IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO. 3818 OF 2018

1 **Adani Enterprises Limited,** a Company incorporated under the Companies Act, 1956, having its Registered Office at Adani House, Mithakali Circle, Navrangpura, Ahmedabad.

2 **Adani Power Limited**, a Company incorporated under the Companies Act having its registered office at Adani House, Mithakali Circle, Navrangpura, Ahmedabad .. Petitioners

Versus

1 **Union of India,** through Secretary Ministry of Home Affairs, New Delhi

2 **Directorate of Revenue Intelligence** through Addl.Director General, having its office at UTI Building, 4th floor, 13, Sir Vithaldas Thackersey Marg, New Marine Lines, Mumbai-20

3 **State of Maharashtra** .. **Respondents**

…

Mr. Vikram Nankani, Sr. Counsel with Mr.Atul Nanda i/b HKS Legal for the petitioner.

Mr. Maninder Singh, Sr. Counsel with Advait M. Sethna with Prabha Bajaj, Tejvir Singh Bhatia i/b Ms.Ruju Thakker for Respondent Nos.1 and 2.

Mr.Deepak Thakare, P.P with Mr.S.R. Shinde, APP for the State.

CORAM: RANJIT V. MORE AND
AND BHARATI DANGRE, J.

RESERVED : 2nd JULY, 2019

PRONOUNCED : 17th OCTOBER, 2019

JUDGMENT :-(Per Smt.Bharati Dangre, J)

1 A pivotal but significant issue which arise in the present Writ Petition is whether the Respondent – Directorate of Revenue Intelligence has legally and validly commenced the investigation against the petitioner into alleged commission of offence punishable under Section 135 of the Customs Act, 1962 and whether or not, based on the said investigation set into motion, it is entitled to take recourse to the provisions of Section 166-A of the Code of Criminal Procedure, 1973 for issuance of the Letter of Rogatory by the Magistrate.

Before we grapple with the said question of law, we would like to recount the bare minimum facts for answering the said question.

2 The petitioner is alleged to be involved in the over valuation of coal of Indonesian origin and it is alleged that during the period from October 2010 to March 2016, Adani Group of Companies had imported about 1300 consignments of Indonesian Coal and majority of the import came to be routed through their group subsidiary company i.e. Adani Global Private Limited (AGPTE), Singapore and Adani Global (AGFZE), Dubai. It is noted that both the said companies are 100% subsidiaries of a Mauritius Based Company i.e. Adani Global Limited (AGL) which is an 100% owned subsidiary of Adani Enterprises Limited i.e. petitioner no.1 before us. It is alleged that the petitioner acting in connivance with the individuals and companies grossly overstated the import value of coal as compared to the actual export value ex-Indonesia and prevalent

international prices and it is alleged that with an object of siphoning of the money abroad and to avail higher power tariff compensation, this course was adopted so that it can sold the power to the power utility public sector undertakings in India. The precise accusation allege that the comparative analysis of value of Indonesian coal declared to Indian customs by the Adani Group of Companies as against the values declared by the Indonesian exporters to the Indonesian authorities at the time of export was to the tune of Rs.930 crore and this over valuation was noticed in 231 consignments. The petitioner is also charged with availing the benefit of nil duty or concessional rate of duty on these imports in terms of the ASEAN- India Free Trade Agreement. According to the DRI, the petitioner was importing coal from Indonesia through its subsidiary companies and availing the benefits of the concessional rates of duty under the AIFTA on one hand and on the other hand, the petitioner was engaged in grossly overstating the value of the imported coal and this was apparent from the mismatch in the values.

On a counter affidavit filed by the Dy. Directorate,

DRI, Mumbai, it is stated that the act of mis-declaration of grade and value of the goods imported and failure to declare the correct grade and value before the Custom Authorities at the time of imports, made the goods liable for confiscation under Section 111(m) of the Customs Act 1962 and the persons involved are liable for a penalty under Section 112(b)(iii) and 114AA of the Customs Act, 1962. The act of the petitioner is alleged to fall within the purview of Section 132 for making a false declaration, statement or document in material particular and the affidavit also allege the petitioners are guilty of evasion of duty by mis-declaration of value, which amounts of an offence punishable with Imprisonment upto 7 years. Thus, to put it pithily the DRI allege the offences punishable under Section 132 and Section 135 against the petitioner.

3 In the background of the aforesaid allegations, requisition under Section 108 of the Customs Act, 1962 were issued to the petitioner to submit documents/information relating to purchase and sell of Indonesian coal by their subsidiary

companies in Singapore and Dubai. It was responded to by the petitioner stating that the AGPTE & AGFZE are independent legal entities incorporated abroad and DRI may directly communicate with them, if at all it desired to do so. On requisitions being issued to AEL to submit the documents since both AGPTE and AGFZE were the step down subsidiaries of AEL, there was no response. This alleged non co-operation of the Adani Group of Companies as well as their banks in submitting the transaction relating documents/information compelled the DRI to prefer application before the Addl. Chief Metropolitan Magistrate, 8th Court Mumbai with a request to issue Letter of Rogatory to the authorities at Singapore,UAE, Hongkong, British Virgin Irelands in order to secure the necessary information. The Addl. Chief Metropolitan Magistrate obliged the authorities after examining the applications made by the DRI and the case records and issued four letters of Rogatory under the Mutual Legal Assistance Treaty (MLAT) on different dates. The Letter of Rogatory to Singapore was issued on 2/8/2016 and forwarded to the competent authority in Singapore. It is this course of action

which is oppugned in the petition instituted by it.

4 In support of the petitioner, we have heard the learned senior counsel Shri Nankani who has over simplified his case by stating that the provision of issuance of Letter of Rogatory contained in Section 166-A of Cr.P.C can be availed of only when the investigation commence under Chapter XII of the Code either in form of Section 154 in respect of cognizable offence or Section 155 in form of non-cognizable offence. Shri Nankani would submit that since the DRI has summarized its allegation against the petitioner in terms of Section 132 and 135 of the Customs Act, undisputedly, being a complete Code, the authorities are empowered to exercise the powers available to it under Chapter XIII of the Customs Act. He would invite out attention to Section 104 which confers a power of arrest on the officer of customs who has a reason to believe that any person in India or within the Indian Custom waters has committed an offence punishable under Section 132, 133, 135, 135-A or 136 may arrest such person. According to Shri Nankani, sub-section

(4) of Section 104 which begins with a non-obstante clause enumerate that 'notwithstanding anything contained in the Code of Criminal Procedure', any offence relating to prohibited goods or evasion or attempted evasion of duty exceeding Rs.50 lakhs shall be cognizable and in terms of sub-section (5) all other offences under the Act shall be non-cognizable. Sub-section (6), according to Shri Nankani, again opens with a non-obstante clause and any offence punishable under Section 135 relating to evasion or attempted evasion of duty exceeding Rs.50 lakhs or prohibited goods notified under Section 11 or any import or export of any goods which has not been declared in accordance with the provisions of the Act and the market price of which exceeds Rs.One crore or where there is a fraudulent availment of or attempt to avail of drawback or any exemption of duty if the amount of duty or drawback exceeds Rs.50 lakhs, the offence is non-bailable and barring this, all other offences under the Act are bailable.

5 It is the submission of Shri Nankani that taking the

case of DRI, it is alleged that coal of Indonesian origin imported by Adani Group of Companies on payment of applicable and assessed custom duties, has been misdeclared on account of the mismatch of grade and over-valuation and automatically it follows that it is not a case of evasion of custom duty. His further submission is to the effect that except the cases which are classified under Section 135(4) all other offences under theAct are non-cognizable, only two type of cases are thus cognizable, the one concerning offences relating to either "prohibited goods" or "evasion of attempted evasion of duty exceeding Rs.50 lakhs". Thus, according to Shri Nankani, the act alleged against him do not attract the prohibited goods category and he submit that there is no notification specifying coal as prohibited good issued by the Central Government under Section 135(1)(i)(c) of the Customs Act. Thus, as per Shri Nankani, the offences with which he is indicted is a non-cognizable offence falling under sub-section (5) of Section 104 of the Customs Act. His argument is focused in the backdrop of the fact that the classification of the alleged offence against the petitioner under Section 135 of the Customs

Act and the investigation was illegally commenced and conducted, in a non-cognizable offence, despite there being no order under Section 155(2) read with Section 4(2) of the code of Criminal Procedure. The submission of Shri Nankani is to the effect that an investigation can only be initiated by lodging an FIR and when such an information relating to commission of a cognizable offence is received by an officer in-charge of a police station, he shall follow course of action as set down in Section 154 of the Code of Criminal Procedure and result into the final report under Section 173 of the Code. Another mode, according to Shri Nankani, is when an information is given to an officer in-charge of a police station of commission of a non-cognizable offence when according to him, the course to be followed is enumerated in Section 155 of the Code. In such a situation, he would invite our attention to the bar created under sub-section (2), where no police officer is empowered to investigate a non-cognizable case without the order of the magistrate having power of try such a case or commit the same for trial. The anchor sheet of the argument of Shri Nankani is Section 4(2) of the Code and what

follows from it i.e. all the provisions of the Code to the extent of the same which are not inconsistent with the provisions of the Act are applicable to the investigations under the Customs Act and according to him, the application/operation of Section 4(2) cannot be restricted or confined only to the provisions of Section 166-A to the exclusion of all the other provisions of the Code to the extent that the same are not inconsistent with the provisions of the Act. According to him, Chapter XIII of the Customs Act which confers specific power on the customs Officer in regards to 'searches, seizure and arrest' do not contain any provision as to how, in what manner, any information of commission or attempted commission or preparation for commission of an offence is to be dealt with. Further, there is no provision stipulating procedure as to how and in what event pursuant to the information, an officer would investigate or would not investigate and there is no departure contained in the Customs Act to exclude the procedure prescribed in Section 155 of the Code including sub-section (2) and sub-section (3). Shri Nankani has placed reliance on the following judgments :

(i) Illias Vs. Collector of Customs, Madras
(19969) 2 SCR 613

(ii) Poolpandi & Ors Vs. Superintendent, Central Excise & Ors
(1992) 3 SCC 259

(iii) Directorate of Enforcement Vs. Deepak Mahajan & Ors
(1994) 3 SCC 440

(iv) Om Prakash & Anr Vs. UOI & Anr
(2011) 14 SCC 1

(v) Gorav Kathuria Vs. Union of India
2017 (348) ELT 24 (P & H)

(vi) Gorav Kathuria Vs. Union of India & Ors
(Order dated 12.8.2016 passed by the Hon'ble Supreme Court in Cri.Appeal No. 737/2016)

(vii) Kishin S. Loungani Vs. Union of India
[2017 (352) ELT 433 (Ker)]

(viii) Kishin S. Loungani Vs. Union of India
(Order dated 06.09.2018 passed by the Hon'ble Supreme Court in SPL Cri.M P No.6051 of 2017)

According to him, the judgment in case of ***Om Prakash (supra)*** is a bright line which luminates the course of action to be chartered by Custom Authority/DRI. We would deal with the same at a subsequent point of time since what we have noted is that the judgment which are sought to be relied by the learned

senior counsel appearing for the DRI overlap and each of them making a distinction of the applicability of the ratio culled out from the said judgments.

6 In support of the respondent, we have heard the learned senior counsel Shri Maninder Singh, who would aver that the present petition is an attempt to frustrate the investigation being carried out by the DRI and is nothing but an attempt to thwart an entirely legal investigation being carried out by it into a serious allegation. The learned senior counsel would submit that section 166-A of the Cr.P.C which is a unique provision contained in the Code and which operates with a *non-obstante* clause can be justiciably invoked by any Investigating Officer, including a Custom officer, when it occurs to him, during investigation into an offence that evidence may be available in a country or place outside India and he may then approach any criminal Court with a letter of Request to the Court or an authority in that country or place competent to deal with such request to examine any person who is acquainted with the facts and circumstances of the case

and to record his statement or direct such a person to produce any document or thing which is in his possession pertaining to the case and forward all the evidence so collected to the Court issuing such letter. According to Shri Singh, every such statement recorded or document or thing received in pursuant of the said exercise shall be deemed to be the evidence collected during the course of investigation under Chapter XII of the Code of Criminal Procedure. He would seriously contest the proposition advanced by Shri Nankani to the effect that the investigation of DRI cannot be said to commence without following the mandatory procedural safeguard contained in Section 154 to 157 of the Code of Criminal Procedure and the same is ex-facie illegal and *void ab initio.* Learned senior counsel submit that the aforesaid sections of the Code of Criminal Procedure use the term "Officer in-charge of a police station" and cannot be made applicable to customs officer who are not police officers. He would take his submission further and submit that investigation of all offences conducted by the police officers is regulated by Cr.P.C. However, there is no concept of FIR, if the inquiry and

investigation is carried under any special statute and in terms of Sections 4 and 5 of Cr.P.C. It is clarified that where special provisions are provided, the provisions of Cr.P.C would not apply. According to learned Senior counsel, the Customs Act is equipped with self-contained provisions relating to inquiry of offences, relating to import, export and smuggling of goods and punishment thereof and wherever required the Act has provided the Magisterial intervention and the DRI is bound to conduct an inquiry in terms of the provisions of the said enactment. The learned senior counsel would further argue on the basis of the 'Report of the Select Committee' on the Customs Bill 1962, and the proceedings of the debate in the Parliament and submit tha the legislature did not intend Magisterial intervention for initiation of investigation under the Customs Act. The learned Senior counsel would also advance his submissions on Section 5 of the Code which provides for “Saving” and according to him,the position that emerges from Section 5 of the Code is to the effect that the provisions of Cr.P.C would not have any effect on any special or local laws or any special jurisdiction unless there is any

specific provision to the contrary in the entire code. According to him, section 4 of the Code which deals with both the offences under IPC as well as offences under special laws, what is eminent is the segregation of two clauses contained in section 4; Section 4(1) deal only with offences under the penal code and 4(2) deal exclusively with the offences under the special laws.

On a conjoint reading, according to learned senior counsel, the position that emerges is that the provisions of Cr.P.C. including Section 166-A which are not contrary or inconsistent with the scheme envisaged in the customs Act 1962 would apply to the investigation carried out by the Custom Officer under the Customs Act, 1962 and thus he is entitled to seek letter of Request Letter of Rogatory under Section 166-A of the Cr.P.C. He uses the judgment of the Apex Court in ***Deepak Mahajan case*** as an ace up his sleeves to buttress his submission that the term "Investigation" is to be understood in a broad sense and according to him, the *non-obstante* clause in Section 166A of Cr.P.C is in relation to the entire code and not for a particular chapter or section and as per Shri Maninder Singh, Section 166-A

is a completely independent provision standing apart and what is required to be complied with is only the procedural format contained in the said section. He has also relied upon the following judgments :

(i) Ramesh Chandra Mehta Vs. UOI
AIR 1970 SC 940

(ii) Illias Vs. Collector of Customs
AIR 1970 SC 1065

(iii) Directorate of Enforcement Vs. Deepak Mahajan
(1994) 3 SCC 440

(iv) Sunil Gupta Vs. Union of India
1999 SCC Online P & H 350

(v) Bhavin Impex Pvt.Ltd Vs. State of Gujarat
2009 SCC Online Guj 9965

(vi) Kishin S. Loungani Vs. Union of India
2016 SCC online Ker 30732

7 Customs Act enacted in the year 1962 aim to prevent illegal import and export and it provides for implementation and collection of duty on goods imported and exported in the country. In order to consider the rival claim of the parties, it would be apposite to briefly refer to the statutory scheme of the Customs

Act, 1962 with special reference to the powers of the custom officer akin to that exercised by a police officer under the Code of Criminal Procedure.

The Customs Act, 1962 aims to sternly and expeditiously deal with smuggled cases and curb the dents on the Revenue thus caused. Section 11 of the Act of 1962 empowers the Central Government by notification in the Official Gazette, to prohibit either absolutely or subject to such conditions as may be specified in the notification, the import or export of goods of any specified description. Chapter IVA to IVC relate to detection of illegal imported goods, prevention and disposal thereof. It contains a mechanism for levy of custom duty at such rates as may be specified under the Customs Tariff Act, 1975. Chapter V contains an entire mechanism for assessment of such duty along with an power to grant exemption from duty. It also provides for refund of export/import duty in certain cases and the manner in which refund can be claimed. Power of provisional attachment to protect revenue in certain cases is also conferred on the proper officer. It contain provisions for confiscation of goods and

conveyance and imposition of penalty when any goods are imported contrary to any prohibition imposed by or under the Act or under any other law for the time being in force. It also contains provision for levy and exemption from custom duties and set out the procedure for clearance of imported and export goods. The Act provides for constitution of an adjudicating authority and an entire mechanism for finalization of the decision of said Authority. For implementation of the provisions of the Act, classes of officers are designated as officers of Customs who are empowered to exercise the powers and discharge the duties conferred or imposed under the Act.

The said enactment which empowers the Officers of Customs to deal with the prohibition and incidentally prevent or detect the illegal exports of goods, can be broadly classified into two parts i.e. the first part being exercise of power by the Custom Officer for the purpose of ensuring the collection of Revenue by preventing smuggling and enforcement and levy of proper duties and prevention of entry into India of dutiable goods without payment of duty and goods of which entry is prohibited. These

adjudicatory powers relate to exercise of the Revenue powers ensuring and assuring the Revenue accruing to the State. The second limb of the powers of the Customs Officer relate to the inquiry into suspected cases of smuggling and invest the Custom Officer with powers akin to that of the police officer. The scheme of Customs Act in Chapter XIII, which is an important chapter confer power of search, seizure and arrest and further Chapter XIV confer the power of confiscation of goods and conveyance and imposition of penalties. Deriving power under Section 100 and 101, Custom Officer is empowered to search any person if he has reason to believe that such person is secreted about his person, any goods, liable to confiscation or any documents relating thereto. Section 104 is the power to arrest conferred on a Customs Officer, to be exercised when he has reason to believe that any person in India or within the Indian custom waters has been guilty of an offence punishable under Section 132 or Section 133 or Section 135 or Section 135A or Section 136, he may arrest such a person. The necessary safeguard of informing the person so arrested of the grounds of arrest is also implicitly provided for.

Section 105 is the power conferred to search any goods, documents or things if the officer has reason to believe that any goods liable for confiscation or documents or things are secreted in any place. Pertinent to note that sub-section (2) of Section 105 specify that the provisions of Cr.P.C relating to searches, shall apply to such searches, subject to modification that sub-section (5) of Section 165 of the Code shall be read by substituting "Principal Commissioner of Customs or Commissioner of Customs: in place of the word "Magistrate". Section 106 is the power to stop and search conveyances. Section 107 empowers the Custom Officer to examine any person during the course of inquiry in connection with smuggling and Section 108 is the power to summon the person to give evidence and produce documents in any inquiry which the officer is making. A reciprocal obligation is created under Section 108A to furnish information sought for by the Custom Officer and Section 108B prescribes penalty for failure to furnish information. The person so summoned is duty bound to attend and to state the truth upon any subject in respect of which he is examined or makes statement

and produce documents and other things as may be required and every such inquiry is deemed to be a judicial proceedings within the meaning of Section 193 and 228 of IPC. Section 110 authorizes the proper Officer to seize such goods as he has reason to believe which are liable to confiscation. Section 111 and Section 113 provides for confiscation of the goods which are improperly imported/ exported. Section 112, 114, 114A and 114AA, 116 and 117 provides for contravention of the provisions contained in the Act and which call for imposition of penalty. Chapter XV contains a provision for Appeal and set out the procedure in Appeal and also the powers of the Appellate Tribunal.

According to the DRI, the petitioner is alleged to have misdeclared the grade and value before the custom authorities and at the time of import and the goods are liable for confiscation in terms of Section 111(m) of the Customs Act and the persons involved are liable to penalty under Section 112(b)(ii) and Section 114AA of the Customs Act. The offences as per DRI are punishable with imprisonment for a term which may extend

to two years or with fine or both under Section 132 of the Customs Act. The DRI has also alleged that they are liable to be indicted under Section 135 for knowingly misdeclaring the value of the goods or for any prohibition for the time being imposed under the Act and the maximum punishment provided under the said section is upto 7 years with fine. The offences and prosecutions are contained in Chapter XVI and we would reproduce Section 135, since the petitioners are charged with an offence under Section 135.

> ***135(1)*** *Without prejudice to any action that may be taken under this Act, if any person—*
>
> *(a) is in relation to any goods in any way knowingly concerned in misdeclaration of value or in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any prohibition for the time being imposed under this Act or any other law for the time being in force with respect to such goods; or*
>
> *(b) acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111 or section 113, as the case may be; or*
>
> *(c) attempts to export any goods which he knows or has reason to believe are liable to confiscation under section 113; or*

(d) fraudulently avails of or attempts to avail of drawback or any exemption from duty provided under this Act in connection with export of goods, he shall be punishable, —

(i) in the case of an offence relating to,—

(A) any goods the market price of which exceeds one crore of rupees; or

(B) the evasion or attempted evasion of duty exceeding thirty lakh of rupees; or

(C) such categories of prohibited goods as the Central Government may, by notification in the Official Gazette, specify; or

(D) fraudulently availing of or attempting to avail of drawback or any exemption from duty referred to in clause (d), if the amount of drawback or exemption from duty exceeds thirty lakh of rupees, with imprisonment for a term which may extend to seven years and with fine: Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the court, such imprisonment shall not be for less than one year;

(ii) in any other case, with imprisonment for a term which may extend to three years, or with fine, or with both.] 2[(2) If any person convicted of an offence under this section or under sub-section (1) of section 136 is again convicted of an offence under this section, then, he shall be punishable for the second and for every subsequent offence with imprisonment for a term which may extend to seven years and with fine: Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the court such imprisonment shall not be for less than 3[one year].

8 The position that emerges from the aforesaid statutory scheme invest the Custom Officer with the power to

search a person, to arrest a person and to examine the person and summon a person to give evidence and to produce documents and also empower him to seize the goods, documents and things which are liable for confiscation. The Custom Officer is also empowered to release a person on bail. The cognizance of the offences under the Customs Act, 1962 can be taken by the Court only on the previous sanction of the Principal Commissioner of Customs or Commissioner of Customs.

9 At this stage, it would be apposite to reproduce Section 104 which confers a power on the Officer of Customs to arrest a person and it also classifies the offences as under :

> **104 Power to arrest :-** (1) If an officer of customs empowered in this behalf by general or special order of the Commissioner of Customs has reason to believe that any person in India or within the Indian customs waters has committed an offence punishable under section 132 or section 133 or section 135 or section 135A or section 136, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.
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> (2) Every person arrested under sub-section (1) shall, without unnecessary delay, be taken to Magistrate.
>
> (3) Where an officer of customs has arrested any

person under sub-section (1), he shall, for the purpose of the releasing such person on bail or otherwise, have the same power and be subject to the same provisions as the officer-in-charge of a police station has and is subject to under the Code of Criminal Procedure, 1898 (5 of 1898).

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (2 of 1974), any offence relating to –

(a) prohibited goods; or

(b) evasion or attempted evasion of duty exceeding fifty lakh rupees, shall be cognizable.

(5) Save as otherwise provided in sub-section (4), all other offences under the Act shall be non-cognizable.

(6) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an offence punishable under Section 135 relating to –

(a) evasion or attempted evasion of duty exceeding fifty lakh rupees,

or

(b) prohibited goods notified under Section 11 which are also notified under sub-clause (C) of clause (i) of sub-section (1) of section 135; or

(c) import or export of any goods which have not been declared in accordance with the provisions of this Act and the market price of which exceeds one crore rupees; or

(d) fraudulently availing of or attempt to avail of drawback or any exemption from duty provided under this Act, if the amount of drawback or exemption from duty exceeds fifty

lakh rupees, shall be non-bailable.

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

The section empower the Officer of Custom to release a person arrested by him on bail and in doing so, he exercise the same and is subjected to the same provisions as the Officer in-charge of the police station and is subject to the provisions of the Code of Criminal Procedure. An offence relating to prohibited goods or evasion or attempted evasion of duty exceeding 50 lakhs is cognizable and all other offences under the Act are non-cognizable. At this point, it would be relevant to note that this provision has been has been substituted with effect from 28th May 2012 and prior to the said amendment and all offence under the Customs Act were classified as non-cognizable. Further, an offence punishable under Section 135 relating to clauses (a) to (d) of sub-section (6) are non-cognizable and all other offences under the Act are bailable.

10 The stanchion of the arguments advanced on both the

sides is as to whether the offences which are cognizable/non-cognizable under the Customs Act, 1962 must undertake the route of Section 154 and 155 of the Cr.P.C and therefore, we deem it appropriate to briefly refer to the scheme of Chapter XII contained in the Code of Criminal procedure.

Code of Criminal Procedure is Code which consolidated and amended the law relating to Criminal Procedure. It is enacted in exercise of powers conferred under Entry II of VII Schedule. It is necessarily procedural in nature and prescribe the procedure to be followed while dealing with the penal provisions. As an exception, it also contain substantive provision like the maintenance proceedings under Section 125. The Code prescribe hierarchy of criminal courts and define their territorial division. We are concerned with Chapter XII of the Code.

11 Chapter XII of the Cr.P.C can be broadly dissected into two distinct category i.e. information in cognizable offences – Section 154 and information as to non-cognizable offences –

Section 155. In respect of every information relating to commission of a cognizable offence, the procedure set out under Section 154 is a mandate of the Code and the culmination of the said process is Section 173, when the investigation result in a police report being forwarded to the Magistrate empowered to take the cognizance. Section 155 set out the procedure to be followed in respect of an information given to an Officer in-charge of a police station of a non-cognizable offence and Section 155 enjoin that the Officer in-charge shall enter or caused to be entered the substance of the information in a book maintained by him in the manner prescribed by the State Government and refer the information to the Magistrate. Sub-section (2) of Section 155 creates an embargo on the police officer to investigate a non-cognizable case without order of a Magistrate having power to try such case or committing the case for trial. Any police officer receiving said order may then exercise the same powers in respect of the investigation (except the power to arrest without warrant) as officer in-charge of a police station may exercise in a cognizable case. Chapter XII of the Cr.P.C thus rule out the entire procedure

followed by a police officer when he undertakes an investigation into a cognizable and non-cognizable offence and consummation of his act on submission of a report to Magistrate in Section 173. By virtue of Section 190, Magistrate is empowered to take cognizance of any offence in any of the modes set out in the section i.e. (a) upon receiving a complaint of facts which constitute such offence, (b) upon a police report of such facts (c) upon information received from any person other than a police officer or upon his own knowledge that such offence has been committed. The submission of DRI is to the effect it is not imperative for the Custom Officer to seek permission of the Magistrate as contemplated under sub-section (2) of Section 155 of Cr.P.C and the broader submission of the petitioner is to the effect that in absence of following the said pathway of Section 155(2) of Cr.P.C which happens to be a part of Chapter XII of Cr.P.C, it is not open for the officer of the custom to take recourse to the provisions contained in form of Section 166-A which pertains to issuance of Letter of Rogatory.

12 Once we have the spectrum of the two enactments before us, we would like to highlight the interplay between the operation of the two enactments and their impact on each other so as to unravel the conundrum. Section 4(1) of the Code of Criminal Procedure rule that the procedure contained in the Code would govern the offences under the Indian Penal Code whereas sub-section (2) of Section 4 determine the situation when the special offences would follow the procedure set out in the Code. The said section can be said to act as a bridge before embarking upon an investigation either into the offences under the IPC or a special statute. Section 4 reads as under :-

> *4. Trial of offences under the Indian Penal Code and other laws.*
>
> *(1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.*
>
> *(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.*

13 It is trite that the Code of Criminal Procedure regulates the procedure for investigation/ inquiry and trial for the offences not only under the Indian Penal Code but also of special offences but in case of latter, application of Cr.P.C is subject to provision (if any), of such special law relating to *inter alia*, the procedure for investigating, inquiry, trial or otherwise. In other words, if a special law creates an offence, it may provide for special forum for the purpose of its trial and also a special procedure for investigation therein or the authorities in whom the power is conferred for the purpose of implementation of the said special law, or it may confer jurisdiction to deal with such process. The special enactment may also specify the nature of the special law offence i.e. whether it is cognizable or non-cognizable, or bailable or non-bailable. The offences under the Indian Penal Code, in terms of Section 4(1) are to be investigated inquired into, tried and otherwise dealt with according to the provisions of the Code of Criminal Procedure. All offences under the special law would also be dealt with the same provisions but subject to any provisions contained in the special enactment for the time

being in force, regulating the manner of investigation/ inquiry or trial or otherwise dealing with such offence.

14 In ***A.R. Antulay Vs. Ramdas Sriniwas Nayak***[1] the Apex Court in reference to Section 4 of the Code of Criminal Procedure has observed as under :

> *20. Sec. 4 (1) provides for investigation, inquiry or trial for every offence under the Indian Penal Code according to the provisions of the Code. Sec. 4 (2) provides for offences under other law which may be investigated, inquired into, tried and otherwise dealt with according to the provisions of the Code of Criminal Procedure but subject to any enactment for the time being in force regulating the manner or place of investigation, inquiring into, trying or otherwise dealing with such offences. 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 Procedure is the parent statute which provides for investigation, inquiring into and trial of cases by criminal courts of various designations.*
>
> *17 Now the Code of Criminal Procedure*

1 1984(2) SCC 500

prescribed only four methods of taking cognizance of an offence whether it be a Magistrate or a Sessions Court is for the time being immaterial. The Code prescribes four methods for taking cognizance upon a complaint, or upon a report of the police officer or where the Magistrate himself comes to know of the commission of offence through some other source and in the case of Sessions Court upon a commitment by the Magistrate. There is no other known or recognized mode of taking cognizance of an offence by a criminal court. Now if Court of special Judge is a criminal court, which atleast was not disputed, and jurisdiction is conferred upon the presiding officer of the Court of special Judge to take cognizance of offences simultaneously excluding one of the four recognised modes of taking cognizance, namely, upon commitment by a Magistrate as set out in Sec 193, the only other method by which the Court of special Judge can take cognizance of an offence for the trial of which it was set up, is any one of the remaining three other methods known to law by which a criminal court would take cognizance of an offence, not as an idle formality but with a view to initiating proceedings and ultimately to try the accused. If the language employed in Sec. 8 (1) is read in this light and in this background that a special Judge may take cognizance of offence without the accused being committed to him for trial, it necessarily implies that the Court of special Judge is armed with power to take cognizance of offences but that it is denied the power to take cognizance on commitment by the Magistrate. This excludes the mode of taking cognizance under Sec. 193. Then remains only Sec. 190 which provides various methods of taking cognizance of offences by

> *courts. It is idle to say that Sec. 190 is confined to Magistrate and special Judge is not a Magistrate. We shall deal with the position of a special Judge a little later. The fact however remains that the Court of the special Judge as the expression is used in sub-sec. (3) of Sec. 8 is a criminal court and in view of Sec. 9 it is under the appellate and administrative control of the High Court. It must take cognizance of offences with a view to trying the same but it shall not take it on commitment of the accused to the court. As a necessary corollary, it must appear that the special Judge can take cognizance of offences enumerated in Sec. 6 (1)(a) and (b) upon a complaint or upon a police report or upon his coming to know in some manner of the offence having been committed.*

15 In persuading ourselves to accept the submission of Shri Maninder Singh that the Customs Act is a special statute and is self sufficient, we would be advert to Section 104 of the Customs Act which bifurcates the offences to be either cognizable/non-cognizable, bailable/non-bailable. Sub-section (4) of Section 104 makes any offence relating to prohibited goods; or evasion or attempted evasion of duty exceeding Rs.50 lakhs to be cognizable, notwithstanding anything contained in the Code of Criminal Procedure. All other offences under the Act are

non-cognizable. The offences under sub-section (6) of Section 104 are declared to be non-bailable notwithstanding anything contained in the Cr.P.C and this covers the offence punishable under Section 135 relating to evasion or attempted evasion of duty exceeding 50 lakhs of rupees or prohibited goods notified under Section and also notified under sub-clause (c) of clause (i) of sub-section(1) of Section 135. By virtue of Section 135, the evasion of duty or prohibition, depending upon the category of the goods is punishable with Imprisonment for a term which may extend to 7 years and with fine, in case where the market price of the goods exceed Rs.One crore or the evasion or the attempted evasion of duty exceed 50 lakhs rupees or it is a fraudulent availment or an attempt to avail drawback and if the amount of the drawback or exemption duty exceeds 50 lakhs. In any other case, the offence under Section 135 is punishable with Imprisonment for a term which may extend to three years or with fine or with both. Thus, the offence under the Customs Act are categorized as cognizable/non-cognizable and bailable/non-bailable, notwithstanding anything contained in the Code of

Criminal Procedure.

Pertinent to note that first schedule appended to the Code of Criminal Procedure which provides for classification of offences and in Part-I it classify offences under the IPC. Part-II classify the offences against other laws and stipulate that if the offences punishable with death, imprisonment for life or imprisonment for more than 7 years, then, it is cognizable and non-bailable, and so is the case if the offence punishable with Imprisonment for three years and upwards, but not more than seven years. However, if the offence is punishable with imprisonment for less than three years or with fine, then it is non-cognizable and bailable. The offence of evasion of duty or prohibition under Section 135 is made cognizable and non-bailable even if the punishment to be imposed is Imprisonment for a term which is less than three years or with fine or with both. When the legislature intended to depart from Part-II of Schedule I of the Code of Criminal Procedure, it categorically provided so by insertion of a non-obstante clause.

Perusal of the Customs Act 1962 would reveal that

the powers have been conferred on the custom officer in regards to an inquiry and Chapter XIII confers power of search, seizure and arrest on the officer of custom and wherever the legislature intended a deviation from the Code of Criminal Procedure, it has specifically made the provisions to the exclusion of the Code of Criminal Procedure and such deviation is to be found in the classification of offences as contained in Section 104. Section 137 of the Customs Act, 1962 impose a restriction on a Court taking cognizance of the offence under Section 132, 133, 134 or Section 135 or Section 135A except previous sanction of the Principal Commissioner of Customs or Commissioner of Customs. The manner of trial of offences under the Customs Act other than the one punishable under clause (ii) of sub-section (1) of Section 135 or under sub-section (2) of the said section to be tried summarily is again a provision which open with *non-obstante* clause and stands to the exclusion of whatever contained in the Code of Criminal Procedure.

16 Careful examination of the provisions of the Act of

1948 would reveal that whenever the legislature intended a departure from the procedure contemplated under the Code, it expressly provided so. As a necessary corollary, if an offence is cognizable, then, it is either made bailable or non-bailable under Part-I of Schedule-I of Cr.P.C. Under the Customs Act, though the offence punishable under Section 135 are made cognizable, it is also made bailable. In case of a cognizable offence, which in terms of the Code of Criminal Procedure is an offence in which a police officer may, in accordance with the First Schedule or under any other law for the time being in force arrest without warrant. A non-cognizable offence in terms of Section 2(l) of the Code of Criminal Procedure means an offence in which a police officer has no authority to arrest without warrant.

17 Code of Criminal Procedure contains a detailed procedure for investigation into cognizable as well as non-cognizable offences. Chapter XII of the Code of Criminal Procedure to which we had made a reference above includes Section 154 and 155. The procedure to be followed would thus

depend upon whether the offence is cognizable or non-cognizable. Part-I of Schedule I of Code of Criminal Procedure catalogue whether the offences are cognizable or non-cognizable and accordingly, whether the investigation would proceed under Section 154 or under Section 155. Under the Customs Act, special enactment, the offences are cognizable/ non-cognizable but the said enactment do not charter any course of action to be followed when the Custom Officer receives an information either of a cognizable case or a non-cognizable case. Undisputedly, he is vested with powers akin to that of a police officer in regard to search of a suspected person and search of the premises coupled with the power of seizure of goods, documents and things and also the power to examine persons and to summon persons to give evidence and produce documents. The Customs Act do not contain any provision guiding the custom officer to follow the procedure in case of a cognizable/non-cognizable offence inspite of its classification. As far as the offence being classified under the Customs Act to be bailable/non-bailable, sub-section (3) of Section 104 specifically confer a power on the officer of customs

who has arrested any person on a belief that he has committed an offence punishable under Section 132, 133, 135 or Section 135A or Section 136 to release such a person on bail and while doing so, he is conferred the same power and is directed to be subjected to the same provisions as the officer in-charge of a police station and is subject to under the Code of Criminal Procedure. The manner in which he would carry an investigation, when he receives an information in respect of a cognizable offence/non-cognizable offence is found to be conspicuously missing in the statutory scheme of Customs Act. The procedure for investigation or its culmination which is to be found in Chapter XII of the Code in respect of cognizable and non-cognizable cases is apparently missing in the special enactment. The police officer in case of a cognizable offence on investigation in the manner set out in Chapter XII of the Code of Criminal Procedure takes it to the Court of law by submitting his final report under Section 173, in case of a cognizable offence. In respect of a non-cognizable offence, when an officer in charge of a police station receives an information, after entering substance of the

information in a book maintained by him, he is bound to refer the informant to the Magistrate and will not investigate a non-cognizable case without order of a Magistrate having power to try such case or commit the case for trial. This police officer, on receipt of the order, from the Magistrate is then empowered to exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in-charge of a police station may exercise in a cognizable case. On such an investigation being completed, he would file his report and thereupon the Magistrate to whom the report is forwarded may take cognizance of the offence. This procedure for investigation and of submission of the report to the competent court is not to be found in the Customs Act though the offences are classified into cognizable/non-cognizable. In absence of any procedure being prescribed for investigation of such offences under the special enactment, recourse must necessarily be had to sub-section (2) to Section 4. The necessary sequitur is that in case of an offence which is made cognizable under the Customs Act, the procedure contemplated under Section 154 and in case of an

offence which is non-cognizable, the procedure under Section 155 would thus become imperative. Sub-section (2) of Section 4 which acts like an exemplar would govern the manner of investigation under the Custom Act by the provisions contained in the Code of Criminal Procedure in absence of any special provision in the Customs Act prescribing the manner of investigation.

18 In ***Gangula Ashok Vs. State of Andhra Pradesh***,[2] while dealing with Scheduled Castes and Scheduled Tribes (Prevention of Atrocities Act) 1999, where a special court was constituted for trial of offences under the said Act, while determining the issue as to whether this Special Court can take cognizance of the offences directly as a Court of Original Jurisdiction without the case being committed to it by a Magistrate in view of Section 193 of Code of Criminal Procedure, by making reference to Section 4(2), it was held that though under the Act, a particular Court of Sessions in each district is sought to be specified as a Special Court, the Court of Sessions is

2 2000(2) SCC 504,

specified to conduct a trial and it is only this Court which is competent to try the offences under the Act and evidently the legislature wanted the Special Court to be Court of Sessions. A reference was made to Section 193 of the Code which imposes an interdict on all Court of Sessions against taking cognizance of any offence has a Court of original jurisdiction. In this background, the Apex Court observed thus :

> *12 We have noticed from some of the decisions rendered by various High Courts that contentions were advanced based on Sections 4 and 5 of the Code as suggesting that a departure from Section 193 of the Code is permissible under special enactments. Section 4 of the Code contains two sub-sections of which the first sub-section is of no relevance since it deals only with offences under the Indian Penal Code. However, sub-section (2) deals with offences under other laws and hence the same can be looked into. Sub- section (2) of Section 4 is extracted below :*
>
> > *"All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."*
>
> 13 *A reading of the sub-section makes it clear that subject to the provisions in other enactments all offences under other laws shall also be investigated, inquired*

into, tried and otherwise dealt with under the provision of the Code, This means that if other enactment contains any provision which is contrary to the provisions of the Code, such other functions would apply in place of the particular provision of the Code, If there is no such contrary provision in other laws, then provisions of the code would apply to the matters covered thereby. This aspect has been emphasised by a Constitution Bench of this Court in paragraph 16 of the decision in A.R. Antulay v. Ramdas Sriniwas Nayak and Anr., [1984] 2 SCC 500."

14 Nor can Section 5 of the Code be brought in aid for supporting the view that the Court of Session specified under the Act can obviate the interdict contained in Section 193 of the Code as long as there is no provision in the Act empowering the Special Court to take cognizance of the offence as a court of original jurisdiction. Section 5 of the Code reads thus :

> *"5. Saving. - 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."*

19 In ***Jeewan Kumar Raut Vs. CBI,***[3] while determining the application scope and implication of Section 22 of the Transplantation of Human Organs Act, 1994 (TOHO) posed an issue whether Section 22 operates as a bar to the applicability of Section 167(2) and 173(2) of the Code of

3 2009(7) SCC 526

Criminal Procedure. The said enactment which empowered CBI as being an authorized agency to investigate offences by registering FIR, by virtue of Section 22 prohibited taking of cognizance except on a complaint made by appropriate authority. The appellant – accused who sought bail under Section 167(2) of Cr.P.C was turned down since it was held that the provisions of Section 167(2) Cr.P.C is not attracted for offence under TOHO as police report under Section 173 Cr.P.C by necessary implication is forbidden under Section 22 of the said Act. The Apex Court observed thus :

> *25 Section 22 of TOHO prohibits taking of cognizance except on a complaint made by an appropriate authority or the person who had made a complaint earlier to it as laid down therein. Respondent, although, has all the powers of an investigating agency, it expressly has been statutorily prohibited from filing a police report. It could file a complaint petition only as an appropriate authority so as to comply with the requirements contained in Section 22 of TOHO. If by reason of the provisions of TOHO, filing of a police report by necessary implication is necessarily forbidden, the question of its submitting a report in terms of Sub-section (2) of Section 173 of the Code did not and could not arise. In other words, if no police report could be filed, Sub- section (2) of Section 167 of the Code was not attracted.*

26 It is a well-settled principle of law that if a special statute lays down procedures, the ones laid down under the general statutes shall not be followed. In a situation of this nature, the respondent could carry out investigations in exercise of its authorization under Section 13(3)(iv) of TOHO. While doing so, it could exercise such powers which are otherwise vested in it. But, as it could not file a police report but a complaint petition only; Sub-section (2) of Section 167 of the Code may not be applicable.

27 The provisions of the Code, thus, for all intent and purport, would apply only to an extent till conflict arises between the provisions of the Code and TOHO and as soon as the area of conflict reaches, TOHO shall prevail over the Code. Ordinarily, thus, although in terms of the Code, the respondent upon completion of investigation and upon obtaining remand of the accused from time to time, was required to file a police report, it was precluded from doing so by reason of the provisions contained in Section 22 of TOHO.

36 We are, however, not oblivious of some decisions of this Court where some special statutory authorities like authorities under the Customs Act have been granted all the powers of the investigating officer under a special statute like the NDPS Act, but, this Court has held that they cannot file chargesheet and to that extent they would not be police officers. [See Ramesh Chandra Mehta v. The State of West Bengal AIR 1970 SC 940, Raj Kumar Karwal v. Union of India (1990) 2 SCC 409]

20 As per the learned senior counsel Shri Maninder Singh, the judgment of the Apex Court in case of ***Directorate of***

Enforcement Vs. Deepak Mahajan & Ors,[4] provides an answer to the controversy in hand, we have extensively referred to the said judgment. The issue before the Apex Court was as regards the applicability of the provisions of Section 167(1) and (2) of the Code, when a person is arrested under Special Act like section 35(1) of FERA or Section 104(1) of Customs Act and he is produced before the Magistrate under Section 35(2) or Section 104(2) thereof. The Apex Court while determining the said issue explored the terminology employed under Section 167 i.e. 'Accused', 'Person arrested', 'Arrest'. After taking note of the fact that the Code of Criminal Procedure gives a power of arrest not only to a police officer and the Magistrate but also under circumstances or given situation to private persons, Their Lordships derived a distinction between the word 'custody' and 'arrest'. After making a detailed reference to the scheme contained in the Customs Act and it analyzed in role of a 'proper officer' under the Customs Act in the following words :-

> The 'proper officer' referred to in various provisions of the Customs Act, who is to perform any function

4 1994(3) SCC 440

> 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.

It formulated the issue for consideration in para 22 to the following effect :

> 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.

In the backdrop of Section 167, it observed thus :

> *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.*

21 The important issue which is relevant for the purpose of our consideration is the observation in para 50. In light of the

said question framed when Their Lordship proceeded to answer the same question it was held in order 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 the case diary. It was held that a mere production of an arrestee with competent Magistrate by an authorized officer or an officer empowered to arrest, notwithstanding the fact that he is not a police officer in a strict sense (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 in custody on being satisfied that the Arresting Officer is legally competent to make the arrest, there exists ground for arrest and the provisions of the Special Act in regard to the arrest serve the purpose under Section 167(1) of the Code. Observations of the Apex Court in paragraph 56 is relevant

> *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.*

22 The Apex Court in ***Deepak Mahajan*** (supra) has re-iterated the view taken earlier that the Officer of Enforcement or a Custom Officer is not a police officer though such officers are vested with the powers of arrest or analogus powers by making reference to the judgment in case of ***Ilias Vs. Collector of Customs, Madras,***[5] It held that the Court had taken a view that the said Officer under the Special Act are not vested with the powers of a police officer qua investigation of an offence under Chapter XII of the Code including power to forward a report

5 (1969) 2 SCR 613

under Section 173 of the Code of Criminal Procedure. It however recognized that though the said Officer is not undertaking investigation contemplated under Chapter XII, yet they enjoy some analogus powers such as arrest, seizure, interrogation etc. A statutory duty is also cast on them to inform the arrestee of the ground of arrest.

Learned Senior counsel Shri Maninder Singh has relied upon the observations of the Apex Court in paragraph 16 to the effect that the word 'investigation' cannot be restricted only for police investigation, but it has a wider connotation and it should be flexible enough to include investigation carried on by any agency whether he is a police officer or empowered or authorized officer or a person not being a police officer under the direction of a Magistrate and vested with the power of investigation. However, the Apex Court in the following paragraphs made following observations :-

> *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.*

The Apex Court also dealt with Section 4(2) of the Code and as to whether it can be availed of for investigating, inquiring or trying offences under any other law, other than the Indian Penal

Code including FERA and Customs Act, etc, and then it proceeds to answer in the following words :-Para 122 and 123

> *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.*

23 The conclusions derived are summed up by the Apex Court in para 128 and 132 in the following words :

> *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."*
>
> *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.

24 The said judgment of the Apex Court is a clear answer to the submission raised before us. It is no doubt true that the term 'investigation' has been attempted to be given a wider meaning by Their Lordships. However, the ratio that flows from it in unequivocal terms lay down that in absence of any special procedure being carved out in the special enactment, the

provisions contained in the Code and continue to govern the area of investigation, inquiry and trial of the offences under the Customs Act.

25 The learned Senior counsel Shri Nankani has placed heavy reliance in case of ***Om Prakash & Anr Vs. Union of India,***[6]. The argument of Shri Maninder Sigh is that the verdict of the Apex Court in the said case only deals with power or arrest and therefore, according to him, the field is governed by the earlier judgment in case of Deepak Mahajan.

26 We have perused the said judgment and at the outset, we must mention that at the time when the said judgment was delivered, all the offences under the Customs Act 1962 were non-cognizable and the issue before the Apex Court was since they are non-cognizable, whether they are bailable. The issue was answered in the affirmative and it was held that the *non-obstante* clause contained in section 9A of the Excise Act made it clear that notwithstanding anything contained in the Code of Criminal

6 (2011) 14 SCC 1

Procedure, offences under Section 9 would be deemed to be non-cognizable within the meaning of Code of Criminal Procedure. In paragraph nos.41 and 42 of the report, the following observations are relevant for the purpose of our discussion :

> *41 In our view, the definition of "non-cognizable offence" in Section 2(l) of the Code makes it clear that a non-cognizable offence is an offence for which a police officer has no authority to arrest without warrant. As we have also noticed hereinbefore, the expression "cognizable offence" in Section 2(c) of the Code means an offence for which a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant. In other words, on a construction of the definitions of the different expressions used in the Code and also in connected enactments in respect of a non-cognizable offence, a police officer, and, in the instant case an excise officer, will have no authority to make an arrest without obtaining a warrant for the said purpose. The same provision is contained in Section 41 of the Code which specifies when a police officer may arrest without order from a Magistrate or without warrant.*
>
> *42 Having considered the various provisions of the Central Excise Act, 1944, and the Code of Criminal Procedure, which have been made applicable to the 1944 Act, we are of the view that the offences under the 1944 Act cannot be equated with offences under the Indian Penal Code which have been made non-cognizable and non-bailable. In fact, in the Code itself exceptions have been carved out in respect of serious offences directed against the security of the country, which though non-cognizable have been made non-bailable.*

As regards the Customs Act is concerned, the power of arrest which was contained in Section 104 was referred to and sub-section (4) which contain a *non-obstante* clause was the focus of attention. As regards the provisions of Customs Act, it observed thus :

> *"66 The provisions of Section 104(3) of the Customs Act, 1962, and Section 13 of the Central Excise Act, 1944, vest Customs Officers and Excise Officers with the same powers as that of a Police Officer in charge of a Police Station, which include the power to release on bail upon arrest in respect of offences committed under the two enactments which are uniformly non-cognizable. Both Section 9A of the 1944 Act and Section 104(4) of the Customs Act, 1962, provide that notwithstanding anything in the Code of Criminal Procedure, offences under both the Acts would be non-cognizable.*
>
> *68 Accordingly, on the same reasoning, the offences under the Customs Act, 1962 must also be held to be bailable and the Writ Petitions must, therefore, succeed. The same are, accordingly, allowed. Crl. M.P. No.10673 of 2011 in WP (Crl.) No.76 of 2011 is also disposed of accordingly. Consequently, as in the case of offences under the Central Excise Act, 1944, it is held that offences under Section 135 of the Customs Act, 1962, are bailable and if the person arrested offers bail, he shall be released on bail in accordance with the provisions of sub-Section (3) of Section 104 of the Customs Act, 1962, if not wanted in connection with any other offence.*

27 The said judgment in our considered view clearly set out the proposition of law which would intend to propound. An argument was advanced by the learned ASG that the bailability or non-bailability of an offence is not depending upon the offence being cognizable or non-cognizable. He submitted that the bailable offences are those which are made bailable in terms of section 2(a) of Cr.P.C and which are defined as such under the First Schedule and whether it is bailable or not, is to be determined with reference to that Schedule. After dealing with the said section, by making reference to the *non-obstante* clause contained in sub-section (4) of section 104, it was held that the offence under Section 135 of the Customs Act though non-cognizable, they are bailable and this was particularly in light of the wording of the said sub-section i.e. "notwithstanding anything in the Cr.P.C." thereby conveying that though a non-cognizable offence under the Code of Criminal Procedure under Schedule-I, though punishable with imprisonment for more than three years, it was held to be bailable.

Shri Nankani has invited our attention to the order of the Apex Court passed in Review Petition assailing the decision in Om Prakash (supra) and the dismissal of the Review Petition and would submit that the Review Petition is dismissed and the observations made in ***Om Prakash*** (supra) are thus affirmed.

28 Learned counsel appearing for the respective parties have relied upon several judgments which lay down a proposition supporting their submission. A judgment in case of ***Sunil Gupta Vs Union of India*** [7] has been heavily relied upon by Shri Maninder Singh which deal with the power of Central Excise Ofifcer to arrest a person without a warrant where he has reason to believe that he is liable to be punished under the Central Excise Act, 1944. The Division Bench of the Punjab & Haryana High Court dismissed the writ petitions by turning down the contention of the counsel for the petitioner that no arrest can be made without a warrant. The said decision has been considered by the Three Judges Bench in ***Om Prakash*** and in paragraph no.31 Their Lordships have made reference to the said decision

7 1999 SCC Online P&H 350

where it has been held that FIR or complaint or warrant is not a necessary pre-condition for an officer under the Act to exercise the power of arrest. Further, in Om Prakash, the earlier decision of the Apex Court in case of Deepak Mahajan (supra) has also been taken note of along with the judgment relied upon by Shri Maninder Singh, in ***Bhavin Impex Pvt.Ltd. Vs. State of Gujarat*** [8].

29 Shri Nankani has placed reliance on a judgment of the Punjab & Haryana High Court in case of ***Gaurav Kathuria Vs. Union of India***[9] and which is affirmed by the Apex Court in view of the dismissal of the Appeal before the Apex Court. The said judgment of the Punjab & Haryana High Court follow the decision of the Apex Court in case of Deepak Mahajan as well as Om Prakash Vs. Union of India (supra). The petitioner before the High Court who was desirous of instituting criminal case alleging duty evasion in import of heavy metal scrap and according to whom the imports were made by mis-declaring the

8 2009 SCC Online Guj 9965
9 2017 (348) E.L.T. 24 (P & H)

relevant price to evade duty and which would constitute offences under Section 132 of the Customs Act, challenged the vires of the provisions of the PMLA Act. The petitioner argued that he intended to apply before the Judicial Magistrate for issuance of directions to the Custom Officer for commencing the investigation into the criminal offences and prosecuting the accused for commission of the offences under the Customs Act. However, according to him, he could not be permitted to set the criminal law into motion by approaching the jurisdictional Magistrate because the Customs Act as well as the PMLA are considered to be complete Code and the provisions as Section 156(3) or Section 155(2) of the Code may not have an application in the field occupying by the special statutes. The exhaustive report deal with the provisions of both the enactments, the existing law on the point, the Division Bench observed thus :

> *15.13 All the aforesaid judgments in the context of Customs Act, 1962 or Central Excise Act, 1944 are in respect of "non-cognizable"offences under these Acts. After the judgment in Om Prakash (supra) amendments were carried out and now some of the offences specified under these Acts are made cognizable and rest remain 'non-cognizable'. After substitution of sub-section (4)*

with effect from 28-5-2012, sub-sections (4) and (5) of Section 104 of the Customs Act read as under :

> *(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), any offence relating to -*
> *(a) prohibited goods; or*
> *(b) evasion or attempted evasion of duty exceeding fifty lakh rupees, shall be cognizable.*
> *(5) Save as otherwise provided in sub-section (4), all other offences under the Act shall be non-cognizable.*

15.14 Therefore, the Customs Act now prescribes 2 categories of offences, first being offences falling under sub-section (4) which are 'cognizable' and second being all offences other than those falling under sub-section (4), which shall be non-cognizable in terms of sub-section (5).

15.15 Words 'cognizable' or 'non-cognizable' offence are not defined under the Act, but are defined under the Code as follows :

> *"2(c) 'cognizable offence' means an offence for which and 'cognizable case' means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant;*
>
> *"2(I) 'non-cognizable offence' means an offence for which, and non-cognizable case' means a case in which, a police officer has no authority to arrest without warrant"*

15.16 By application of Section 4(2) of the Code and in view of the aforesaid binding precedents, the

> *words 'police officer' appearing in these definitions would be read as 'officer' authorized under the Customs Act, 1962. Thus, in a 'cognizable offence' under Customs Act, 1962 the Customs Officer would have power to arrest under Section 104(1) without a warrant. He would comply with provisions of Sections 154 to 157 by recording the information and sending forthwith a copy of the Report under Section 157 to the jurisdictional Magistrate. But in a 'non-cognizable offence' under the Act, he would have to obtain from jurisdictional Magistrate permission to investigate and a warrant of arrest under Section 104(1) of the Act, as already held by the Hon'ble Supreme Court in Om Prakash (supra).*

30 On carefully examining the principle enunciated by the Apex Court, the position that emerge is to the effect that though the Customs Act, 1962 classifies the offence punishable thereunder as cognizable/non-cognizable, it do not lay down any set of procedure for dealing with the information received by the Custom Officer for proceeding under the provisions of the Act. It also do not define the term “cognizable/non-cognizable” and in absence of such a definition, the terms take the meaning assigned in the Code of Criminal Procedure. In absence of any set of procedure for commencing the so-called 'investigation' in words of the learned senior counsel Shri Maninder Singh, though the statute applies the phrase 'inquiry' for commencing conducting

and culminating a valid investigation into the distinct classes of offences, the position that would therefore emerge is to resort to sub-section (2) of Section 4 in relation to an investigation into an offence under the special statute and in absentia of any provision setting out the modalities for commencing, conduct and culmination of investigation. In absence of any overriding provision in the Customs Act, stipulating any contrary procedure, relating to an information received and the manner in which the Custom Officer, who for limited purpose posses the power of a police officer, by virtue of Section 4(2) of the Code, the respective provisions in the Code relating to dealing with the information requiring an inquiry/investigation into the offences classified as cognizable/non-cognizable shall necessarily follow. The position of law as could be discerned from the judgment in the case of ***Deepak Mahajan*** (supra) by virtue of Section 4(2), the provisions of Chapter XII of the Cr.P.C are made applicable to the investigations by the Enforcement Directorate. What follows from the judgment of the Apex Court in Deepak Mahajan is the ratio that by combined operation of Section 4(2) and 26B of the

Code, the offence complained of should be investigated or inquired into or tried according to the provisions of the Code when the Customs Act do not create a special procedure.

31 In ***Illias Vs. Commissioner of Customs*** (supra), the Constitution Bench has held that the custom authorities have been invested with many powers akin to that of a police officer in matter relating to arrest, investigation and search which was not there in the earlier Customs Act. Even though the custom officers possess the said power, they do not become police officials within the meaning of Section 25 of the Evidence Act and it was held that the confessional statements made by the accused persons to custom officers would be admissible in evidence against them. The Constitution Bench recorded as under :

> *14 It was reiterated that the appellant could not take advantage of the decision in Raja Ram Jaiswal's case and that Barkat Ram's case was more apposite. The ratio of the decision Badku Joti Savant is that even if an officer under the special Act has been invested with most of the powers which an officer- in-charge of a police station exercises when investigating a cognizable offence he does not thereby become a police officer within the meaning of s. 25 of the Evidence Act unless he is empowered to file a charge sheet under s. 173 of the Code of Criminal Procedure.*

15 In this view of the matter even though under the new Act a customs officer has been invested with many powers which were not to be found in the provisions of the old Act, he cannot be regarded as a police officer within the meaning of s. 25 of the Evidence Act. In two recent decisions of this Court in which the judgments were delivered only on October 18, 1968 i.e. Romesh Chandra Mehta v. State of West Bengal(1) and Dady Adarji Fatakia v.K.K. Ganguly, Asstt Collector of Customs & Ant.,('2) the view expressed in Barkat Ram's(3) case with reference to the old Act has been reaffirmed on the question under consideration and it has been held that under the new Act also the position remains the same. This is what has been said in Dady Adarji Fatakia's(2) case:

> *"For reasons set out in the judgment in Cr. A. 27/67 (Romesh Chand Mehta v. State of West Bengal) and the judgment of this Court in Badku Joti Savant's(4) case, we are of the view that a Customs Officer is under the Act of 1962 not a police officer within the meaning of s. 25 of the Evidence Act and the statements made before him by a person who is arrested or against whom an inquiry is made are not covered by s. 25 of the Indian Evidence Act."*

The submission of the learned senior counsel appearing for DRI to the effect that the entire provisions of chapter XII of the Cr.P.C stand excluded on the premise of a decision in case of ***Ramesh Chandra Mehta Vs. Union of India***[10]. According to us, is not a correct reading of the said

10 AIR 1970 SC 940

decision. The Constitution Bench while rejecting the contention that the power conferred on a custom officer to arrest on having a reason to believe that he has been guilty of an offence under Section 135, result into a formal accusation of an offence came to be rejected by observing that Section 104(1) only prescribes the conditions in which the power of arrest may be exercised and arrest and detention are only for the purpose of holding effectively an inquiry under Section 107 and 108 of the Act with a view to adjudge the confiscation of dutiable or prohibited goods and imposing penalties. The Constitution Bench observed thus :

> *"26.....Arrest and detention are only for the purpose of holding effectively and inquiry under Section 107 and 108 of the Act with a view to adjudging confiscation of dutiable or prohibited goods and impose the penalties. At that stage, there is no question of offender against the Customs Act being charged before a Magistrate. Ordinarily, after adjudging the penalty and confiscation of goods or without doing so, if the Custom Officer forms an opinion that offender should be prosecuted, he may prefer a complaint in the manner provided under Section 137 with the sanction of Collector of Customs and until a complaint is so filed, a person against whom an inquiry is commenced under Customs Act, do not stand in the character of a person accused of an offence punishable under Section 135".*

The observations cannot be read to exclude the applicability of Chapter XII of Cr.P.C in entirety. The offences under the Customs Act,till the amendment were only non-cognizable and therefore, resort to Section 173 of Chapter XII was clearly not permissible. The judgment in case of Deepak Mahajan (supra) follows the judgment of the Constitution Bench in regard to admissibility of statements in light of Section 20(3) and Section 25 of the Evidence Act and was not applicable for deciding the issue of applicability of the provisions of the Code in light of Section 4(2) thereof. The contention of the petitioner is not to the effect that in every non-cognizable offence, an FIR has to be registered but according to the petitioner, the course to be adopted would depend on whether the offence is cognizable/non-cognizable, but it necessarily fall within the purview and ambit of Chapter XII of Cr.P.C. The commencement point therefore lies either Section 154 or 155 and in absence of following the said path, the 'investigation' cannot be said to have been commenced which would permit the authorities to take recourse to Section

166A contained in Chapter XII.

32 Turning back to Section 166A which opens with a non-obstante clause "Notwithstanding anything contained in this Code" are not the only guiding words of the said section but the decisive words of the said section i.e. 'In the course of investigation'. In order to appreciate the contention of Shri Maninder Singh, it would be apposite to reproduce Section 166A of Cr.P.C.

> ***Section 166-A*** Letter of request competent authority for investigation in a country or place outside India.
>
> *(1) Notwithstanding anything contained in this Code, if, in the course of an investigation into an offence, an application is made by the investigating officer or any officer superior in rank to the investigating officer that evidence may be available in a country or place outside India, any Criminal Court may issue letter of request to a Court or an authority in that country or place competent to deal with such request to examine orally any person supposed to be acquainted with the facts and circumstances of the case and to record his statement made in the course of such examination and also to require such person or any other person to produce any document or thing which may be in his possession pertaining to the case and to forward all the evidence so taken or collected or the authenticated copies thereof or the thing so collected to the Court issuing such letter.*

> *(2) The letter of request shall be transmitted in such manner as the Central Government may specify in this behalf.*
>
> *(3) Every statement recorded or document or thing received under Sub-Section (1) shall be deemed to be the evidence collected during the course of investigation under this Chapter.*

The said section came to be inserted by Act No.10 of 1990 and the statements of objects and reasons of the said Amendment Act *inter alia* states as under :-

> *"the investigating authorities in India were handicapped in collecting evidence in a foreign country or a place in respect of a crime committed by a citizen of India outside the country, due to the absence of a specific provision in the Code of Criminal Procedure, 1973"*

Pertinent to note that by virtue of Section 1(2) of the Code of Criminal Procedure, the Code extends to the whole of India and a difficulty was posed in permitting an evidence collected outside India to be treated as an evidence collected during the course of the investigation since it was extra territorial. In order to do away with the practical difficulty, the said section begins with a non-obstante clause to make the evidence collected from any other country or place and brought before the Court

trying such an offence and the evidence is so taken or collected shall be deemed to be the evidence collected during the course of investigation under Chapter XII. Sub-section (3) of Section 166A therefore, introduces the deeming provision and the evidence collected by issuing the Letter of Request to the competent authority in a country or place outside India, is accepted as an evidence collected during the course of investigation. The non-obstante clause in the beginning of Section 166A of the Code thus deviates from the golden thread which runs through the entire Code i.e. only the evidence collected by adopting the procedure prescribed under the Code being admissible in evidence. The non-obstante clause, therefore, in our considered view does not exclude/override all the provisions of the Code and only such provisions of the Code which are inconsistent with the application of Section 166A are overriden. The said non-obstante clause cannot be construed in a manner that it stands in deviation and derogation of all the procedural safeguards contained in Chapter XII including the mode and manner of commencing a valid investigation. The

non-obstante clause is a well known legislative device and in olden times, it had the effect of *non-obstante aliquo statuto* in contrarium (notwithstanding any statute to the contrary). However, in the modern legislation, it has a contextual and limited application. It is a settled position that the impact of the non-obstante clause must be kept in measure by the legislative policy and it has to be limited to the extent it is intended by Parliament and not beyond that. Section 166A cannot be read in isolation and it will have to be read as a part of Chapter XII of the Code to be invoked and applied where the investigation is commenced either under Section 154 or 155 in the manner prescribed therein and it is necessarily an investigation under Chapter XII, which in case of a cognizable offence, commenced with lodging of an information with the police station officer and the police officer following the procedure set out in Section 154 and in case of a non-cognizable offence, by obtaining an order of the jurisdictional Magistrate in terms of sub-section (2) of Section 155, without obtaining such an order from the Magistrate under Section 155((2). The valid investigation cannot be said to be

commenced and continued and therefore, recourse to section 166A without obtaining the necessary permission in respect of an investigation of a non-cognizable offence cannot be justified. The DRI has commenced the investigation into a non-cognizable offence without obtaining the necessary permission from the Magistrate and in such circumstances, the LR issued by the Magistrate do not meet the test and is not compliant of Chapter XII of the Cr.P.C. since it do not precede the mandatory requirement of initiation of investigation, as prescribed in Chapter XII. We are in agreement with the submission of Shri Singh to the effect that Section 166A adopts a liberal procedure to be followed to the effect that such an application can be made by the Investigating Officer to "any criminal court" and it is then imperative on the part of the said Court irrespective of the fact that whether the offence was committed within its territorial jurisdiction to issue a letter of Request to a Court or an authority in another country or place competent to deal with such request to examine orally any person supposed to be quantified with the facts and circumstances of the case and to record his statement

made, in the course of such examination or to produce any document or thing in his possession. The flexibility in the said procedure as a purpose to serve and without being stuck in the procedural rigmarole of jurisdictional Court, it is any criminal court which can issue such a Letter of Request. However, this provision, which according to Shri Singh is a special provision do not exclude the applicability of the procedure contemplated under Section 154/155 of the Code of Criminal Procedure. The statutory safeguard contained in Section 155(2) of the Code has been construed to be mandatory in nature since the said safeguard are conceived in public interest and has a guarantee against frivolous and vexatious investigation in case of ***Tilak Nagar Industries Ltd vs. State of U.P & Anr,***[11] .

33 Pertinent to note that when we heard the matter on 19th September 2018, our attention was invited to the guidelines issued by the Government of India, Ministry of Home Affairs, Internal Security Division on 31st December 2007, relating to the issue of Letter of Rogatory (LRs) for causing investigation abroad.

11 2011(15) SCC page 571

The said guidelines contemplate that in order to obtain proposal from the Ministry of Home Affairs, the Investigating Agency is expected to sent certain documents which include the brief facts of the case, incorporating the allegations, name of the accused and particulars of the offences committed and a copy of the FIR and it is even the Ministry has understood and reflected when an investigation is set in motion and it is only in the backdrop of these circumstances, according to the guidelines, the Court may issue a letter of Rogatory. We only express that even the Ministry of Home Affairs has understood it in the way which we have elaborated. We say nothing more on this.

34 In light of the legal position emerging from the aforesaid discussion and the conclusions arrived by us, we make it clear that we have not gone into the merits of the letter of Rogatory issued by the Magistrate. We have only dealt with the contention as to whether it was permissible for the Magistrate to issue such a Letter of Rogatory without following the procedure mandates by sub-section (2) of Section 155 and whether the letter

of Rogatory was issued on initiation of a valid investigation under Chapter XII of Cr.P.C. Since we are of the express opinion that Section 166A is not an independent island on which any investigating/inquiring authority can jump on without taking recourse to Section 154/155, we hold and declare that the action of the respondents in giving effect ot the letter of Rogatory issued by the learned Metropolitan Magistrate, Mumbai in relation to the import of coal of Indonesian origin cannot be sustained and it deserves to be quashed and set aside.

35 Writ Petition therefore stands allowed in terms of prayer clauses (a) and (b).

SMT. BHARATI DANGRE, J RANJIT V. MORE,J