" at the said time and therefore the confessional statement of such a person recorded during such inquiry cannot be said to be hit by Article 20(3) of the Constitution. It cannot be said that by the DRI officers issuing such a summons, the respondent was called upon to give evidence against himself."

77. The only idea with which we have referred to a Division Bench decision of the Bombay High Court drawing a fine distinction between the scheme of Section 108 of the Customs Act and Section 67 of the NDPS Act is to meet with the vociferous submissions of Mr.Pandya as regards the admissibility of such statements in evidence. Mr.Pandya, in the course of his submissions, has referred to Noor Aga (supra), Nirmal Singh Pehalwan @ Nimma (supra) and Vinod Solanki (supra) to make good his submissions that the statements recorded by the Customs Officer while the person is in custody of such officer is inadmissible in evidence and is hit by Section 25 of the Evidence Act, 1872. In all the above referred cases of the Supreme Court, the subject matter was Section 67 of the NDPS Act.

78. In any view of the matter, the issue is at large before the Supreme Court. A constitution bench of the Supreme Court would be deciding this issue.

Whether the DRI officers are 'proper officers' for the purpose of Section 28 of the Customs Act, 1962 ?

79. Before we proceed to answer this question, we must give a fair idea about the Directorate of Revenue Intelligence. The Directorate of Revenue Intelligence is an Indian intelligence agency. It is India's apex anti-smuggling intelligence, investigations and operations agency. The Directorate is run by the officers from the Central Board of Indirect Taxes and

Customs (CBIC) who are posted in its various Zonal Units as well as in the Indian embassies abroad as part of the Customs Overseas Intelligence Network. It is headed by a Director General of the rank of Special Secretary to the Government of India. The agency works to secure India's national and economic security by preventing the outright smuggling of contraband such as firearms, gold, narcotics, fake Indian currency notes, antiques, wildlife and environmental products. Moreover, it also works to prevent the proliferation of black money, trade-based money laundering and commercial frauds.

80. Though its early days were committed to combating the smuggling in of gold, it now addresses a wide and interconnected gamut of narcotics and economic crimes. The DRI enforces provisions of the Customs Act in addition to over 50 other statutes including the NDPS Act, Arms Act, WMD Act etc. The DRI is also a part of the Cabinet Secretariat's National Authority Chemical Weapons Convention, the Special Investigation Team on Black Money, the Task Force on Shell Companies, the Multi Agency Center (MAC) on National Security, the Ministry of Home Affairs/NIA's special wings on Left Wing Extremism Financing, as well as various inter-ministerial committees on Terror Financing, Coastal Security, Fake Indian Currency Notes, etc.

81. The DRI is the major intelligence agency which enforces the prohibition of the smuggling of items including drugs, gold, diamonds, electronics, foreign currency, and counterfeit Indian currency. The Directorate of Revenue Intelligence functions under the Central Board of Indirect Taxes and Customs in the

Ministry of Finance, Department of Revenue, Government Of India. Headed by the Director General (Chief Commissioner Rank) in New Delhi, it is divided into seven zones, each under the charge of an Additional Director General (Commissioner Rank). It is further sub-divided into Regional Units, Sub-Regional Units and Intelligence Cells with a complement of Additional Directors, Joint Directors, Deputy Directors, Assistant Directors, Senior Intelligence Officers and Intelligence Officers.

82. The Customs Act, 1962, came to be enacted as a special Act by the Parliament of India on 13th December 1962 and has, thereafter, by way of various amendment Acts, acquired its true status by being a special Act as it stands today. The Act empowers the officers of the Customs by terming them as 'Proper Officers', duly appointed by the Central Board of Indirect Taxes and Customs to exercise the powers entrusted to them under the Act and to discharge the duties and functions conferred or imposed upon them under the Act, more particularly, Section 5 thereof. The Act was enacted and subsequently amended by various Acts for the objects and reasons stated therein, depending on the change in the scenario and the contingencies which demanded such amendments time and again. One of the main amendments which came to be introduced in the context of defining the expression 'proper officer', happened in the year 2011 by way of the Amendment Act 14 of 2011 and thereafter in 2019, by the corresponding Amending Act. The Act in sub-section (34) of Section 2 defines 'proper officer'. The said definition is reproduced herein below for ready reference :-

"'proper officer', in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Commissioner of Customs;"

83. The said terminology of 'proper officer' became a subject matter of litigation in a reported decision of the Supreme Court in the case of Commissioner of Customs v. Sayed Ali reported in (2011)3 SCC 532. Various other High Courts had the occasion to deal with the term 'proper officer' and the various powers to be exercised by such officer under the various provisions of the Act. The Parliament, in its wisdom, deemed it appropriate to come up with the Amending Act, 2011, and the objects and reasons of such amendment are as under :-

"Statement of Objects and Reasons of Amendment Act 14 of 2011 *- The Customs Act, 1962 consolidates and amends the law relating to customs. Clause (34) of Section 2 of the said Act defines the expression "proper officer" in relating to the functions under the said Act to mean the officer of customs who is assigned those functions by the Central Board of Excise and Customs or the Commissioner of Customs. Recently, a question has arisen as to whether the Commissioner of Customs (Preventive) is competent to exercise and discharge the powers of a proper officer for issue of a notice for demand of duty. The Hon'ble Supreme Court of India in Commr. of Customs v. Sayed Ali, (2011) 3 SCC 537 held that only a customs officer who has been specifically*

assigned the duties of assessment and re-assessment in the jurisdiction area is competent to issue a notice for the demand of duty as a proper officer. As such the Commissioner of Customs (Preventive) who has not been assigned the function of a "proper officer" for the purposes of assessment or re-assessment of duty and issue of Show Cause Notice to demand customs duty under Section 17 read with Section 28 of the Act in respect of goods entered for home consumption is not competent to function as a proper officer which has not been the legislative intent.

2. In view of the above the Show Cause Notices issued over the time by the Customs Officers such as those of the Commissionerates of Customs (Preventive), Directorate General of Revenue Intelligence and others, who were not specifically assigned the functions of assessment and re-assessment of customs duty may be construed as invalid. The result would be huge loss of revenue to the exchequer and disruption in the revenue already mobilized in cases already adjudicated. However, having regard to the urgency of the matter, the Government issued notification on 6th July, 2011 specifically declaring certain officers as proper officers for the aforesaid purposes.

3. In the circumstances, it has become necessary to clarify the true legislative intent that Show Cause Notices

issued by Customs Officers, i.e., officers of the Commissionerates of Customs (Preventive), Directorate General of Revenue Intelligence (DRI), Directorate General of Central Excise Intelligence (DGCEI) and Central Excise Commissionerates for demanding customs duty not levied or short levied or erroneously refunded in respect of goods imported are valid, irrespective of the fact that any specific assignment as proper officer was issued or not. It is, therefore, purposed to amend the Customs Act, 1962 retrospectively and to validate anything done or any action taken under the said Act in pursuance of the provisions of the said Act at all material times irrespective of issuance of any specific assignment on 6th July, 2011.

4. The Bill seeks to achieve the above objects."

84. This Court had the occasion to deal with the term 'proper officer' in the case of Swati Menthol & Allied Chemicals Ltd. v. Joint Director – Directorate of Revenue Intelligence (Special Civil Application No.2894 of 2013, decided on 8th January 2014). The issue involved in the said matter pertained to the exercise of powers by the 'proper officers' vis-a-vis Sections 17, 18 and 28 of the Act. Reliance was placed on the case of Sayed Ali (supra). While dealing with the other contentions, a Division Bench of this Court held that -

"8. Counsel submitted that since respondent no.1 was not a proper officer in terms of section 2(34) of the Customs Act,

he had no authority to issue notice under section 28 of the said Act.

9. Heavy reliance was placed on the decision of the Apex Court in the case of Commissioner of Customs v. Sayed Ali reported in MANU/SC/0125/2011 : 2011 (265) E.L.T. 17 (S.C.), wherein in the context of the definition of proper officer under Section 2(34) of the Customs Act, the Apex Court held and observed that it is only such a customs officer, who has been assigned the specific functions of assessment and reassessment of duty in the jurisdictional area where the import concerned has been effected, by either the Board or the Commissioner of Customs, in terms of Section 2(34) of the Act would be competent to issue notice under Section 28. It was observed that any other reading of Section 28 would render the provisions of Section 2(34) of Act otiose inasmuch as the test contemplated under Section 2(34) of the Act is that of specific conferment of such functions. Revenue's contention that once territorial jurisdiction was conferred, Collector of Customs (Preventive) becomes a "proper officer" in terms of Section 28 of the Act was rejected observing that it would lead to a situation of utter chaos and confusion as all officers of customs, in a particular area would be treated as "proper officers". It was, therefore, held that "in our view, therefore, it is only the officers of the Customs, who are assigned the functions of assessment, which of course, would include the reassessment, working under the jurisdictional Collectorate within whose jurisdiction bills of entry or baggage declarations had been filed and the consignments had been

cleared for home consumption, will have the jurisdiction to issue notice under Section 28 of the Act.

10. Our attention was also invited to sub-section (11) of Section 28 of the Customs Act which was introduced by way of an amendment by amending Act, 14 of 2011 with effect from 16-9-2011 to save certain proceedings under Sections 17 and 28 of the Customs Act, which would have otherwise been hit by the ratio of the judgment of the Supreme Court in the case of Sayed Ali (supra). Our attention was also drawn to the circular of the Central Board of Excise & Customs dated 23-9-2011 explaining the amendments brought in by virtue of subsection (11) of Section 28 of the Customs Act.

11. Learned counsel for the petitioners also brought to our notice a subsequent Notification No. 40/2012 : MANU/ CUSN/0100/2012, dated 2-5-2012 issued by the Central Board of Excise and Customs in which the Board assigned the officers mentioned in the notification the functions under the Customs Act, 1962 as specified in Column No. 3 of the Table. On the basis of such notification, the counsel submitted that even in the said assignment of functions the DRI authorities have not been empowered to issue show cause notice and adjudicate on the questions of short-levy or non-levy of duty, etc., under Section 28 of the Customs Act. Reliance was placed on the decision of the Apex Court in the case of Union of India v. Ram Narain Bishwanath reported in MANU/SC/1475/1998: 1997 (96) E.L.T. 224 to contend that it is only the Customs Authority where the goods are

imported would have jurisdiction to adjudicate on the issues connected thereof.

12. Reliance was placed on the decision of the Apex Court, in the case of Raza Textiles Ltd. v. Income-tax Officer, Rampur reported in MANU/SC/0333/1972 : (1973) 87 ITR 539 to contend that when the jurisdictional fact is lacking the action of the authority of issuing notice and assuming jurisdiction would be rendered invalid.

13. On the other hand, learned counsel Mr. Hriday Buch for the respondents opposed the petition challenging that the show cause notice has been issued by a proper officer, who had been vested with the powers by virtue of series of notifications issued by C.B.E. & C. Our attention was drawn to the affidavit-in-reply filed by Dr. Arvind Kumar, Deputy Director of Revenue Intelligence dated 4-4-2013 in which following averments have been made:-

> *6. Without prejudice to the aforesaid contentions, it is submitted that in terms of Notification No. 31/97-Cus. (N.T.), dated 7-7-1997 the Central Government has appointed all the officers of the Directorate of Revenue Intelligence as officers of Customs. Further in terms of Notification No. 17/2002-Cus. (N.T.) : MANU/CUSN/ 0053/2002, dated 7-3-2002 the Additional Director General, Additional Director/Joint Director and Deputy/Assistant Director of Directorate of Revenue Intelligence have been appointed as officers of Customs with jurisdiction over the whole of India. I*

further say and submit that in terms of Notification No. 44/2011-Cus. (N.T.) : MANU/CUSN/0099/2011, dated 6-7-2011 the Central Board of Excise and Customs has assigned the functions of the proper officer for the purpose of Section 17 and Section 28 of the Customs Act, 1962 to the Additional Director General, Additional Director/Joint Director and Deputy/Assistant Director of Directorate of Revenue Intelligence.

14. Our attention was drawn to Notifications No. 31 of 1997, dated 7-7-1997, No. 44 of 2011, dated 6-7-2011 and No. 17 of 2002, dated 7-3-2002 to contend that Officers of Revenue Intelligence are considered as Customs Officers and their functions are also properly assigned.

15. Counsel contended that in view of such notifications neither the decision in the case of Sayed Ali (supra) nor the subsequent notification of the Board dated 2-5-2012 would alter the situation. He submitted that notification dated 2-5-2012 did not rescind the previous notifications, which continue to hold the field.

16. Having thus heard learned counsel for the parties and having perused the documents on record, a short question that calls for consideration is whether in facts of the present case, the impugned show cause notice issued by respondent No. 1 Joint Director of Revenue Intelligence had authority to do so. Section 2(34) of the Customs Act, 1962 defines the term "proper officer" as under:-

2(34) "proper officer", in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Commissioner of Customs;

17. The term "proper officer" is used at various places under the Act. Under Section 17 it is proper officer who can verify the self-assessment of goods and examine or test any imported goods or exported goods as may be necessary. Likewise under Section 18. It is the proper officer, who may undertake the exercise of provisional assessment and direct the importer to pay difference in duty or furnish security as deemed fit for provisional release of the goods.

18. Section 28 of the Customs Act with which we are directly concerned pertains to recovery of duties not levied or short-levied or erroneously refunded. It provides for a complete mechanism for recovery of duties not levied, short-levied or erroneously refunded or any interest has not been paid, part paid or erroneously refunded, in which case proper officer shall serve a notice on the person chargeable with the duty or interest requiring to show cause why he should not pay the amount specified in the notice. The period of limitation prescribed for issuance of the notice is one year in normal cases and extended period in cases of collusion, willful misstatement or suppression of facts is 5 years.

19. The question of proper officer, therefore, assumes considerable significance since it is only the proper officer,

who under sub-section (1) of Section 28, can issue such a show cause notice.

20. We have noticed that under sub-section (34) of Section 2 a proper officer is defined as a person in relation to any function to be performed under the Act to mean the officer of customs who is assigned those functions by the Board or Commissioner of Customs. Thus, the proper officer is a person, who has been assigned functions by the Board or by the Commissioner of Customs in relation to such functions to be performed under the Act.

21. It is in this respect that the Supreme Court in the case of Sayed Ali (supra) held that it is only the officers of Customs, who are assigned the functions of assessment working under the jurisdictional of Collectorate/ Commissionerate within whose jurisdiction bills of entry or baggage declaration had been made and the consignment having been cleared will have a jurisdiction to issue notice under Section 28 of the Act. This was a case in which the assessee who was engaged in the business of carpet manufacturing and export was charged with the misuse of the Export Pass Book scheme by selling goods cleared duty free in the open market or selling the pass book in premium in violation of the restrictions imposed on such sale. Investigation was conducted by the Marine and Preventive Wing of the Customs and the Assistant Collector of Customs (Preventive), Mumbai issued a show cause notice alleging violations of provisions of Section 111(d) of the Customs Act. At an appellate stage the Collector (Appeals) though set

aside the order passed by the Assistant Collector, granted liberty to the Department to re-adjudicate the case after issuing proper show cause notice. Fresh notice was issued on 16-4-1994 why the goods should not be confiscated and customs duty amounting to Rs. 5,07,274/- be not levied in terms of Section 28(1) of the Customs Act. Such notice was questioned on the ground of jurisdiction of the Collector of Customs (Preventive). It was in this background that the Supreme Court rendered its decision holding that only such Customs Officer who has been assigned the specific functions of assessment and reassessment of duty either by the Board or the Commissioner of the Customs in terms of Section 2(34) in the jurisdictional area where the import concerned has been effected, who is competent to issue notice under Section 28.

22. Perhaps since the decision of the Supreme Court in the case of Sayed Ali (supra) would upset large number of pending or even concluded proceedings, the Legislature introduced sub-section (11) to Section 28, which provides as under:-

> *(11) Notwithstanding anything to the contrary contained in any judgment, decree or order of any Court of law, Tribunal or other authority, all persons appointed as officers of Customs under sub-section (1) of section 4 before the sixth day of July, 2011 shall be deemed to have and always had the power of assessment under Section 17 and shall be deemed to have been and always had been the proper officers for*

the purposes of this section.

23. In the circular dated 23-9-2011 the Board in connection with newly added sub-section (11) of Section 28 clarified as under:

**** **** ****

2. Further, as a prospective remedial measure, in terms of Section 2(34) of the Act, 1962, the Board issued Notification No. 44/2011-Customs (N.T.) : MANU/CUSN/0099/2011, dated 6-7-2011. By virtue of this notification, officers of Directorate General of Revenue Intelligence (DRI), Commissionerates of Customs (Preventive), Directorate General of Central Excise Intelligence (DGCEI) and Central Excise Commissionerates were assigned the functions of the 'proper officer' for the purposes of Sections 17 and 28 of the said Act.

**** **** ****

4. Accordingly, as per the amended Section 28 of the Customs Act, 1962, show cause notices issued prior to 6-7-2011 by officers of Customs, which would include officers of Commissionerates of Customs (Preventive), Directorate General of Revenue Intelligence (DRI), Directorate General of Central Excise Intelligence and similarly placed officers stand validated since these officers are retrospectively recognized as 'proper

officers' for the purpose of Sections 17 and 28 of the said Act.

**** **** ****

5. In this regard it may also be noted that in terms of Notification No. 44/2011 - Customs (N.T.) : MANU/ CUSN/0099/2011, dated 6-7-2011 the officers of DRI and DGCEI are 'proper officers' for the purposes of Section 28. However, it is hereby directed by the Board that these officers shall not exercise authority in terms of clause (8) of Section 28 of the said Act. In other words, there shall be no change in the present practice and officers of DRI and DGCEI shall not adjudicate the show cause notices issued under Section 28 of the said Act.

24. It can be straightaway seen from sub-section (11) of Section 28 of the Board Notification dated 23-9-2011 that sub-section (11) would operate notwithstanding anything contrary to the judgment, decree or order of any Court and all persons appointed as officers of the Customs under sub-section (1) of Section 4 before the 6th day of July, 2011 would be deemed to have always had the power of assessment under Section 17 and should be deemed and always should be considered as proper officers for the purpose of the said section.

25. In the context of the inquiry, whether the respondent No. 1 can be stated to be a proper officer we may refer to the different notifications of C.B.E. & C. placed for our

consideration.

26. Notification dated 7-7-1997 provided as under :-

> *.....In exercise of the powers conferred by sub-section (1) of section 4 of the Customs Act, 1962 (52 of 1962) and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 38/63-Customs, dated 1st February, 1963 the Central Government hereby appoints the following persons to be the Officers of Customs, namely:-*
>
> *1. Appraisers, Examiners, Superintendent Customs (Preventive), Preventive Officers, Women Searchers, Ministerial Officers and Class IV Officers in the Customs Department in any place in India.*
>
> *2. Superintendents, Inspectors, Women Searchers, Ministerial staff and Class IV staff of Central Excise Department, who are for the time being posted to a Customs port, Customs airport, Land-Customs station, Coastal port, Customs preventive post, Customs Intelligence post or a Customs warehouse.*
>
> *3. Superintendents, and Inspectors of Central Excise Department in any place in India.*
>
> *4. All Officers of the Directorate of Revenue Intelligence.*

5. All Officers of the Narcotics Control Bureau.

6. All Intelligence Officers of the Central Economic Intelligence Bureau.

27. Under notification dated 7-3-2002, the Government of India appointed officers mentioned in column No. 2 of the table, notification dated 7-3-2002 provided as under:-

S.O. (E). - In exercise of the powers conferred by sub-section (34) of Section 2 of the Customs Act, 1962 (52 of 1962), the Central Board of Excise and Customs hereby assigns the functions of the proper officer to the following officers mentioned in column (2) of the Table below, for the purposes of Section 17 and Section 28 of the said Act, namely:-

Sr. No.	*Designation of the Officers.*
1	*2*
1	*Additional Director Generals, Additional Directors or Joint Directors, Deputy Directors or Assistant Directors in the Directorate General of Revenue Intelligence.*
2	*Commissioners of Customs (Preventive), Additional Commissioners or Joint Commissioners of Customs (Preventive), Deputy Commissioners or Assistant Commissioners of Customs (Preventive).*
3	*Additional Director Generals, Additional Directors or Joint Directors, Deputy Directors or Assistant Directors in the Directorate General of Central Excise Intelligence.*

4	*Commissioners of Central Excise, Additional Commissioners or Joint Commissioners of Central Excise, Deputy Commissioners or Assistant Commissioners of Central Excise.*

28. *Notification dated 6-7-2011 provides as under :-*

S.O. (E) - In exercise of powers conferred by sub-section (34) of Section 2 of the Customs Act, 1962 (52 of 1962), the Central Board of Excise and Customs hereby assigns the functions of the proper officer to the following officers mentioned in column (2) of the Table below, for the purposes of Section 17 and Section 28 of the said Act, namely:-

Sr. No.	*Designation of the Officers.*
1	*2*
1	*Additional Director Generals, Additional Directors or Joint Directors, Deputy Directors or Assistant Directors in the Directorate General of Revenue Intelligence.*
2	*Commissioners of Customs (Preventive), Additional Commissioners or Joint Commissioners of Customs (Preventive), Deputy Commissioners or Assistant Commissioners of Customs (Preventive).*
3	*Additional Director Generals, Additional Directors or Joint Directors, Deputy Directors or Assistant Directors in the Directorate General of Central Excise Intelligence.*
4	*Commissioners of Central Excise, Additional Commissioners or Joint Commissioners of Central Excise, Deputy Commissioners or Assistant Commissioners of Central Excise.*

29. Under the notification dated 2-5-2012 the Central Board of Excise and Customs assigned various officers mentioned in Column No. 2 of the Table corresponding functions mentioned in column No. 3 thereof.

Sr. No.	*Designation of the Officers.*	*Functions under No. section of the Customs Act, 1962*
***	***	
4	*Deputy Directors or Assistant Directors in the Directorate General of Revenue Intelligence and Directorate General of Central Excise Intelligence.*	*(i) Section 28B;* *(ii) Section 72.*
***	***	
6	*Intelligence Officer in the Directorate General of Revenue Intelligence and Directorate General of Central Excise Intelligence*	*(i) Section 37;* *(ii) Section 100;* *(iii) Section 103;* *(iv) Section 106;* *(v) Section 106A;* *(vi) Sub-sections (1) and (3) of Section 110;* *(viii) Section 144; and* *(ix) Section 145.*

30. We agree with the counsel for the petitioners that under notification dated 2-5-2012, the officers of DRI have not been assigned specific function of adjudication under Section 28 of the Customs Act. So much is amply clear from the portion of the notification reproduced hereinabove. The question, however, is whether by virtue of the notifications dated 7-7-1997, 7-3-2002 and 6-7-2011, the DRI would

have the authority to act under Section 28 of the Customs Act and whether by virtue of the judgment of the Supreme Court in the case of Sayed Ali (supra), this position would be altered. As we have already noticed in the notification dated 7-7-1997, all the officers of the Directorate of Revenue Intelligence are appointed as the officers of the Customs. Under the notification dated 7-3-2002, the officers of DRI have been given jurisdiction over the whole of India. Most significant notification is one of 6-7-2011. As noted, the notification, for the purpose of Section 2(34) of the Customs Act, assigns functions of the proper officer to the various officers including those under the Directorate of Revenue Intelligence, such as Additional Director, Joint Director, Deputy Directors and Assistant Directors for the purposes of Sections 17 and 28 of the Customs Act.

31. We may recall, in the present case that the show cause notice was issued on 24-1-2013, that is, after the notification dated 6-7-2011. To our mind, therefore, respondent No. 1 had the jurisdiction to issue show cause notice. The show cause notice under sub-section (1) of Section 28 could be issued by a proper officer. A proper officer is one, who is defined in Section 2(34) as the officer of Customs, either by the Board or by the Commissioner of Customs, who is assigned specific functions. Under notification dated 6-7-2011, Joint Director of Revenue Intelligence is assigned the function for the purpose of Sections 17 and 28 of the Customs Act by a specific reference to sub-section 2(34) of the Act.

32. In that view of the matter by the settled position, we cannot hold that respondent No. 1 lacked the jurisdiction to issue a show cause notice. Had this notification not been issued, the question perhaps would be whether under sub-section (17) of Section 28 despite the decision of the Supreme Court in the case of Sayed Ali (supra), the respondent No. 1 could be considered as a proper officer for the purpose of Section 28. However, it is not necessary for us to examine such question since in our opinion notification dated 6-7-2011 is specific and assigns functions under Sections 17 and 28 to such officer. He is, therefore, the proper officer in terms of Section 2(34) of the Act. Subsequent notification dated 2-5-2012 would not change this position. This is only a further notification assigning further functions to various officers including those under the Directorate of Revenue Intelligence, functions specified in column No. 3 thereof. This notification is not in supersession of the earlier Notification dated 6-7-2011. Both notifications, therefore, co-exist. In other words notification dated 2-5-2012 has not rescinded the earlier notification. Assignment of the functions, under both notifications, therefore, must operate simultaneously. When we hold that under notification dated 6-7-2011 respondent No. 1 was assigned the functions under Sections 17 and 28 of the Act, his action of issuing show cause notice after the said date in particular cannot be seen as one without jurisdiction. We have noticed that in the clarification issued by C.B.E. & C. on 23-9-2011 it is specified that these officers "DRI and Preventive Wing" would continue the practice of not adjudicating the show cause notice issued under Section 28 of the Act. It was

perhaps because of this that having issued show cause notice, the said authority placed the adjudication proceedings before the competent Customs officer at Mumbai for adjudication.

33. Before concluding, we may notice that the Bombay High Court in the case of Commissioner of Customs (Import) v. Electron Textile Exports (P) Limited and Another dated 14-6-2006 confirmed the view of the Special Bench of the Tribunal. In case of Konia Trading Co. v. Commissioner of Customs, Jaipur reported in MANU/CE/0423/ 2004 : 2004 (170) E.L.T. 51, the Tribunal had held that the DRI authorities would have jurisdiction to issue show cause notice and also adjudicate the proceedings under Section 28. However, much water has flown since then, in particular, the decision of the Supreme Court in the case of Sayed Ali (supra) and the subsequent statutory amendments and notifications of the Government have materially changed the situation. We have, therefore, not based our reasonings on such judgment but adopted an independent logic. With respect to the rest of the prayers, the same in our opinion, must be allowed to follow adjudication proceedings and subject to outcome thereof. The petitioners had been subjected to certain conditions for provisional release of the goods. At this stage when the conditions were imposed sometime in February, 2012 and the goods were also released, we would not alter such conditions. We would permit the Department to proceed further and conclude the show cause notice proceedings.

Subject to the outcome thereof, the deposit, security and bank guarantee of the petitioners be governed.

34. The petitioners have not filed reply to the notice so far. They would have time up to 15-3-2014 to file reply to the show cause notice.

35. We do see a point in contention of the petitioners that the competent authority should finalize the assessment without any further delay. Only thereafter the question of short-levy or non-levy of the duty would arise. The competent authority may take appropriate steps in this regard expeditiously. Subject to above observations, petition is dismissed. Rule is discharged. Interim relief stands vacated."

85. We may note that the above referred decision of this Court has attained finality in view of the fact that no SLP challenging the said judgment came to be preferred by the Revenue.

86. The decision of the Delhi High Court, in the case of Mangali Impex Ltd. (supra), upon which significant reliance has been placed by Mr.Pandya, is not helpful in any manner. We take notice of the fact that the said decision of the Delhi High Court has been stayed by the Supreme Court vide order dated 1st August 2016 passed in the SLP filed by the Union of India. The order reads thus :

"Exemption from filing c/c of the impugned judgment and permission to file synopsis and list of dates granted. Issue notice. In the meanwhile, there shall be a stay of operation of the impugned judgment and order passed by the High Court of Delhi."

87. One another important amendment we should look into is the amendment brought in by the Finance Act, 2019, whereby, it sought to amend Section 110 of the Act by inserting sub-section (5) and the proviso. The same is reproduced herein below for the ready reference.

"(5) Where the proper officer, during any proceedings under the Act, is of the opinion that for the purposes of protecting the interest of revenue or preventing smuggling, it is necessary so to do, he may, with the approval of the Principal Commissioner of Customs or Commissioner of Customs, by order in writing, provisionally attach any bank account for a period not exceeding six months :

Provided that the Principal Commissioner of Customs or Commissioner of Customs may, for reasons to be recorded in writing, extend such period to a further period not exceeding six months and inform such extension of time to the person whose bank account is provisionally attached, before the expiry of the period so specified."

88. We also have to our advantage a Division Bench decision of the Madras High Court in the case of Vasantha (in the matter of detenu : Krishnan Govindaraj) v. State of Tamil Nadu, represented by Secretary to Government Public (S.C.) Department, Fort St.George, Chennai, wherein the court held as under :

> *"It was further contended that the DRI officers are the authorised officers and a notification has been placed before this Court, besides pointed out that in an earlier writ petition, this Court had rejected an identical contention in S.Peer Mohammed v. State of Tamil Nadu and others, H.C.P.No.800 of 2000, dated 29.9.2000.*
>
> *In our considered view, the last of the contentions just requires to be mentioned and rejected as DRI officers are also Customs officers as seen from the notification dated 8th February, 1963, published in the Gazette and DRI officers have been conferred with the powers specified in Secs.100, 101, 103, 104, 106, 107 and 110 of the Customs Act, 1962. This contention is a favorite contention, which Mr.B.Kumar, learned senior counsel advances in every case and it had been considered in detail by an earlier Division Bench of this Court in S.Peer Mohammed v. State of Tamil Nadu and others, H.C.P.No.800 of 2000, dated 29.9.2000 to which one of us (E.Padmanabhan, J.), was a party. In the said H.C.P., it has been held thus:*

> *"16. The learned senior counsel referred to the definition of the 'Proper Officer' as found in Sec.2(34) of the Customs Act as well as Secs.77, 107, 124 of the Customs Act and contended that Directorate of Revenue Intelligence officers who intercepted the detenu are not the Proper Officers and therefore no action could be taken, nor the detenu could be branded as a smuggler. We are not persuaded to sustain the said contention."*

In the circumstances, while accepting the view taken by the earlier Division Bench, we reject the last of the contentions as untenable."

89. The aforesaid discussion leads us to only one conclusion that the DRI officers are also Customs officers and have been conferred with the powers specified under the various provisions of the Customs Act, 1962.

90. The aforesaid takes us now to the last question as regards the misuse of Section 108 of the Customs Act, 1962 and the allegations of harassment made by the writ-applicant at the end of the DRI officials at Vapi.

91. As regards the allegations of harassment, we are of the view that as such there is no credible material on record except the bare words of the writ-applicant on the basis of which we can arrive at the conclusion that the writ-applicant is being unnecessarily harassed by the DRI officials stationed at Vapi by

summoning him time and again. We take notice of the fact that the writ-applicant has, in the past, attended the DRI office at Vapi and his statements have also been recorded. We may only observe that if no further inquiry is necessary, then the writ-applicant may not be unnecessarily called at the office of the DRI at Vapi for the purpose of inquiry.

FINAL CONCLUSION :

92. We sum-up our final conclusions as under :

(1) Any person can be arrested for any offence under the Customs Act, 1962, by the Customs Officer, if such officer has reasons to believe that such person has committed an offence punishable under Section 132 or Section 133 or Section 135 or Section 135A or Section 136 of the Customs Act, 1962, and in such circumstances, the Customs Officer is not obliged to follow the dictum of the Supreme Court as laid in the case of Lalitha Kumari (supra).

(2) When any person is arrested by an officer of the Customs, in exercise of his powers under Section 104 of the Customs Act, 1962, the officer effecting the arrest is not obliged in law to comply with the provisions of Sections 154 to 157 of the Code of Criminal Procedure, 1973. The officer of the Customs, after arresting such person, has to inform that person of the grounds for such arrest, and the person arrested will have to be taken to a Magistrate without unnecessary delay. However, the provisions of

Sections 154 to 157 of the Code will have no application at that point of time.

(3) The Customs/DRI Officers are not the Police Officers and, therefore, are not obliged in law to register FIR against the person arrested in respect of an offence under Sections 133 to 135 of the Customs Act, 1962.

(4) The decision of the Supreme Court in the case of Om Prakash (supra) has no bearing in the case on hand.

(5) A DRI Officer is a 'proper officer' for the purposes of the Customs Act, 1962. As the Customs/DRI Officers are not the Police Officers, the statements made to them are not inadmissible under Section 25 of the Evidence Act.

(6) A Police Officer, making an investigation of an offence, representing the State, files a report under Section 173 of the Code, becomes the complainant, whereas, the prosecuting agency under the special Acts files a complaint as a complainant, i.e. under Section 137 of the Customs Act.

(7) The power to arrest a person by a Customs Officer is statutory in character and should not be interfered with. Section 108 of the Act does not contemplate any Magisterial intervention. The statements recorded under Section 108 of the Customs Act are distinct and different from the statements recorded by the Police Officers during

the course of investigation under the Code.

(8) The expression 'any person' in Section 104 of the Customs Act includes a person who is suspected or believed to be concerned in the smuggling of goods. However, a person arrested by a Customs Officer because he is found to be in possession of smuggled goods or on suspicion that he is concerned in smuggling goods is not, when called upon by the Customs Officer to make a statement or to produce a document or thing, a person is accused of an offence within the meaning of Article 20(3) of the Constitution of India. Where a Customs Officer arrests a person and informs that person of the grounds of his arrest, for the purposes of holding an inquiry 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. The accusation could be said to have been made when a complaint is lodged by an officer competent in that behalf before the Magistrate. The arrest and detention are only for the purpose of holding effective inquiry under Sections 107 and 108 of the Customs Act with a view to adjudging confiscation of dutiable or prohibited goods and imposing penalty.

(9) The main thrust of the decision in the case of Om Prakash (supra) to ascertain whether the offence was bailable or non-bailable, was on the point that the offence being non-cognizable, it had to be bailable. In other words, Om Prakash (supra) deals with the question, “whether the

offences under the Customs Act, 1962, and the Central Excise Act, 1944, are bailable or not ?" At the time when the decision in Om Prakash (supra) was rendered, an offence under the Customs Act was not cognizable. So also, the categorization of cases which are non-bailable and cases which are bailable was not there before the amendment of Section 104 by Act No.23 of 2012 and Act No.17 of 2013 respectively.

(10) The Notification dated 7th July 1997 issued by the Central Board of Central Excise makes it clear that all the officers of the Directorate of Revenue Intelligence are appointed as the officers of the Customs. Under the Notification dated 7th March 2002, the officers of the DRI have been given the jurisdiction over the whole of India. In such circumstances, the submissions of the learned counsel appearing for the writ-applicant as regards the territorial jurisdiction of the DRI office at Vapi to summon the writ-applicant under Section 108 of the Customs Act, 1962, pales into insignificance.

(11) Although the allegations of harassment at the end of the DRI officials at Vapi are not substantiated by any credible material on record, yet there should not be any unnecessary harassment to a person summoned for the purpose of interrogation under Section 108 of the Customs Act, 1962.

93. In view of the aforesaid discussion, this writ-application stands disposed of accordingly.

(VIKRAM NATH, CJ)

(J. B. PARDIWALA, J)

/M.A. SAIYED