Supreme Court of India
Directorate Of Enforcement vs Deepak Mahajan on 31 January, 1994
Equivalent citations: 1994 AIR 1775, 1994 SCR (1) 445
Author: S Pandian
Bench: Pandian, S.R. (J)

PETITIONER:
DIRECTORATE OF ENFORCEMENT

Vs.

RESPONDENT:
DEEPAK MAHAJAN

DATE OF JUDGMENT31/01/1994

BENCH:
PANDIAN, S.R. (J)
BENCH:
PANDIAN, S.R. (J)
REDDY, K. JAYACHANDRA (J)

CITATION:
1994 AIR 1775 1994 SCR (1) 445
1994 SCC (3) 440 JT 1994 (1) 290
1994 SCALE (1)294

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by S. RATNAVEL PANDIAN, J.- The salient and indeed substantial legal question which looms for determination in this appeal may be formulated as follows:

> Whether a Magistrate before whom a person arrested under subsection (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?

2. As a preclude to the judgment, we would like to state that though the appellant in the present case

has been arrested under sub-section (1) of Section 35 of Foreign Exchange Regulation Act, 1973 (hereinafter referred to as the 'FERA') and taken to the Magistrate under sub-section (2) thereof, we while disposing the legal questions posed for determination, are inclined to deal with the corresponding provisions under the Customs Act also for the reasons (i) that the scheme for both the FERA and the Customs Act is more or less the same; (ii) the provisions relating to the arrest and production of the arrestee before the Magistrate are identical; (iii) the arguments by both the parties have been advanced pertaining to provisions of both the Acts; and (iv) almost all the decisions cited relate to the provisions of both the Acts.

3. There is a vertical cleavage of opinion amongst the various High Courts on the above legal question which has come up for adjudication in the present appeal.

4. This appeal, by special leave is directed against the judgment of the High Court of Delhi dated April 6, 1990 rendered by a five-Judge Bench in Criminal Writ No. 316 of 1989 overruling the decision of the same High Court in Union of India v. O.P. Gupta' rendered in Criminal Writ Nos. 104 and 116 of 1984 by a three-Judge Bench reversing an earlier decision in Dalam Chand Baid v. Union of India2 which was decided by a Division Bench of the same High Court holding that a Magistrate has no power to remand a person accused of an offence punishable under the Foreign Exchange Regulation Act, 1973 (hereinafter refer-red to as 'FERA') to judicial custody.

5. Though normally, it may not be necessary to make any reference about the constitution of a particular bench which is the prerogative of the Chief Justice of the High Court concerned, yet regrettably in this case, it has become unavoidable to make reference concerning the constitution of the Bench since during the course of the arguments, a diatribe, though not justifiable was made about the formation of the Bench, presided over by Charanjit Talwar, J. who gave a dissenting judgment in the case of O.P. Gupta'.

6. In Gupta case' the Bench was presided over by Yogeshwar Dayal, J. (as he then was) and two other learned Judges, namely, Charanjit Talwar and Malik Sharief-Ud-Din, JJ. of whom Charanjit Talwar, J. gave his dissenting judgment.

7. When the decision of Gupta case' was holding the field, Respondent I namely Deepak Mahajan was arrested on March 13, 1989 by the officers of the Enforcement Directorate for an offence punishable under the provisions of FERA and taken before the Additional Chief Metropolitan Magistrate, New Delhi on the next date as per the mandate of sub-section (2) of Section 35 of the said Act. An application under Section 167(2) of the Code of Criminal Procedure (hereinafter referred to as 'the Code') was moved by the Enforcement Officer seeking petitioner's detention under judicial custody commonly known in the legal parlance as 'judicial remand' on the ground that it was necessary to complete the investigation. On the very same day, the respondent unsuccessfully moved the court for bail. The Magistrate remanded the first respondent to judicial custody for fourteen days and subsequently extended the detention period. The first respondent challenged the jurisdiction of the Magistrate in authorising the detention (remand) and the subsequent consecutive extensions. But his plea was rejected on the basis of the decision in Gupta case'. This order of the Magistrate was impugned before the High Court. The Division Bench of the

High Court comprising of Charanjit Talwar, V.B. Bansal, JJ. in the light of the decision of this Court in Chaganti Satyanarayana v. State of A.p.3 holding that the powers of remand vested in a Magistrate become exercisable only after an accused is produced 1 (1990) 2 Del Lawyer 23 (FB) 2 1982 Cri LJ 747: (1982) 21 DLT 144 (Del) 3 (1986) 3 SCC 141: 1986 SCC (Cri) 321: AIR 1986 SC 2130: (1986) 2 SCR 1128 before him in terms of sub-section (1) of Section 167 of the Code, referred the matter by its order dated March 12, 1980 to a larger Bench opining that the law laid down in Gupta case' was no longer a good law and it required reconsideration. The learned Chief Justice of the High Court on such reference constituted a Full Bench comprising of Charanjit Talwar, J.C. Jain and V.B. Bansal, JJ. This three-Judge Bench after hearing the matter for sometime expressed their view that the case should be heard and decided by a five-Judge Bench since the judgment in Gupta case' was already decided by a three-Judge Bench. It was under those circumstances, the Bench was constituted comprising of Charanjit Talwar, Malik Sliarief-Ud-Din, Sunanda Bhandare, P.K. Bahri and R.L. Gupta, JJ. Thus the said case was heard by a five-Judge Bench.

8. By majority (per Charanjit Talwar, Sunanda Bhandare and P.K. Bahri, JJ.) the decision in Gupta case' has been overruled though Malik ShariefUd-Din and R.L. Gupta, JJ. gave their separate dissenting judgments. The result was that the dictum laid down in Gupta case' to the effect that there is " power available to a Magistrate under Section 167(2) of the Code to commit to custody a person produced before him by a Customs Officer under Section 104 of the Customs Act", has been overruled. However, the conclusion of Gupta case' that "Section 437 of the Code of Criminal Procedure does not confer implied power of remand on a Magistrate" has been upheld.

9. Consequent upon the above dictum by majority, it has been held in the present case that the Magistrate has no power to remand a person produced before him in accordance with Section 35(2) of FERA.

10. In this connection, be it noted that the provisions of Section 35 of FERA [which corresponds to Section 19-B of the old FERA Act (VII of 1947)] and sub-sections (1) to (3) of Section 104 of the Customs Act are identical and they do not explicitly lay down the procedure as to how the Magistrate should deal with an arrestee, when brought before him either by the Officer of the Enforcement Directorate or the Customs Officer, as the case may be.

11. For proper understanding and scrutiny of this rule, let us reproduce the relevant provisions of Section 35 of FERA and Section 104 of the Customs Act.

"Section 35 of FERA "35. (1) If any officer of Enforcement authorised in this behalf by the Central Government, by general or special order, has reason to believe that any person in India or within the Indian customs waters has been guilty of an offence punishable under this Act, 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 any officer of Enforcement 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)."

Section 104 of the Customs Act "104. (1) If any officer of Customs empowered in this behalf by general or special order of the Collector of Customs has reason to believe that any person in India or within the Indian customs waters has been guilty of an offence punishable under Section 135, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest. (2) Every person arrested under sub-section (1) shall, without unnecessary delay, be taken to a Magistrate.

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

12. Though there is no specific provision in FERA as sub- section (4) of Section 104 of the Customs Act, Section 62 speaks of non-cognizable offences and that section reads as follows:

> "62. Certain offences to be non-cognizable.- Subject to the provisions of Section 45 and notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898), an offence punishable under Section 56 shall be deemed to be non-cognizable within the meaning of that Code."
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> 13. Sub-section (2) of Section 61 restricts a court in taking cognizance of certain offences and also in cases of certain offences except under certain conditions. That provision reads thus:
>
> "61. Cognizance of offences.-
>
> (2) No court shall take cognizance-
>
> (i) of any offence punishable under sub- section (2) of Section 44 or sub-section (1) of Section 58,-
>
> (a) where the offence is alleged to have been committed by an officer of Enforcement not lower in rank than an Assistant Director of Enforcement, except with the previous sanction of the Central Government;

(b) where the offence is alleged to have been committed by an officer of Enforcement lower in rank than an Assistant Director of Enforcement, except with the previous sanction of the Director of Enforcement; or

(ii) of any offence punishable under Section 56 or Section 57, except upon complaint in writing made by-

(a) the Director of Enforcement; or

(b) any officer authorised in writing in this behalf by the Director of Enforcement or the Central Government; or

(c) any officer of the Reserve Bank authorised by the Reserve Bank by a general or special order:

Provided that where any such offence is the contravention of any of the provisions of this Act or of any rule, direction or order made thereunder which prohibits the doing of an act without permission, no such complaint shall be made unless the person accused of the offence has been given an opportunity of showing that he had such permission."

14. The key questions that come up for consideration are whether a Magistrate before whom a person arrested under Section 35 is taken can detain that arrestee in judicial custody and if not, what the Magistrate is expected to do? To answer those questions, we have to examine sub-section (2) of Section 35 of FERA and sub-section (2) of Section 104 of the Customs Act which are in pari materia reading:

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

15. Apart from the power of arrest provided under Section 35 of the FERA, Section 45 of that Act empowers any police officer not below the rank of a Sub-Inspector of Police or any other officer of the Central Government or State Government authorised by the Central Government in this behalf to enter into any public place and search and also arrest without warrant any person found therein who is reasonably suspected of having committed or of committing or of being about to commit any contravention of the provisions of sub-section (1) of Section 8. The procedure to be followed, after effecting such arrest is contemplated under sub-section (2) of Section 45 which states that:

"Where any person is arrested under sub- section (1) by an officer other than a police officer, such officer shall, without unnecessary delay, take or send the person arrested before a Magistrate having jurisdiction in the case or before the officer-in-charge of a police station."

In this context, a perplexed question arises as to what the Magistrate or the police officer has to do in case the arrestee under Section 45(1) of FERA is taken or sent before him? Section 46 lays down the procedure in respect of foreign exchange or any other goods seized by police officers. Though we are not very much concerned in this case with the procedure laid down in Section 46, the fact remains that in the FERA, the police officers are given some independent authority to act in exercise of certain provisions of this Act. There is no provision in the Customs Act similar to Sections 45 and 46 of the FERA. However, Section 151 of Customs Act empowers and requires certain specified officers enumerated under clauses (a) to (e) to assist officers of Customs in the execution of the Act. One of the officers enumerated under clause (c) is 'officers of police'. But this section does not empower police officers to exercise the powers conferred upon customs officers by and under the Act but only authorises and requires the police officers to assist the customs officer in the exercise of their powers.

16. The 'proper officer' referred to in various provisions of the Customs Act, who is to perform any function under the said Act, means the officer of Customs who is assigned those functions by the Board or Collector of Customs as defined under clause (34) of Section 2 of Customs Act, but it does not include the officers of Police or any other officers enumerated under Section 151. Therefore the police officers have no independent role to play in exercise of the powers under the Customs Act as in Sections 45 and 46 of the FERA.

17. For the disposal of this appeal, we have to deal with the intendment and application of various provisions of the FERA particularly Sections 35, 45, 46, Section 104 of Customs Act, Section 68 of the Gold Control Act and various provisions of the Code of Criminal Procedure in particular Sections 4(2), 41, 56, 57, 157(2), 167(1)(2), 436, 437 and the allied provisions, in the light of the principles of law enunciated by the judicial pronouncements of this Court as well as of some High Courts. In fact, in the impugned judgment, the High Court also has examined all those provisions from various angles, but the question would be whether the interpretation given and the conclusion arrived at by the majority of the court below can be sustained?

18. Reverting to the judgment under challenge, Charanjit Talwar, J. in his separate judgment with which Sunanda Bhandare and P.K. Bahri, JJ. agreed, has given the following reasons for his conclusions. Those being:

> (1) Neither an officer of Enforcement nor the Customs Officer within the meaning of the provisions of FERA or Customs Act respectively is a police officer, in charge of a police station or a police officer making an investigation as contemplated under Section 167(1) of the Code and, therefore, a Magistrate before whom an arrestee is taken or sent by an Enforcement Officer or Customs Officer, as the case may be, cannot authorise the detention of the persons so produced or presented, either to judicial custody or to the custody of the arrestor or make subsequent periodical extension of detention or remand in exercise of the powers under Section 167(2) of the Code. In other words, the power to arrest a person coupled with the duty to produce or present him before a Magistrate under Section 35 of FERA or Section 104 of Customs Act ipso facto does not attract the operation of clauses (1) and (2) of

Section 167 of the Code.

(2) Neither the Officer of Enforcement authorised under Section 35 of FERA nor the Officer of Customs empowered under Section 104 is a police officer nor is the person arrested by any of them is yet an accused triable by a Magistrate having jurisdiction or an accused to be committed for trial at that stage. (3) Neither the Officer of Enforcement nor the Customs Officer is empowered with the power of investigation as contemplated under Chapter XII of the Code or under any specific provisions of the special laws. (4) Neither the officer holding inquiry under the provisions of FERA or the Customs Act can exercise the power of investigation as contemplated under Chapter XII of the Code by virtue of Section 4(2) of the Code. (5) The power conferred on such authorised or empowered officer to make arrest of any person on reasonable belief that such person has been guilty of an offence punishable under the provisions of FERA or Section 135 of the Customs Act, as the case may be, and to produce the arrestee before a Magistrate is though similar with a duty cast on a police officer as under Sections 56 and 57 of the Code, those officers are not equivalent to police officers with the power of investigation into the commission of an offence as empowered under Chapter XII of the Code though they are enjoying the limited power, as given to the officer-incharge of a police station under the Code for the purpose of releasing an arrestee on bail or otherwise.

19. Ere we turn to the legal issues raised by the respective parties, it has become inevitably necessary to first examine the issues on the legal principle and then to interpret the construction of the language of the statute, deployed both implicitly and explicitly with reference to the provisions of the Code and of the other allied special laws.

20. Manifestly, the significant and axial issue that arises in this appeal for decision is pristinely a legal question which we have indicated in the proemial part of this judgment and which we have to examine in the backdrop of the various provisions of the general procedural laws, keeping in mind of the dividing arguendo and the shades of divergent judicial opinions of various High Courts though the controversy centres around a short point.

21. In order to resolve that controversy, it has become essential to focus our attention on the task of proper application of the concerned law by ascertaining the purposeful meaning of the language deployed, the spirit and sense which the legislature has aimed and intended to convey and the conclusions to be drawn which are in the tenor of the law though not within the letter of the law.

22. In the background of the above principle of statutory interpretation, now coming to and dealing with the legal challenges, several vital queries have to be considered and answered. Those are:

(1) Whether the jurisdiction of the Magistrate to authorise detention of an arrestee produced before him either in judicial custody or otherwise under Section 167(2) of the Code is completely excluded or ousted by the absence of any specific provision in the FERA or the Customs Act empowering the Magistrate to authorise the detention'

of the arrestee under the Code?

(2) When the jurisdiction of the Magistrate to authorise detention is not expressly forbidden by any specific exclusionary provision and when such exclusion of jurisdiction cannot be clearly implied or readily inferred, does the detention authorised by the Magistrate either to judicial custody or otherwise become ab initio void and illegal and can the Magistrate be said to have exceeded or abused his authority? (3) What is the procedure to be followed and the order required to be passed by the Magistrate when a person arrested under the FERA or Customs Act is presented before him?

(4) When the Officer of Enforcement or Customs Officer is not inclined to release the arrestee on bail or otherwise by exercising the power under sub-section (3) of Section 35 of FERA or Section 104 of the Customs Act, a s the case may be, but produces the arrestee before a Magistrate as mandated by sub-section (2) of the abovesaid provisions, will it not be a legal absurdity to say that the Magistrate should forthwith let go the arrestee without ordering detention and also extension of further detention or remand? and (5) Whether the Magistrate has no other alternative except to release that arrested person, produced before him on bail or direct him to be freed unconditionally and whether the Magistrate is completely stripped off his authority to refuse bail and take him to judicial custody?

The above questions are some of the legal challenges canvassed before the Full Bench of the High Court, which by a majority opinion, has negatively answered.

23. Keeping in view the cardinal principle of law that every law is designed to further the ends of justice but not to frustrate on the mere technicalities, we shall deal with all those challenges in the background of the principles of statutory interpretations and of the purpose and the spirit of the concerned Acts as gathered from their intendment.

24. The concerned relevant provisions of the Acts with which we are concerned, no doubt, pose some difficulty in resolving the question with regard to the jurisdiction of the Magistrate authorising detention and subsequent extension of the same when the provisions of those Acts are narrowly and literally interpreted. Though the function of the courts is only to expound the law and not to legislate, nonetheless the legislature cannot be asked to sit to resolve the difficulties in the implementation of its intention and the spirit of the law. In such circumstances, it is the duty of the court to mould or creatively interpret the legislation by liberally interpreting the statute.

25. In Maxwell on Interpretation of Statutes, Tenth Edn. at page 229, the following passage is found:

"Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. ... Where the main object and

> intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used."
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> 26. In Seaford Court Estates Ltd. v. Asher4 Denning, L.J. said:
>
> "[W]hen a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament ... and then he must supplement the written word so as to give 'force and life' to the intention of the legislature. A Judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do as they would have done. A judge must not alter the material of which the Act is woven, but he can and should iron out the creases."

27. Though the above observations of Lord Denning were disapproved in appeal by the House of Lords in Magor and St. Mellons v. Newport Corpn5 Sarkar, J. speaking for the Constitution Bench in M. Pentiah v. Muddala Veeramallappa6 adopted that reasoning of Lord Denning. Subsequently also, Beg, C.J. in Bangalore Water Supply and Sewerage Board v. A. Rajappa7 approved the observations of Lord Denning stating thus : (SCC p. 285, para 148) "Perhaps, with the passage of time, what may be described as the extension of a method resembling the 'arm-chair rule' in the construction of wills, Judges can more frankly step into the shoes of the legislature where an enactment leaves its own intentions in much too nebulous or uncertain a state."

(emphasis supplied)

28. It will be befitting, in this context, to recall the view expressed by Judge Frank in Guiseppi v. Walling8 which read thus:

"The necessary generality in the wordings of many statutes, and ineptness of drafting in others frequently compels the court, as best as they can, to fill in the gaps, an activity which no matter how one may label it, is in part legislative. Thus the courts in their way, as administrators perform the task of supplementing statutes. In the case of courts, we call it 'interpretation' or 'filling in the gaps'; in the case of administrators we call it 'delegation' or authority to supply the details."

4 (1949) 2 All ER 155, 164
5 (1951) 2 All ER 839 (HL)
6 (1961) 2 SCR 295: AIR 1961 SC 1107
7 (1978) 2 SCC 213:1978 SCC (L&S) 215: AIR 1978 SC 548
8 144 F 2d 608, 620, 622 (CCA 2d, 1944) quoted in 60 Harvard Law Review 370, 372

29. Subba Rao, C.J. speaking for the Bench in Chandra Mohan v. State of U.P.9 has pointed out that the fundamental rule of interpretation is that in construing the provisions of the Constitution or the

Act of Parliament, the Court "will have to find out the express intention from the words of the Constitution or the Act, as the case may be ..." and eschew the construction which will lead to absurdity and give rise to practical inconvenience or make the provisions of the existing law nugatory.

A.P. Sen, J. in Organo Chemical Industries v. Union of India10 has stated thus: (SCR p. 89 : SCC p. 586, para 23) "A bare mechanical interpretation of the words 'devoid of concept or purpose' will reduce most of legislation to futility. It is a salutary rule, well established, that the intention of the legislature must be found by reading the statute as a whole."

30. Krishna Iyer, J. has pointed out in his inimitable style in Chairman, Board of Mining Examination and Chief Inspector of Mines v. Ramjee11: "To be literal in meaning is to see the skin and miss the soul of the Regulation."

31. True, normally courts should be slow to pronounce the legislature to have been mistaken in its constantly manifested opinion upon a matter resting wholly within its will and take its plain ordinary grammatical meaning of the words of the enactment as affording the best guide, but to winch up the legislative intent, it is permissible for courts to take into account of the ostensible purpose and object and the real legislative intent. Otherwise, a bare mechanical interpretation of the words and application of the legislative intent devoid of concept of purpose and object will render the legislature inane. In cases of this kind, the question is not what the words in the relevant provision mean but whether there are certain grounds for inferring that the legislature intended to exclude jurisdiction of the courts from authorising the detention of an arrestee whose arrest was effected on the ground that there is reason to believe that the said person has been guilty of an offence punishable under the provisions of FERA or the Customs Act which kind of offences seriously create a dent on the economy of the nation and lead to hazardous consequences. Authorities, a few of which we have referred to above, show that in given circumstances, it is permissible for courts to have functional approaches and look into the legislative intention and sometimes it may be even necessary to go behind the words and enactment and take other factors into consideration to give effect to the legislative intention and to the purpose and spirit of the enactment so that no absurdity or practical inconvenience may result and the legislative exercise and its scope and object may not become futile.

32. In the light of the above exposition of the principle of law, we have no reason to believe and in fact do not believe that the provisions of the (1967) 1 SCR 77: AIR 1966 SC 1987: (1967) 1 LLJ 412 (1979) 4 SCC 573: 1980 SCC (L&S) 92: (1980) 1 SCR 61 (1977)2SCC256:1977SCC(L&S)226:AIRI977SC965 FERA and Customs Act were passed for any other purpose rather than their ostensible purposes, vital among which being the economic development of the country and augmentation of revenue.

33. Bearing in mind the above principles of interpretation and the legal proposition, we shall now approach all the challenges canvassed and examine the legal issue on the principle of interpretation of law, more so with the aid of some other provisions of the procedural law so that no obscurity or absurdity may result in resolving the legal intricacy posed for consideration in this case.

34. To begin with, we shall examine the primary question whether Section 35(2) of FERA or Section 104(2) of the Customs Act serves as a substitute to Section 167(1) of the Code. To say in other words, whether Section 167(1) is replaced or substituted by the abovesaid provisions of two special Acts. The majority of the Judges in O.P. Gupta' in paragraph 37 had posed a similar question for their consideration and answered that question in the following words:

> "Section 167(1) of the Code is already replaced by Section 104(2) of the Customs Act and Section 35(2) of the Foreign Exchange Regulation Act. What is to be done to a person who is so produced before the Magistrate is dealt with only under Section 167(2) of the Code and not under Section 167(1) of the Code."

But Talwar, J. dissented from that view observing, "the power to arrest a person coupled with the duty to produce him or present him before the Magistrate ipso facto does not attract the provisions of Section 167 of the Code."

35. The same learned Judge (Talwar, J.) in his judgment in Deepak Mahajan which is impugned herein again considered that question and reaffirmed his earlier stand rejecting altogether the contention that Section 35(2) of FERA and Section 104(2) of the Customs Act are substitutes to Section 167(1) of the Code and that it is nothing but only a mismatch of the provisions of the Code and the provisions of the Customs Act and FERA, mainly on the ground that the pre- requisite conditions required for invocation of Section 167(1) are conspicuously absent in the provisions of the other two special Acts, those being: (1) Section 167 of the Code specifically refers only to a person arrested and detained in custody by a police officer on well-founded accusation or information; (2) there must be an investigation by a police officer as explained in Section 167(1) of the Code; (3) the words 'officer-in-charge of a police station or a police officer making the investigation, if he is not below the rank of Sub-Inspector' cannot be substituted by the words 'Customs Officer or Officer of Enforcement'; (4) there is no question of transmission of a copy of the entries in the diary as prescribed relating to the case in respect of the accused arrested and (5) the person arrested by the Officer of Enforcement or Customs Officer is not an accused within the purview of the Code and that the officer concerned is not investigating the commission of an offence triable by a Magistrate though they have been given a limited power of the officer-in-charge of a police station "to grant or not to grant bail" and nothing more.

36. The majority of the Judges in Deepak Mahajan have gone to the extent of holding that Section 4(2) of the Code cannot come in aid to invoke Section 167(2) even on interpretation of the provisions of those two special Acts read with Section 4(2) of the Code.

37. We shall now examine the provisions of Section 167(1) and (2) of the Code vis-a-vis Section 35(2) of FERA and Section 104(2) of the Customs Act having regard to the purpose for which these provisions are enacted.

38. The caption of Section 167 reads: "Procedure when investigation cannot be completed in twenty-four hours." A conjoint reading of Section 57 (corresponding to Section 61 of the old Code) and Section 167(1) and (2) barring the provisos to sub-section (2) of the Code together, manifestly

shows that the legislature has contemplated that the investigation of the offence in case of a person arrested without a warrant should be completed in the first instance within twenty-four hours and if the investigation cannot be completed within that period, then the Magistrate can authorise the detention of the accused in such custody as he thinks fit for a term not exceeding fifteen days.

39. The original proviso added to sub-section (2) of Section 167 of the Code empowered the Magistrate to authorise detention of the accused persons otherwise than in custody of the police, beyond the period of fifteen days for a total period not exceeding sixty days and on the expiry of the said period of sixty days, the accused person shall be released on bail. But subsequently, in place of the original proviso, the present proviso was substituted by Section 13(a) of CrPC (Amendment) Act, 1978 w.e.f. December 18, 1978 whereby the period of 60 days prescribed in general for all kinds of cases under the original proviso has been modified as ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years, and sixty days, where the investigation relates to any other offence, By Section 13(b) of the said Amendment Act, original Explanation 1 was renumbered as Explanation II and Explanation 1 was added.

40. Sub-section (2-A) to Section 167 of the Code has been inserted by Section 13(c) of the abovesaid Amendment Act w.e.f. December 18, 1978. Before the introduction of the proviso to Section 167(2), further remand on the expiry of fifteen days was made on the strength of the Explanation to Section 344 of the old Code under the heading "Reasonable cause for remand" which corresponded to the present Explanation 1 of Section 309 of the new Code. The reasonable cause for such extension of remand was the collection of sufficient evidence within the first period of fifteen days to raise a suspicion that the accused might have committed an offence and that it appeared likely that further evidence might be obtained by such a remand.

This extension of remand was for enabling the investigating agency to collect further material pertaining to the offence under investigation. See (1) A. Lakshmanarao v. Judicial Magistrate, Parvatipuram 12, (2) Gouri Shankar Jha v. State of Bihar13 and (3) Matabar Parida v. State of Orissa 14.

41. The present proviso (a)(i) and (ii) of Section 167(2) empowers the Magistrate to authorise the detention of the accused person otherwise than in the custody of the police beyond the period of fifteen days, if the Magistrate is satisfied that adequate grounds exist for doing so, but no Magistrate can authorise the detention of the accused person in custody for a total period exceeding ninety days or sixty days as the case may be. If the investigation is not completed within the prescribed period, the accused is entitled to bail as embodied in the statute itself, provided the accused person is 'prepared to and does furnish bail' and the person released on bail under Section 167(2) of the Code should be deemed to have been so released under the provisions of Chapter XXXII for the purposes of that Chapter. Reference may be made to Hussainara Khatoon v. Home Secretary, State of Bihar] 5 and Khatri v. State of Bihar16.

42. A doubtful question may arise as to whether the Magistrate can detain the accused person for further period beyond the prescribed period of ninety or sixty days if the accused is not prepared to

and does not furnish bail. This doubt is cleared by Explanation 1 of Section 167(2) stating that notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail. We feel that it is not necessary, in this context, to go in detail of the powers of the Magistrate to extend the period of detention under Section 167(2) or to remand the accused resorting to Explanation 1 of Section 309 corresponding to Explanation of Section 344 of the old Code since that question is not germane to the issue pertaining to this case. However, reference may be made to Chaganti Satyanarayana v. State of A.p.3 paragraph 10.

43. To say differently, Section 167(2) in its entirety uses the expression only 'detention' but not 'remand' (as found in Section 309 of the Code). Under Section 167(2) the Magistrate to whom the accused person is forwarded irrespective of the fact that whether he has or has not jurisdiction to try the case, authorises the detention of the accused in such custody as he thinks fit for a term not exceeding fifteen days and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction. Under the proviso, the Magistrate can authorise the detention for a specified period as envisaged in the proviso to sub- section (2) 12 (1970) 3 SCC 501: 1971 SCC (Cri) 107 13 (1972) 1 SCC 564: 1972 SCC (Cri) 328 14 (1975) 2 SCC 220: 1975 SCC (Cri) 484 15 (1980) 1 SCC 81: 1980 SCC (Cri) 23: (1979) 3 SCR 169 16 (1981) 1 SCC 627: 1981 SCC (Cri) 228 of Section 167 of the Code beyond the period of fifteen days, on his being satisfied with the existence of adequate grounds.

44. Section 167 is one of the provisions falling under Chapter XII of the Code commencing from Section 154 and ending with Section 176 under the caption "Information to the police and other powers to investigate". Though Section 167(1) refers to the investigation by the police and the transmission of the case diary to the nearest Magistrate as prescribed under the Code etc., the main object of sub- section (1) of Section 167 is the production of an arrestee before a Magistrate within twenty-four hours as fixed by Section 57 when the investigation cannot be completed within that period so that the Magistrate can take further course of action as contemplated under subsection (2) of Section

167.

45. The first limb of sub-section (1) of Section 167 uses the expression person is arrested and detained in custody". The word 'accused' occurring in the second limb of sub- section (1) and in sub-section (2) of Section 167 refers only that person "arrested and detained in custody".

46. The word 'arrest' is derived from the French word 'Arreter' meaning "to stop or stay" and signifies a restraint of the person. Lexicologically, the meaning of the word 'arrest' is given in various dictionaries depending upon the circumstances in which the said expression is used. One of us, (S. Ratnavel Pandian, J. as he then was being the Judge of the High Court of Madras) in Roshan Beevi v. Joint Secretary, Government of T.N.17 had an occasion to go into the gamut of the meaning of the word 'arrest' with reference to various textbooks and dictionaries, the New Encyclopaedia Britannica, Halsbury's Laws of England, A Dictionary of Law by L.B. Curzon, Black's Law Dictionary and Words and Phrases. On the basis of the meaning given in those text book sand lexicons, it has

been held that :

> "[T]he word 'arrest' when used in its ordinary and natural sense, means the apprehension or restraint or the deprivation of one's personal liberty. The question whether the person is under arrest or not, depends not on the legality of the arrest, but on whether he has been deprived of his personal liberty to go where he pleases. When used in the legal sense in the procedure connected with criminal offences, an arrest consists in the taking into custody of another person under authority empowered by law, for the purpose of holding or detaining him to answer a criminal charge or of preventing the commission of a criminal offence. The essential elements to constitute an arrest in the above sense are that there must be an intent to arrest under the authority, accompanied by a seizure or detention of the person in the manner known to law, which is so understood by the person arrested."

47. There are various sections in Chapter V of the Code titled "Arrest of persons" of which Sections 41, 42, 43 and 44 empower different authorities and even private persons to arrest a person in given situation. Section 41 deals with the power of a police officer to arrest any person without an order 17 1984 Cri LJ 134: (1984) 15 ELT 289: 1983 MLW (Cri) 289 (Mad) from a Magistrate and without a warrant. Section 42 deals with the power of a police officer to arrest any person who in the presence of a police officer has committed or has been accused of committing a non-cognizable offence and who refuses on demand "to give his name and residence or gives a name or residence which such officer has reason to believe to be false". Section 43 empowers any private person to arrest any person who in his presence commits a non- cognizable offence, or any proclaimed offender. Section 44 states that when any offence is committed in the presence of a Magistrate whether Executive or Judicial, within his local jurisdiction, he may himself arrest or order any person to arrest the offender and may thereupon subject to the provisions contained in the Code as to bail commit the offender to custody.

48. Thus the Code gives power of arrest not only to a police officer and a Magistrate but also under certain circumstances or given situations to private persons. Further, when an accused person appears before a Magistrate or surrenders voluntarily, the Magistrate is empowered to take that accused person into custody and deal with him according to law. Needless to emphasize that the arrest of a person is a condition precedent for taking him into judicial custody thereof. To put it differently, the taking of the person into judicial custody is followed after the arrest of the person concerned by the Magistrate on appearance or surrender. It will be appropriate, at this stage, to note that in every arrest, there is custody but not vice versa and that both the words 'custody' and 'arrest' are not synonymous terms. Though 1 custody' may amount to an arrest in certain circumstances but not under all circumstances. If these two terms are interpreted as synonymous, it is nothing but an ultra legalist interpretation which if under all circumstances accepted and adopted, would lead to a startling anomaly resulting in serious consequences, vide Roshan Beevi17.

49. While interpreting the expression 'in custody' within the meaning of Section 439 CrPC, Krishna Iyer, J. speaking for the Bench in Niranjan Singh v. Prabhakar Rajaram Kharote18 observed that: (SCC p. 563, para 9) "He can be in custody not merely when the police arrests him, produces him

before a Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before the court and submits to its directions."

50. The next vital question, in this connection that crops up for consideration is as to whether the registration of a case and the entries in the diary relating to that case as prescribed by the Code are sine qua non for a Magistrate taking into custody of a person when that person appears or surrenders or is brought before the Magistrate and whether that person should have assimilated the characteristic of "an accused of an offence" at that stage itself within the meaning of sub-section (1) of Section 167 or subsection (1) of Section 437 CrPC.

18 (1980) 2 SCC 559, 563: 1980 SCC (Cri) 508

51. This question is in a way answered in Gurbaksh Singh Sibbia v. State of Punjab19. While examining the scope of Section 438 of the Code in that case, Chandrachud, C.J. speaking for the Constitution Bench held that: (SCR p. 418: SCC p. 590, para 37) "The filing of a first information report is not a condition precedent to the exercise of the powers under Section 438. The imminence of a likely arrest founded on a reasonable belief can be shown to exist even if an FIR is not yet filed."

52. The dictum laid down in that case indicates that the registration of a case and the entries of the case diary are not necessary for entertaining an application for grant of anticipatory bail, but the mere imminence of a likely arrest on a reasonable belief on an accusation of having committed a nonbailable offence, will be sufficient to invoke that provision.

53. In the backdrop of the above legal position, the conclusion that can be derived is that a Magistrate can himself arrest or order any person to arrest any offender if that offender has committed an offence in his presence and within his local jurisdiction or on his appearance or surrender or is produced before him and take that person (offender) into his custody subject to the bail provisions. If a case is registered against an offender arrested by the Magistrate and a follow-up investigation is initiated, or if an investigation has emanated qua the accusations levelled against the person appearing or surrendering or being brought before the Magistrate, the Magistrate can in exercise of the powers conferred on him by Section 167(2) keep that offender or person under judicial custody in case the Magistrate is not inclined to admit that offender or person to bail.

54. The above deliberation leads to a derivation that to invoke Section 167(1), it is not an indispensable pre- requisite condition that in all circumstances, the arrest should have been effected only by a police officer and none else and that there must necessarily be records of entries of a case diary. Therefore, it necessarily follows that a mere production of an arrestee before a competent Magistrate by an authorised officer or an officer empowered to arrest (notwithstanding the fact that he is not a police officer in its stricto sensu) on a reasonable belief that the arrestee "has been guilty of an offence punishable" under the provisions of the special Act is sufficient for the Magistrate to take that person into his custody on his being satisfied of the three preliminary conditions, namely (1) the arresting officer is legally competent to make the arrest; (2) that the particulars of the offence or the accusation for which the person is arrested or other grounds for such arrest do exist and are well-founded; and (3) that the provisions of the special Act in regard to the arrest of the persons and

the production of the arrestee serve the purpose of Section 167(1) of the Code.

55. In this background, it has become obligatory and imperative to settle the spinal issue as to whether Section 35(2) of FERA and Section 104(2) of 19 (1980) 2 SCC 565: 1980 SCC (Cri) 465: (1980) 3 SCR 383 the Customs Act serve as a substitute of Section 167(1) substantially fulfilling the basic conditions contained therein.

56. No doubt, there is no investigation by any officer equivalent or comparable to an officer-in-charge of police station or a police officer in a proceeding under any of these two special Acts as contemplated under Chapter XII of the Code. But what Section 167 envisages is that the arrestee is an accused or accused person against whom there is well-founded information or accusation requiring an investigation. Firstly the reason given in the impugned judgment for holding that Section 167(1) is neither replaced nor substituted by any provision of the special Acts is that the arrestee by the authorised officer or empowered officer under the FERA or Customs Act respectively cannot be said to be 'an accused' or 'accused person' which expressions are used in Section 167 or 'accused of an offence' which expression is used in Article 20(3) of the Constitution and in Sections 25 and 27 of the Evidence Act. In support of this reasoning, some decisions of this Court have been relied upon about which we would deal at the later part of this judgment.

57. We shall presently ponder over the true meaning of the word/words person', 'accused', 'accused person', "person accused of an offence" and " person accused of any offence" used in various provisions of the varied laws in different context and scrutinise as to whether they are interchangeable words and have the same connotation in and under all situations and circumstances which exercise will render much assistance in ascertaining the significance and import of the words, 'persons', 'accused' appearing in Section 167 of the Code.

58. It is germane to note that though the word "person" is defined in the Indian Penal Code (Section 11) and the General Clauses Act [Section 3(42)] which are identical and are not exhaustive but an inclusive one, the words I accused' or 'accused person' or 'accused of an offence' are not defined either in the Indian Penal Code or in the Indian Evidence Act or in the General Clauses Act, 1897. In the Code of Criminal Procedure also, these words are not defined except an inclusive meaning of the word 'accused' is given in the Explanation to Section 273 of the Code of 1973, of course, confined only to the mode of taking and recording evidence in the course of the trial or other proceedings as envisaged in the said section. Though this explanation of the word 'accused' limited to that Section 273 cannot and should not be strained and stretched to such an extreme extent to make it applicable in all circumstances wherever the word 'accused' appears in the Code, this explanation gives a clue providing or suggesting an answer to the problem that we are trying to solve.

59. To perfectly understand the vital significance and impetus of the introduction of this new explanation, one must take note of the legislative change in the substantive provision of Section 273 which corresponds to Section 353 of the old Code which section laid down the general rule that at any inquiry or trial, all evidence "shall be taken in the presence of the accused..... As recommended by the Joint Committee to make it clear that the provision of this section would apply not only to proceedings against an accused but also other proceedings inclusive of the security proceedings

under Chapter VIII of the Code, the words and figures "under Chapters XVIII, XX, XXI, XXII, XXIII" occurring in old Section 353 have been substituted in the present section by the words "in the course of the trial or other proceeding". Consequent upon the change in the substantive part of the section, it had become necessary to introduce the explanation so that the evidence in security proceeding against a person also shall be taken in his presence or in the presence of his pleader when his personal attendance is dispensed with.

The relevant explanation reads:

> "In this section, 'accused' includes a person in relation to whom any proceeding under Chapter VIII has been commenced under this Code."
>
> (emphasis supplied)

60. Chapter VIII deals with (1) security for keeping the peace (a) on conviction; (b) on information; and (2) with security for good behaviour, covering Sections 106 to 124 of the Code. The provisions of this Chapter are preventive in their scope and object and they are not intended to punish but to prevent against possible hazard to the community as well as commission of crimes. There is no question of making any investigation by any police officer as contemplated under Chapter XII of the Code and forwarding of any report under Section 173(2) of the Code to a Magistrate pertaining to security proceedings under this Chapter though such proceedings are criminal in nature but not relating to any offence.

61. In none of the sections in Chapter VIII, the words 'accused' or ,accused person' or 'accused of an offence' or 'accused of any offence' are used barring the word 'person' as deployed in Section 35 of the FERA and Section 104 of the Customs Act.

62. We shall now examine this aspect of the matter in relation to other provisions of the Code.

63. The proviso to Section 113 of the Code states that if it appears to a Magistrate "that there is reason to fear the commission of a breach of the peace, and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person, the Magistrate may at any time issue a warrant for his arrest". The necessary corollary is that when the person after his arrest on such warrant is produced before the Magistrate, the Magistrate has either to detain him or to-release him on bail. For the enforcement of preventive action under Chapter VIII of the Code, the officer incharge of a police station is authorised under Section 41(2) of the Code to arrest or cause to be arrested any person belonging to one or some of the categories of persons specified in Sections 109 or 1 10 of the Code. It may be recalled in this context that Magistrate under Section 122 of the Code can commit any person to prison if that person ordered to give security under Section 106 or Section 117 of the Code does not give such security.

Similarly, under Section 151 which falls under Chapter XI under the heading "Preventive action of the police", the police officer is empowered to arrest a person so as to prevent the commission of a cognizable offence where commission of the offence cannot be otherwise prevented. Sub-section (2)

of Section 151 restricts the period of detention of the person arrested in custody for a period exceeding 24 hours unless his further detention is required or authorised under any of the provisions of the Code or for any other law for the time being in force. In all the above provisions of the Code, the word used is 'person' alone.

64. Likewise, Section 41(1) of the Code which gives authority to a police officer to arrest a person without warrant does not use the expression I accused' or 'accused person' under any of the enumerated categories (a) to (i) but uses the expression 'person'. However, the person arrested under the provision of Section 41(1) when produced before the Magistrate is detained in exercise of the power vested on the Magistrate under sub-sections (1) and (2) of Section 167. We have already referred to various sections empowering the Magistrate or any private person to effect an arrest and in that case also, the subsequent detention is made by the Magistrate only in exercise of his powers under Section 167(2) of the Code. 65. As we have pointed out in the preceding part of this judgment, that in the first limb of Section 167(1), the expression used is "person ... arrested and detained in custody" and the word 'accused' occurs only in the second limb of the same provision denoting that "person arrested and detained in custody" as envisaged in the first limb of that section.

66. Section 35 of FERA and Section 104 of the Customs Act which confer power on the prescribed officer to effect the arrest deploy only the word 'person' and not 'accused' or 'accused person' or 'accused of any offence'. In fact, the word 'accused' appears only in the penal provisions of the special Acts, namely sub-section (4) of Section 56 of FERA and subsection (3) of Section 135 of the Customs Act while explaining as to what would be the special and adequate reasons for awarding the sentence of imprisonment for a sub- minimum period, though sub-sections (1) to (3) of Section 56 of FERA and sub-sections (1) and (2) of Section 135 of Customs Act use the expression 'person' who becomes punishable on conviction under the penal provisions by the court trying the offence.

67. In this context, a relevant doubtful question arises for deliberation whether the expressions 'person', 'accused' or 'accused person' found in Section 167 of the Code and "person accused of any offence" used in Article 20(3) of the Constitution and Sections 25 and 27 of the Evidence Act denote one and the same meaning. Though it is not absolutely essential to exhaustively examine the connotation of these two expressions and render our considered and reasoned opinion, yet it has become necessary to fonder over to the limited question as to whether the expression .'accused' and I accused person' appearing in Section 167(1) and (2) denote "a person accused..... As recommended by the Joint Committee to make it clear that the provision of this section would apply not only to proceedings against an accused but also other proceedings inclusive of the security proceedings under Chapter VIII of the Code, the words and figures "under Chapters XVIII, XX, XXI, XXII, XXIII" occurring in old Section 353 have been substituted in the present section by the words "in the course of the trial or other proceeding". Consequent upon the change in the substantive part of the section, it had become necessary to introduce the explanation so that the evidence in security proceeding against a person also shall be taken in his presence or in the presence of his pleader when his personal attendance is dispensed with.

The relevant explanation reads:

"In this section, 'accused' includes a person in relation to whom any proceeding under Chapter VIII has been commenced under this Code."

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60. Chapter VIII deals with (1) security for keeping the peace (a) on conviction; (b) on information; and (2) with security for good behaviour, covering Sections 106 to 124 of the Code. The provisions of this Chapter are preventive in their scope and object and they are not intended to punish but to prevent against possible hazard to the community as well as commission of crimes. There is no question of making any investigation by any police officer as contemplated under Chapter XII of the Code and forwarding of any report under Section 173(2) of the Code to a Magistrate pertaining to security proceedings under this Chapter though such proceedings are criminal in nature but not relating to any offence.

61. In none of the sections in Chapter VIII, the words 'accused' or ,accused person' or 'accused of an offence' or 'accused of any offence' are used barring the word 'person' as deployed in Section 35 of the FERA and Section 104 of the Customs Act.

62. We shall now examine this aspect of the matter in relation to other provisions of the Code.

63. The proviso to Section 113 of the Code states that if it appears to a Magistrate "that there is reason to fear the commission of a breach of the peace, and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person, the Magistrate may at any time issue a warrant for his arrest". The necessary corollary is that when the person after his arrest on such warrant is produced before the Magistrate, the Magistrate has either to detain him or to release him on bail. For the enforcement of preventive action under Chapter VIII of the Code, the officer in-charge of a police station is authorised under Section 41(2) of the Code to arrest or cause to be arrested any person belonging to one or some of the categories of persons specified in Sections 109 or 1 10 of the Code. It may be recalled in this context that Magistrate under Section 122 of the Code can commit any person to prison if that person ordered to give security under Section 106 or Section 117 of the Code does not give such security.

Similarly, under Section 151 which falls under Chapter XI under the heading "Preventive action of the police", the police officer is empowered to arrest a person so as to prevent the commission of a cognizable offence where commission of the offence cannot be otherwise prevented. Sub-section (2) of Section 151 restricts the period of detention of the person arrested in custody for a period exceeding 24 hours unless his further detention is required or authorised under any of the provisions of the Code or for any other law for the time being in force. In all the above provisions of the Code, the word used is 'person' alone.

64. Likewise, Section 41(1) of the Code which gives authority to a police officer to arrest a person without warrant does not use the expression ,accused' or 'accused person' under any of the enumerated categories (a) to (i) but uses the expression 'person'. However, the person arrested under the provision of Section 41 (1) when produced before the Magistrate is detained in exercise of

the power vested on the Magistrate under sub-sections (1) and (2) of Section 167. We have already referred to various sections empowering the Magistrate or any private person to effect an arrest and in that case also, the subsequent detention is made by the Magistrate only in exercise of his powers under Section 167(2) of the Code.

65. As we have pointed out in the preceding part of this judgment, that in the first limb of Section 167(1), the expression used is "person ... arrested and detained in custody" and the word 'accused' occurs only in the second limb of the same provision denoting that "person arrested and detained in custody" as envisaged in the first limb of that section.

66. Section 35 of FERA and Section 104 of the Customs Act which confer power on the prescribed officer to effect the arrest deploy only the word 'person' and not 'accused' or 'accused person' or 'accused of any offence'. In fact, the word 'accused' appears only in the penal provisions of the special Acts, namely sub-section (4) of Section 56 of FERA and subsection (3) of Section 135 of the Customs Act while explaining as to what would be the special and adequate reasons for awarding the sentence of imprisonment for a sub- minimum period, though sub-sections (1) to (3) of Section 56 of FERA and sub-sections (1) and (2) of Section 135 of Customs Act use the expression 'person' who becomes punishable on conviction under the penal provisions by the court trying the offence.

67. In this context, a relevant doubtful question arises for deliberation whether the expressions 'person', 'accused' or 'accused person' found in Section 167 of the Code and "person accused of any offence" used in Article 20(3) of the Constitution and Sections 25 and 27 of the Evidence Act denote one and the same meaning. Though it is not absolutely essential to exhaustively examine the connotation of these two expressions and render our considered and reasoned opinion, yet it has become necessary to fonder over to the limited question as to whether the expression .'accused' and ,accused person' appearing in Section 167(1) and (2) denote "a person accused of any offence" at the stage of authorising detention on production of an arrestee before a Magistrate.

68. The legislative change in Section 436 of the old Code (about which we shall deal with presently) and the introduction of the Explanation to Section 273 of the new Code as well as the legislative intendment of some other provisions of the Code to be mentioned hereafter insinuate in finding out the answer to the above query.

69. It may be noted in Section 436 of the old Code (1898) which corresponded to Section 437 of the Code of 1861 and Section 298 of the Code of 1872, the expression 'accused person' alone was employed but subsequently, the expression was substituted by "person accused of an offence" by Section 117 of Act XVIII of 1923. This legislative change by substituting the new expression was made in order to supersede a number of rulings rendered under the old Code (Section 437) employing the words, ,accused person' which held the section applicable to proceedings against person proceeded under Chapter VIII also as "persons against whom there is an accusation in the ordinary acceptation of the word".

70. In this connection, reference may be made to a judgment of the Madras High Court in which Justice Miller in Re Kora Ayyappa2O held that persons ordered to give security for keeping peace or

to be of good behaviour are not persons accused of an offence.

71. The present Section 398 (power to order further inquiry) of the new Code which corresponds to Section 436 of the old Code are similar except for the substitution of the words 'Chief Judicial Magistrate' in place of the words 'District Magistrate'.

72. In other words, by the introduction of the expression "person accused of an offence" Section 398 is made inapplicable to the security proceedings as well as to proceedings under Sections 133, 144 and 145 of the Code.

73. The above legislative change of the expression in Section 436 of the old Code serves as a guide in adjudging the distinction between the two expressions "accused person" and "accused of an offence".

74.Let us now approach this aspect of the matter from different angle with reference to the provisions of Article 20(3) of the Constitution as well as to Sections 24 to 27 of the Evidence Act.

75. The prohibitive sweep of Article 20(3) which imposes the ban on self-accusation reads, "No person accused of any offence shall be compelled to be a witness against himself."

76. In explaining the intendment of Article 20(3), relating to search and seizure of documents under Sections 94 and 96 of the old Code, an eight Judge Bench of this Court in M.P. Sharma v. Satish Chandra, District Magistrate, Delhi21 held that one of the components for invoking sub-clause 20 (1910) It Cri LJ 251: 7 MLJ 104: 5 IC 809 (Mad) 21 1954 SCR 1077: AIR 1954 SC 300: 1954 Cri LJ 865 (3) of Article 20 should be that it is a right pertaining to a person 'accused of an offence.'

77. Having regard to the facts therein, it has been held: (SCR pp. 1086-87) "The cases with which we are concerned have been presented to us on the footing that the persons against whom the search warrants were issued, were all of them persons against whom the First Information Report was lodged and who were included in the category of accused therein and that therefore they are persons "accused of an offence" within the meaning of Article 20(3) and also that the documents for whose search the warrants were issued, being required for investigation into the alleged offences, such searches were for incriminating material."

78.Thereafter, a Constitution Bench of this Court in Raja Narayanlal Bansilal v. Maneck Phiroz Mistry22 while dealing with the import of Article 20(3) with reference to certain provisions of the Indian Companies Act made the following observation, relying on the decision in M.P. Sharma21: (SCR p. 438) "Similarly, for invoking the constitutional right against testimonial compulsion guaranteed under Article 20(3) it must appear that a formal accusation has been made against the party pleading the guarantee and that it relates to the commission of an offence which in the normal course may result in prosecution. Here again the nature of the accusation and its probable sequel or consequence are regarded as important." In the above two judgments, both the Benches have not discussed the distinction between the expression 'accused person' and 'person accused of any offence'.

79. Subsequently, an eleven-Judge Bench of this Court in State of Bombay v. Kathi Kalu Oghad23 went into the question and by majority concluded that an accused person cannot be said to have been compelled to be a witness against himself simply because he made a statement while in police custody, without anything more.

80.What is that 'anything more' required has been explained in the following words: (SCR p. 37) "(6) 'To be a witness' in its ordinary grammatical sense means giving oral testimony in Court. Case-law has gone beyond this 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.

(7) To bring the statement in question within the prohibition of Article 20(3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that 22 (1961) 1 SCR 417,438:AIR 1961 SC 29:(1960) 30 Comp Cas 644 23 (1962) 3 SCR 10: AIR 1961 SC 1808: (1961) 2 Cri LJ 856 he should become an accused any time after the statement has been made."

See also Nandini Satpathy v. P.L. Dani24.

81. The essence of the above decisions is that to bring a person within the meaning of 'accused of any offence', that person must assimilate the character of an 'accused person' in the sense that he must be accused of any offence.

82.We think it is not necessary to interpret the expression, "person accused of any offence" as appearing in Article 20(3) any more but suffice to note that the same expression is found in Sections 25 and 27 of the Evidence Act.

83. It is apposite to note that clauses (1) to (3) of Article 22 which speak of a 'person arrested' use only the word 'person'. Article 22(2) states that "every person who is arrested and detained in custody..... A similar expression is used in Section 167(1) of the code reading, "Whenever any person is arrested and detained in custody..... Thus while referring to a person arrested and detained neither Article 22 nor Section 167 employs the expression "accused of any offence".

84.Coming to the provisions of the Evidence Act, Section 24 uses the expression 'accused person' whereas in Sections 25 and 27, the identical expression "person accused of any offence" is used. But in Section 26 neither of these two expressions is used but "any person". It was only while in examining the admissibility or otherwise of a statement of an 'accused person' or "a person accused of any offence", this Court in a series of judgments has dealt with the connotation of these two expressions but not otherwise.

85. Justice J.C. Shah who was member of the Bench in Raja Narayanlal Bansilal22 speaking for the majority of a Constitution Bench in State of U.P. v.Deoman Upadhyaya25 has observed as follows: (SCR p. 21) "The ban which is partial under Section 24 and complete under Section 25 applies equally whether or not the person against whom evidence is sought to be led in a criminal trial was

at the time of making the confession in custody. For the ban to be effective the person need not have been accused of an offence when he made the confession. The expression, 'accused person' in Section 24 and the expression 'a person accused of any offence' have the same connotation and describe the person against whom evidence is sought to be led in a criminal proceeding."

86. The judgment in Deoman case25 is refer-red to State of Bombay v. Kathi Kalu Oghad23 but that Bench has not expressed any view as to whether the expression 'accused person' and the expression "person accused of any 24 (1978) 2 SCC 424: 1978 SCC (Cri) 236 25 (1961) 1 SCR 14: AIR 1960 SC 1125:1960 Cri LJ 1504 offence" have the same connotation. But in none of these judgments, Section 167 has come up for interpretation.

87. in Ramesh Chandra Mehta v. State of W.B.26 a Constitution Bench of this Court while examining the admissibility of a statement recorded under Section 171-A of the Sea Customs Act of 1878 (which Act is now repealed) corresponding to Section 108 of the Customs Act of 1962 has held that a person arrested by a Customs Officer is not a person accused of an offence within the meaning of Article 20(3) of the Constitution or within the meaning of Section 25 of the Evidence Act.

88. In Veera Ibrahim v. State of Maharashtra27 a Division Bench of this Court following the dictum laid down in Ramesh Chandra Mehta26 observed that in order to claim the benefit of the guarantee against testimonial compulsion embodied in clause (3) of Article 20 it must be shown, firstly that the person who made the statement was "accused of any offence"; secondly that he made the statement under compulsion. It has been further held that when the statement of a person is recorded by the Customs Officer under Section 108, he is not a person "accused of an offence under the Customs Act" and that an accusation which would stamp a person with the character of an accused of any offence is levelled only when the complaint is filed against that person by the Customs Officer complaining of the commission of any offence under the provisions of the Customs Act.

89. In a recent decision, this Court in Poolpandi v. Superintendent, Central Excise28 has reiterated the same view and held that a person being interrogated during investigation under Customs Act or FERA is not a person accused of any offence within the meaning of Article 20(3) of the Constitution. See also Percy Rustomji Basta v. State of Maharashtra29.

90.In this connection, reference may be made to a decision in Ramanlal Bhogilal Shah v. D.K. Guha30 which has distinguished Ramesh Chandra Mehta26 and held on the facts of that case that the person served with summons under the FERA, was an accused within the meaning of Article 20(3) of the Constitution of India. The decision in Ramanlal Bhogilal30 has taken a different view to that of Ramesh Chandra Mehta26 which view was examined in Poolpandi28 and was distinguished on the ground that a first information report in Ramanlal Bhogilal Shah30 has been lodged earlier and consequently it was settled that the person was accused of an offence within the meaning of Article 20(3).

91. Though this Bench is bound by the decisions of all the above Constitution Benches yet these decisions are distinguishable since none of the above decisions relates to the interpretation of

Section 167 of the Code explaining the meaning of the word 'accused' or 'accused person' limited to 26 AIR 1970 SC 940: (1969) 2 SCR 461: 1970 Cri LJ 863 27 (1976) 2 SCC 302: 1976 SCC (Cri) 278 28 (1992) 3 SCC 259: 1992 SCC (Cri) 620 29 (1971) 1 SCC 847 30 (1973) 1 SCC 696: 1973 SCC (Cri) 583 the purpose of Section 167. On the other hand, all those decisions are rendered only on the question of admissibility or otherwise of the statement of a person arrested under the provisions of the general Act or special Acts concerned and recorded while in the custody of the arrester.

92. A thorough and careful study of all the provisions of the Code manifestly discloses that the word 'accused' in the Code denotes different meanings according to the context in which it is deployed; in that sometimes the said word is employed to denote a person arrested, sometimes a person against whom there is an accusation, but who is yet not put on trial and sometimes to denote a person on trial and so on.

93. It is apposite, in this context, to refer to the following passage found in Chapter 4 in the book titled The Loom of Language :

> "Words are not passive agents meaning the same thing and carrying the same value at all times and in all contexts. They do not come in standard shapes and sizes like coins from the mint, nor do they go forth with a decree to all the world that they shall mean only so much, no more and no less. Through its own particular personality, each word has a penumbra of meaning which no draftsman can entirely cut away. It refuses to be used as a mathematical symbol."

94. It may not be out of place to mention here that an officer-in-charge of a police station who is empowered under Section 156 to investigate on an information received under Section 154 or otherwise takes up the investigation by proceeding to the spot "for the discovery and arrest of the offender when he has reason to suspect the commission of an offence" as contemplated under Section 157 of the Code. At that stage, the investigating officer does not suddenly jump to a conclusion that the person against whom the investigation has commenced has committed an offence. But he can arrive at such a conclusion only when the investigation consummates to a finality on the collection of evidence eliminating all suspicion and establishing the commission of the offence. In case the investigating officer arrives at a conclusion that no offence is made out he forwards his final report to that effect.

95.The view of majority in the impugned judgment that the person arrested under the FERA or Customs Act cannot fall within the meaning of the word 'accused' for invoking Section 167 solely based on the decisions of this Court, namely Ramesh Chandra Mehta26 as well as Illias v. Collector of Customs, Madras31 is not logically concluded for more than one reason

96. Firstly, almost all the decisions of this Court holding that "a person arrested by an Enforcement Officer or Customs Officer, as the case may be, is not a 'person accused of an offence' " have been rendered only in the context of examining the question of admissibility or otherwise of the statement of a person arrested under those special Acts but not with reference 31 AIR 1970 SC 1065: (1969) 2 SCR 613 to authorising the detention of an arrestee under Section 167 of the Code by a

Magistrate and so the dictum laid down in those decisions is clearly distinguishable;

97. Secondly, in the teeth of the newly introduced explanation to Section 273 of 1973 Code it is made clear that the word 'accused' includes a person against whom any proceeding under Chapter VIII of the Code has been commenced. Thus the explanation gives a clear clue that in given situation the word 'person' can be construed as 'accused' or 'accused person'.

98. Thirdly, in the Code different expressions are used under various provisions to denote a person involving in a criminal proceeding such as I offender', 'person', 'accused', 'accused person', "accused of an offence" depending on the nature of the proceeding.

99. Fourthly, the very legislative change made in Section 436 of the old Code corresponding to Section 398 of the new Code substituting the words It person accused of an offence" in the place of "accused person" as originally stood makes it clear that in the procedural code, these two expressions cannot always denote the same meaning or be construed as synonymous or interchangeable and this legislative change indicates that the Legislature in its wisdom intended to make a clear distinction between these expressions for the reasons mentioned supra.

100. Fifthly, if the expression 'accused person' and "a person accused of an offence" are to be held denoting the same meaning and interchangeable at all times and situations, it will become fallacious and pernicious in the implementation of the procedural law of the Code.

101. Sixthly, in interpreting a statute in its true spirit, the right direction should be to give a full and literal meaning to the language aiming ever to show fidelity to the meaningful purpose of the statute and never to make it sterile and impotent by giving a strict literal interpretation putting blinkers for judicial approach; because such interpretation will run counter to the legislative intent.

102. From the foregoing discussion, it is clear that the word 'accused' or accused person' is used only in a generic sense in Section 167(1) and (2) denoting the'person' whose liberty is actually restrained on his arrest by a competent authority on well-founded information or formal accusation or indictment. Therefore, the word 'accused' limited to the scope of Section 167(1) and (2) particularly in the light of Explanation to Section 273 of the Code includes 'any person arrested'. The inevitable consequence that follows is that "any person is arrested" occurring in the first limb of Section 167(1) of the Code takes within its ambit "every person arrested" under Section 35 of FERA or Section 104 of the Customs Act also as the case may be and the 'person arrested' can be detained by the Magistrate in exercise of his power under Section 167(2) of the Code. In other words, the 'person arrested' under FERA or Customs Act is assimilated with the characteristics of an 'accused' within the range of Section 167(1) and as such liable to be detained under Section 167(2) by a Magistrate when produced before him.

103. In fact, Justice Yogeshwar Dayal speaking for the majority in Union of India v. O.P. Gupta' has rightly observed thus:

> "The expression 'accused' used in Section 167(2) of the Code is not in the sense of accused under Article 20(3) of the Constitution and/or Section 25 of the Indian Evidence Act with which the Supreme Court was concerned in the cases of Ramesh Chander Mehta26 and/or Illias31. The word, 'accused' in Section 167(2) of the Code is merely used in the sense of defining a person who has been arrested, detained and produced before a Magistrate and not in the sense of accused person under the Customs Act and/or Foreign Exchange Regulation Act since that person has been defined in the aforesaid two judgments as only that person against whom cognizance has been taken by the Magistrate on a complaint being filed. Therefore, the judgments of the Supreme Court in the cases of Ramesh Chander Mehta26 or IlliaS31 referred to above do not stand in the way of applicability of Section 167(2) of the Code to the person detained and produced by competent officer before the Magistrate in pursuance of Section 104(2) of the Customs Act or Section 35(2) of the Foreign Exchange Regulation Act."

104. Further, in the later part of his judgment the learned Judge has observed :

> "The word accused is to be construed in its widest connotations. It means the one who is arrested and detained."

After having observed as above, it has been concluded by the learned Judge thus :

> "Section 167(1) of the Code is already replaced by Section 104(2) of the Customs Act and Section 35(2) of the Foreign Exchange Regulation Act. What is to be done to a person who is so produced before the Magistrate is dealt with only under Section 167(2) and not under Section 167(1) of the Code."

105. Agreeing with the majority judgment in O.P. Gupta' and with the view of the High Court of Kerala in Supdt. of Customs, C.L U. Cochin v. P.K Ummerkutty32 and M.K Ayoob v. Superintendent, C.I W., Cochin33 as well as of the Gujarat High Court in N.H. Dave v. Mohmed Akhtar34 Arunachalam, J. of the Madras High Court in his well-reasoned judgment in Senior Intelligence Officer v. M.KS. Abu Bucker35 has observed as follows:

> "Obviously in relation to a person arrested under the Customs Act, Section 167(1), CrPC, is covered suitably by Section 104(1) and (2) of the Customs Act. In that event, the application of Section 167(2) of the 32 1983 Cri LJ 1860 (Ker) 33 1984 Cri LJ 949: 1984 KLT 215 (Ker) 34 (1984) 15 ELT 353 (Guj) 35 1989 LW (Cri) 325 Code can pose no difficulty, except the consideration of the words accused person' used in that sub-section.
>
> * * * * If we construe the words 'an accused person' in Section 167(2) of the Code, it will be clear that the words would take in, the person who is arrested or detained in custody by the Customs Officer who had reason to believe that such person was guilty of an offence punishable under Section 135 of the Act.

> * * * * Looked at in this background, the word 'accused' in Section 167(2), CrPC, will have to be construed in its widest connotation meaning 'one who has been arrested and detained' which will include even a person suspected of having committed an offence.
>
> * * * * I hold that the Magistrate has the power to remand a person produced before him in accordance with Section 104 of the Customs Act by virtue of the powers of remand under Section 167(2) and (3) of the Code and could further exercise the powers under Section 437 of the Code."

106. In our considered opinion, the view taken in O.P. Gupta' and M.K.S. Abu Bucker35 and also of the Kerala High Court and Gujarat High Court is the logical and correct view and we approve the same for the reasons we have given in the preceding part of this judgment. We, indeed, see no imponderability in construing Section 35(2) of FERA and Section 104(2) of Customs Act that the said provisions replace Section 167(1) and serve as a substitute thereof substantially satisfying all the required basic conditions contained therein and that consequent upon such replacement of sub-section (1) of Section 167, the arrested person under those special Acts would be an accused person to be detained by the Magistrate under subsection (2) of Section 167. In passing, it may be stated that there is no expression 'police officer' deployed in Section 167(1) nor does it appear in any part of Section 167(2). The authority for detaining a person as contemplated under Section 167(2) is in aid of investigation to be carried on by any prosecuting agency who is invested with the power of investigation.

107. We next proceed to consider the second question whether the authorised or empowered officer under FERA or Customs Act exercises all or any of the powers of a police officer outlined under Chapter XII of the Code and conducts any investigation within the meaning of Section 2(h) of the Code.

108.The word 'investigation' is defined under Section 2(h) of the present Code [which is an exact reproduction of Section 4(1)(b) of the old Code] which is an inclusive definition as including all the proceedings under the Code for the collection of evidence conducted by a police officer or any person (other than a Magistrate) who is authorised by a Magistrate in this behalf. The said word 'investigation' runs through the entire fabric of the Code. There is a long course of decisions of this Court as well as of the various High Courts explaining in detail, what the word 'investigation' means and is? It is not necessary for the purpose of this case to recapitulate all those decisions except the one in H.N. Rishbud v. State of Delhi36. In that decision, it has been held that: (SCR pp. 1157-58) "[U]nder the Code investigation consists generally of the following steps: (1) Proceeding to the spot, (2) Ascertainment of the facts and circumstances of the case, (3) Discovery and arrest of the suspected offender, (4) Collection of evidence relating to the commission of the offence which may consist of (a) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (b) the search of places of seizure of things considered necessary for the investigation and to be produced at the trial, and (5) Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so taking the necessary steps for the same by the filing of a charge-sheet

under Section

173."

The steps involved in the course of investigation, as pointed out in Rishbud case36 have been reiterated in State of M.P. v. Mubarak Ali37.

109. No doubt, it is true that there are a series of decisions holding the view that an Officer of Enforcement or a Customs Officer is not a police officer though such officers are vested with the powers of arrest and other analogous powers. Vide Ramesh Chandra v. State of W.B.26 and Illias v. Collector of Customs, MadraS31. In the above decisions, this Court has held that the above officers under the special Acts are not vested with the powers of a police officer qua investigation of an offence under Chapter XII of the Code including the power to forward a report under Section 173 of the Code. See also State of Punjab v. Barkat Ram38 and Badku Joti Savant v. State of Mysore39.

110. As we have pointed out in the preceding part of this judgment, Section 167(1) falls under Chapter XII relating to "Information to the Police and their powers to investigate". Sub-section (1) of Section 167 speaks of the arrest by a police officer and the follow-up investigation by him. Section 35(1) of FERA and Section 104(1) of the Customs Act empower the authorised officer under the relevant provisions to effect arrest of a person against whom there is reason to believe that he has been guilty of an offence under the respective concerned Acts.

36 (1955) 1 SCR 1150: AIR 1955 SC 196: 1955 Cri LJ 526 37 1959 Supp 2 SCR 201: AIR 1959 SC 707: (1960) 1 LLJ 36 38 (1962) 3 SCR 338: AIR 1962 SC 276: (1962) 1 Cri LJ 217 39 (1966) 3 SCR 698: AIR 1966 SC 1746: 1966 Cri LJ 1353

111. Neither the Police Act, 1861 (Act V of 1861) nor any other statute defines the expression 'police officer'. Shortly stated, the main duties of the police are the prevention, detention and investigation of crimes. As the powers and duties of the State have increased and are increasing manifold, various Acts dealing with Customs, Excise, Forest, Taxes etc. have come to be passed and consequently the prevention, detention and investigation of offences as prescribed under those Acts have come to be entrusted to officers with different nomenclatures appropriate to the subject with reference to which they function. However, as stated supra, though the powers of customs officers and enforcement officers are not identical to those of police officers qua the investigation under Chapter XII of the Code yet the officers under the FERA and Customs Act are vested with certain powers similar to the powers of police officers.

112. The expression 'diary' referred to in Section 167(1) of the Code is the special diary mentioned in Section 167(2) which should contain full and unabridged statements of persons examined by the police so as to give the Magistrates on a perusal of the said diary, a satisfactory and complete source of information which would enable him to decide whether or not the accused person should be detained in custody but it is different from the general diary maintained under Section 44 of the Police Act.

113. Though an authorised officer of Enforcement or Customs is not undertaking an investigation as contemplated under Chapter XII of the Code, yet those officers are enjoying some analogous powers such as arrest, seizures, interrogation etc. Besides, a statutory duty is enjoined on them to inform the arrestee of the grounds for such arrest as contemplated under Article 22(1) of the Constitution and Section 50 of the Code. Therefore, they have necessarily to make records of their statutory functions showing the name of the informant, as well as the name of the person who violated any other provision of the Code and who has been guilty of an offence punishable under the Act, nature of information received by them, time of the arrest, seizure of the contraband if any and the statements recorded during the course of the detection of the offence/offences.

114. Apart from those two special Acts under consideration, there are various Central Acts containing provisions of prevention of offences enumerated therein and also for enforcement of the said provisions. Certain provisions of the Central Acts which we would like to give below by way of illustration in a tabular form showing the powers vested and the duties cast on the officers concerned will show that those officers enjoy certain powers during the course of any investigation or inquiry or proceeding under the special Acts concerned though not in strict sense of an investigation under Chapter XII of the Code as undertaken by police officers including the filing of a police report under Section 173(2) of the Code.

51. Name of the Act	Power to search premises	Power to search persons,search entering orpersons leaving India	Power to
No.			
2	3	4	5
1. Foreign Exchange Regulation Act, 1973	Sec. 37	Sec. 34	Sec. 34
2. The Customs Act	Sec. 105	Sec. 100	Sec.
3. The Gold (Control) Act	Sec. 58	Sec. 60 (now repealed)	
4. The Prevention of Food Adulteration Act.	Sec. 10(2)	S. 6 to be r/w S. 18 or the Sea Customs Act.	
5. The Railway Property (Unlawful Possession) Act. I I		Sec. 10 and Sec.	

Power to Power to Power to Power toPower to stop and seize arrest. examinesummon persons search goods, personsto give evidence conveyances documents and produce etc. documents 6 7 8 9 10 Sec.36 Sec.38 Sec.35 Sec.39 Sec.40 Sec.106 Sec.110 Sec.104 Sec.107 Sec.108 Sec.61 Sec.66 Sec.68 Sec.64 Sec.63 Sec.10 Sec.

10(B)	
Sec.6	Sec.9

115. The above table manifestly imparts that all the powers vested on various authorities as given in the table are equipollent as being enjoyed by a police officer under the Code and exercised during investigation under Chapter XII because the investigation is nothing but an observation or inquiry into the allegations, circumstances or relationships in order to obtain factual information and make certain whether or not a violation of any law has been committed.

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 complainant 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.

117. It may be recalled, in this connection, that Section 202(1) of the Code falling under Chapter XV under the caption "Complaints to Magistrates" envisages that any Magistrate on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under Section 192 of the Code can direct an investigation to be made by a police officer or 'by such other person as he thinks fit'. As regards the conferment of power on such person, sub-section (3) of Section 202 reads:

> "If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant."

The expression "all the powers conferred by this Code on an officer-incharge of a police station" will include the powers conferred on the police officer under the relevant provisions of Chapter XII also.

118. M.P. Thakkar, C.J. of the Gujarat High Court (as he then was) speaking for a Division Bench in N.H. Dave, Inspector of Customs v. Mohmed Akhtar34 while examining the import of Section 104 of the Customs Act has ruled thus:

> "The expression 'investigation' has been defined in Section 2(h). It is an inclusive definition. No doubt it will not strictly fall under the definition of 'investigation' insofar as the inclusive part is concerned. But then it being an inclusive definition the ordinary connotation of the expression 'investigation' cannot be overlooked. An 'investigation' means search for material and facts in order to find out whether or not an offence has been committed. It does not matter whether it is made by the police officer or a customs officer who intends to lodge a complaint."

We are in total agreement with the above view of M.P. Thakkar, C.J.

119. The word 'investigation' though is not shown in any one of the sections of the Customs Act, certain powers enjoyed by the police officer during the investigation are vested on the specified officer of customs as indicated in the table given above. However, in the FERA the word 'investigation' is used in various provisions, namely Sections 34, 36, 37, 38 and 40 reading, "... any investigation or proceeding under this Act..... though limited in its scope.

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.

121.Lastly, it falls for our consideration whether Section 4(2) of the Code of Criminal Procedure can be availed of for investigating, inquiring or trying offences under any law other than the Indian Penal Code which expression includes FERA and Customs Act etc.

122. Section 4(2) of the Code corresponds to Section 5(2) of the old Code. Section 26(b) of the Code corresponds to Section 29 of the old Code except for a slight change. Under the present Section 26(b) any offence under any other law shall, when any court is mentioned in this behalf in such law, be tried by such court and when no court is mentioned in this behalf, may be tried by the High Court or other court by which such offence is shown in the First Schedule to be triable. The combined operation of Sections 4(2) and 26(b) of the Code is that the offence complained of should be investigated or inquired into or tried according to the provisions of the Code where the enactment which creates the offence indicates no special procedure.

123. We shall now consider the applicability of provisions of Section 167(2) of the Code in relation to Section 4(2) to a person arrested under FERA or the Customs Act and produced before a Magistrate. As we have indicated above, a reading of Section 4(2) read with Section 26(b) which governs every criminal proceeding as regards the course by which an offence is to be tried and as to the procedure to be followed, renders the provisions of the Code applicable in the field not covered by the provisions of the FERA or Customs Act.

124.We are not concerned with sub-section (1) of Section 4 in this matter which provides for the procedure to be followed in every investigation, inquiry or trial in relation to offences under the Indian Penal Code stating that all offences under the Indian Penal Code "shall be investigated, inquired into, tried and otherwise dealt with according to the provisions hereinafter contained".

125. In this context, Section 5 of the Code which is for all practical purposes identical with the relevant portion of the corresponding Section 1(2) of the old Code, also may be referred to which states, "Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force."

The expression 'special law' or 'local law' is defined under Sections 41 and 42 of the Indian Penal Code.

126. Desai, J. in Vishwa Mitter of Vijay Bharat Cigarette Stores v. O.P. Poddar40 speaking for the Bench on the import of Section 4(2) has stated thus: (SCC p. 704, para 4) "... Section 190 thus confers power on any Magistrate to take cognizance of any offence upon receiving a complaint of facts which constitute such offence. It does not speak of any particular qualification for the complainant. Generally speaking, anyone can put the criminal law in motion unless there is specific provision to the contrary. This is specifically indicated by the provision of sub-section (2) of Section 4 which provides that all offences under any other law meaning thereby law other than the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions in the Code of Criminal Procedure but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. It would follow as a necessary corollary that unless in any statute other than the Code of Criminal Procedure which prescribes an offence and simultaneously specifies the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences, the provisions of the Code of Criminal Procedure shall apply in respect of such offences and they shall be investigated, inquired into, tried and otherwise dealt with according to the provisions of the Code of Criminal Procedure."

127. In A.R. Antulay v. Ramdas Sriniwas Nayak41 a Constitution Bench of this Court while examining the similar question with regard to 40 (1983) 4 SCC 701: 1984 SCC (Cri) 29 41 (1984) 2 SCC 500: 1984 SCC (Cri) 277: (1984) 2 SCR 914 applicability of Section 4 with reference to the Prevention of Corruption Act has laid down the law thus: (SCR p. 935: SCC p. 517, para 16) "In the absence of a specific provision made in the statute indicating that offences will have to be investigated, inquired into, tried and otherwise dealt with according to that statute, the same will have to be investigated, inquired into, tried and otherwise dealt with according to the Code of Criminal Procedure. In other words, Code of Criminal is the parent statute which provides for investigation, inquiring into and trial of cases by criminal courts of various designations."

128. To sum up, Section 4 is comprehensive and that Section 5 is not in derogation of Section 4(2) and it only relates to the extent of application of the Code in the matter of territorial and other jurisdiction but does not nullify the effect of Section 4(2). In short, the provisions of this Code would be applicable to the extent in the absence of any contrary provision in the special Act or any special provision excluding the jurisdiction or applicability of the Code. In fact, the second limb of Section 4(2) itself limits he application of the provisions of the Code reading..... but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."

129. It is also significant to take note of the "Objects and Reasons" for the introduction of the present Section 104 of the Customs Act replacing the existing Sections 173, 174 and 175 of the Sea Customs Act with some amendments one of which being, "in addition to the power to commit an arrested person to jail or order him to be kept in police custody, the Magistrate is being empowered to order the arrested person to be kept in such other custody as he deems fit". Vide S. O.R. Gaz. of India 1962, Pt.

S. 2 Ext. p. 334.

130. The Select Committee expressed its view on the proposed amendment as follows:

> "The Committee are of the view that an Officer of Customs arresting a person under the clause should have the power to release the arrested person on bail or otherwise similar to the power conferred on the officer in charge of a police station under the Code of Criminal Procedure, 1898 so as to obviate the necessity of detaining an arrested person till he can be taken to a Magistrate.
>
> The Committee feel that sub-clause (3) being merely a repetition of the provisions of the Criminal Procedure Code, 1898 should be omitted."

The view of the Committee expressed above can be taken as a guide in understanding the import of Section 35 of FERA.

131. The submission that as there is no investigation within the terms of the Code in the field of FERA or Customs Act, Section 4(2) of the Code can have no part to play, has to be rejected for the reasons given by us while disposing of the contention "What investigation means and is" in the preceding part of this judgment.

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.

133. Though much argument was advanced on the expression "otherwise dealt with", we think it is not necessary to go deep into the matter except saying that the said expression is very wide and all comprehensive. Vide Bhim Singh v. State of U. P. 42 and Delhi Admn. v. Ram Singh43.

134. There are a series of decisions of various High Courts, of course with some exception, taking the view that a Magistrate before whom a person arrested by the competent authority under the FERA or Customs Act is produced, can authorise detention in exercise of his powers under Section

167. Otherwise the mandatory direction under the provision of Section 35(2) of FERA or Section 104(2) of the Customs Act, to take every person arrested before the Magistrate without unnecessary

delay when the arrestee was not released on bail under sub-section (3) of those special Acts, will become purposeless and meaningless and to say that the courts even in the event of refusal of bail have no choice but to set the person arrested at liberty by folding their hands as a helpless spectator in the face of what is termed as "legislative casus omissus" or legal flaw or lacuna, it will become utterly illogical and absurd.

135. We are in total agreement with the above view of the various High Courts for the discussion made already and conclusions arrived at thereto.

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.

137. In the result, the impugned judgment of the Full Bench (five Judges) of the High Court holding the view that the law laid down in O.P. Gupta' "regarding the powers available to a Magistrate under Section 167(2) of the Code of Criminal Procedure to commit to custody a person taken before him by the Customs Officer is incorrect" is set aside. The law enunciated in O.P. Gupta' by a three-Judge Bench is the correct law and accordingly the said decision is upheld.

138. The appeal is allowed accordingly.

42 AIR 1955 SC 435: (1955) 1 SCR 1444: 1955 Cri LJ 1010 43 (1962) 2 SCR 694: AIR 1962 SC 63: (1962) 1 Cri LJ 106