

SUPREME COURT OF INDIA

Om Prakash & Anr.

Vs.

Union of India & Anr.

W.P.(CrI.)No.66 of 2011

(Altamas Kabir,J., Cyriac Joseph and Surinder Singh Nijjar,JJ.,)

30.09.2011

JUDGMENT

Altamas Kabir,J.,

1. Two sets of matters have been heard together, one relating to the provisions of the Customs Act, 1962, and the other involving the provisions of the Central Excise Act, 1944, since the issue in both sets of matters is the same. The common question in these two sets of matters is that since all offences under the Central Excise Act, 1944 and the Customs Act, 1962, are non-cognizable, are such offences bailable? Although, the provisions of both the two Acts in this regard are *pari materia* to each other, we shall first take up the matters relating to the Central Excise Act, 1944, hereinafter referred to as "the 1944 Act", namely, (1) Writ Petition (CrI) No.66 of 2011, Om Prakash & Anr. Vs. Union of India & Anr., which has been heard as the lead case, (2) Writ Petition No.85 of 2010 and (3) Writ Petition (CrI.) Nos.74, 87, 101 and 102 of 2011.

2. Section 9A of the 1944 Act, which was introduced in the Act with effect from 1st September, 1972, provides that certain offences are to be non-cognizable. Since we shall be dealing with this provision in some detail, the same is extracted hereinbelow :-

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

(2) Any offence under this Chapter may, either before or after the institution of prosecution, be compounded by the Chief Commissioner of Central Excise on payment, by the person accused of the offence to the Central Government, of such compounding amount and in such manner of compounding, as may be prescribed. Provided that nothing contained in this sub-section shall apply to -(a) a person who has been allowed to compound once in respect of any of the offences under the provisions of clause (a), (b), (bb), (bbb), (bbbb) or (c) of sub-section (1) of Section 9;

(b) a person who has been accused of committing an offence under this Act which is also an offence under the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985);

(c) a person who has been allowed to compound once in respect of any offence under this Chapter for goods of value exceeding rupees one crore;

(d) a person who has been convicted by the court under this Act on or after the 30th day of December, 2005."

3. What is important is the non-obstante clause with which the Section begins and in very categorical terms makes it clear that notwithstanding anything contained in the Code of Criminal Procedure, offences under Section 9 of the 1944 Act would be deemed to be non-cognizable within the meaning of the Code. In fact, Sub-section (2) of Section 9A also provides for compounding of offences upon payment of the compounding amount with the exceptions as mentioned in the proviso thereto.

4. Mr. Mukul Rohatgi, learned senior counsel appearing for the Petitioners in both sets of matters, submitted that since the expressions "cognizable" or "non-cognizable" or even "bailable offences" had not been defined in either the 1944 Act or the Customs Act, 1962, one would have to refer to the provisions of the Code of Criminal Procedure, 1973 (Cr.P.C.) to understand the meaning of the said expressions in relation to criminal offences. Section 2(a) Cr.P.C. defines "bailable offence" as follows :-

"2(a). "bailable offence" means an offence which is shown as bailable in the First Schedule, or which is made bailable by any other law for the time being in force; and "non-bailable offence" means any other offence;"

Section 2(c) defines "cognizable offence" 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;" Section 2(l) defines "non-cognizable offence" as follows :-

"2(l). "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;"

5. Mr. Rohatgi then submitted that offences which are punishable under the 1944 Act have been indicated in Section 9 of the said Act and these sets of cases relate to the offences indicated in Section 9(1)(d) of the said Act. Section 9(1)(d) is again divided into two sub-clauses and reads as follows:-

"9. Offences and penalties. (1) Whoever commits any of the following offences, namely:-

(a) to (c)

(d) attempts to commit, or abets the commission of, any of the offences mentioned in clauses (a) and (b) of this section; shall be punishable,-

(i) in the case of an offence relating to any excisable goods, the duty leviable thereon under this Act exceeds one 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 a term of less than six months;

(ii) in any other case, with imprisonment for a term which may extend to three years or with fine or with both."

6. What is of significance is that offences covered by clauses (a) and (b) and the subsequent amendments thereto relating to any excisable goods, where the duty leviable thereon under the Act exceeds one lakh of rupees, would be punishable with imprisonment for a term which may extend to seven years and with fine, whereas under Section 9(1)(d)(ii), in any other case, the offence would be punishable with imprisonment for a term which may extend to three years or with fine or with both.

7. Since the question of arrest is in issue in these sets of cases, Mr. Rohatgi then referred to the provisions of Section 13 of the 1944 Act, which deals with the power to arrest in the following terms:-

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

8. Mr. Rohatgi submitted that the said power would have to be read along with Sections 18, 19, 20 and 21 of the 1944 Act along with Section 155 Cr.P.C. Section 18 of the 1944 Act provides for searches and how arrests are to be made under the Act and rules framed thereunder and reads as follows :-

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

9. Sections 19, 20 and 21 deal with how a person arrested is to be dealt with after his arrest and the procedure to be followed by the Officer in- Charge of the police station concerned to

whom any person is forwarded under Section 19. For the sake of understanding the Scheme, the provisions of Sections 19, 20 and 21 of the 1944 Act are extracted hereinbelow ad seriatim :-

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

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

21. Inquiry how to be made by Central Excise Officers against arrested persons forwarded to them under Section 19.- (1) When any person is forwarded under section 19 to a Central Excise Officer empowered to send persons so arrested to a Magistrate, the Central Excise Officer shall proceed to enquire into the charge against him.

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

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

(b) if it appears to the Central Excise Officer that there is not sufficient evidence or reasonable ground of suspicion against the accused person, he shall release the accused person on his executing a bond, with or without sureties as the Central Excise Officer may direct, to appear, if and when so required, before the Magistrate having jurisdiction, and shall make a full report of all the particulars of the case to his official superior."

10. As indicated in Section 18, all steps taken under Sections 19, 20 and 21 would have to be taken in accordance with the provisions of the Code of Criminal Procedure and the relevant provision thereof is Section 155 which deals with information as to non-cognizable cases and investigation of such cases, since under Section 9A of the 1944 Act all offences under the Act are non-cognizable. For the sake of reference Section 155 Cr.P.C. is extracted hereinbelow :-

"155. Information as to non-cognizable cases and investigation of such cases.- (1) When information is given to an officer in charge of a police station of the commission within the limits of such station of a non-cognizable offence, he shall

enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf, and refer, the informant to the Magistrate. (2) No police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial.

(3) Any police officer receiving such order may 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.

(4) Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable."

11. As will be evident from the aforesaid provisions of Section 155 Cr.P.C., no police officer in charge of a police station is entitled to investigate a non-cognizable case without the order of a Magistrate having the power to try such case or to commit the case for trial. Furthermore, no such police officer is entitled to effect arrest in a non-cognizable case without a warrant to effect such arrest. According to Mr. Rohatgi, since all offences under the 1944 Act, irrespective of the length of punishment are deemed to be non-cognizable, the aforesaid provisions would fully apply to all such cases. This now brings us to the question as to whether all offences under the 1944 Act are bailable or not. As has been indicated hereinbefore in this judgment, Section 2(a) of the Code defines "bailable offence" to be an offence shown as bailable in the First Schedule to the Code or which is made bailable by any other law for the time being in force. The First Schedule to the Code which deals with classification of offences is in two parts. The first part deals with offences under the Indian Penal Code, while the second part deals with classification of offences in respect of other laws. Inasmuch as, the offences relate to the offences under the 1944 Act, it is the second part of the First Schedule which will have application to the cases in hand. The last item in the list of offences provides that if the offence is punishable with imprisonment for less than three years or with fine only, the offence will be non-cognizable and bailable. Accordingly, if the offences come under the said category, they would be both non-cognizable as well as bailable offences. However, in the case of the 1944 Act, in view of Section 9A, all offences under the Act have been made non-cognizable and having regard to the provisions of Section 155, neither could any investigation be commenced in such cases, nor could a person be arrested in respect of such offence, without a warrant for such arrest.

12. Mr. Rohatgi submitted that Section 20 of the 1944 Act would also make it clear that the Officer in-Charge of a police station to whom any person arrested is forwarded under Section 19, shall either admit him to bail to appear before the Magistrate having jurisdiction, or in default of bail forward him in custody to such Magistrate. In other words, unless the offence was bailable, the Officer in-Charge of the police station would not have been vested with the power to admit him to bail and to direct him to appear before the Magistrate having jurisdiction. Mr. Rohatgi pointed out that Section 21 which deals with the manner in which

the enquiry is to be made by the Central Excise Officer against the arrested person forwarded to him under Section 19, is similar to the procedure prescribed under Section 20.

13. The submissions made by Mr. Rohatgi will have to be considered in the context of the provisions of Sections 9A, 13 and 18 to 21 of the 1944 Act and Section 155 Cr.P.C.

14. Section 41 of the Code provides the circumstances in which a police officer may, without an order from a Magistrate and without a warrant, arrest any person. What is relevant for our purpose are Sub-section (1)(a) and Sub-section (2) of Section 41 which are extracted hereinbelow:-

"41. When police may arrest without warrant.- (1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person-

(a) Who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned; or

(b) to (h)..... (2) Any officer in charge of a police station may, in like manner, arrest or cause to be arrested any, person, belonging to one or more of the categories of persons specified in section 109 or section 110."

15. An exception to the provisions of Section 41 has been made in Section 42 of the Code which enables a police officer to arrest a person who has committed in the presence of such officer or has been accused of committing a non-cognizable offence refuses, on demand of such officer, to give his name and residence or gives a name or residence which such officer has reason to believe to be false.

16. One other provision of the Code referred to is Section 46 which deals with how arrests are to be made. The same merely provides the procedure for effecting the arrest for which purpose the officer or other person making the same shall actually touch or confine the body of the person to be arrested. The said provision is not really material for a determination of the issues in this case and need not detain us.

17. In this connection, Section 436 Cr.P.C. which provides in what cases bail could be taken, may be taken note of. The said Section provides as under:-

"436. In what cases bail to be taken.- (1) When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such court to give bail, such person shall be released on bail:

Provided that such officer or court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided: Provided further that nothing in this section shall be deemed to affect the provisions of sub-section (3) of section 116 [or section 446A].

(2) Notwithstanding anything contained in sub-section (1), where a person has failed to comply with the conditions of the bail-bond as regards the time and place of attendance, the court may refuse to release him on bail, when on a subsequent occasion in the same case he appears before the court or is brought in custody and any such refusal shall be without prejudice to the powers of the court to call upon any person bound by such bond to pay the penalty thereof under section 446."

As will be evident from the above, when any person, other than a person accused of a non-bailable offence, is arrested or detained without warrant by an Officer in-Charge of a police station, or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before a Court to give bail, he shall be released on bail. In other words, in respect of a non-cognizable case, a person who is arrested without warrant shall be released on bail if he is prepared to give bail. The scheme of the Section is that without a warrant, if a person is arrested by the Officer in-Charge of a police station or if such person is brought before the Court, he is entitled to be released on bail, either by the police officer, or the Court concerned.

18. The legal contentions indicated hereinabove were opposed on behalf of the Union of India and the stand taken by Mr. Mohan Parasaran, learned Additional Solicitor General, was that what was required to be considered in the Writ Petitions was whether there is a power to arrest vested in the officers exercising powers under Section 13 of the 1944 Act without issuance of a warrant and whether such power could be exercised only after an FIR/complaint had been lodged under Section 13 of the aforesaid Act. It was also contended that it was necessary to consider further whether criminal prosecution or investigation could be initiated, which could lead to arrest, without final adjudication of a dual liability. The last contention raised was whether offences referred to in Section 9(1)(d)(i) of the 1944 Act were bailable or not on account of the fact that in the said Act by a deeming fiction all offences under the respective Sections are deemed to be non-cognizable. Mr. Parasaran pointed out that the Preamble to the 1944 Act states that it is expedient to consolidate and amend the law relating to central excise duty on goods manufactured or produced in certain parts of India. Under the Act it is the duty of the officers to ensure that duty is not evaded and persons who attempt to evade duty are proceeded against. The learned Additional Solicitor General submitted that wide powers have been conferred on the Officers under the Act to enable them to discharge their duties in an effective manner, though not for the purpose of prevention and detection of crime, but to prevent smuggling of goods or clandestine removal thereof and for due realization of excise duties. It was also urged that the Officers under the said Act are not police officers and that the said question is no longer res integra. Consequently, in *Ramesh Chandra Mehta Vs. State of West Bengal* [AIR 1970 SC 940], a Constitution Bench of this Court held that since a customs officer is not a police officer, as

would also be the case in respect of an officer under the Excise Act, submissions made before him would not be covered under Section 25 of the Evidence Act.

19. Mr. Prasaran submitted that the High Court had also made a distinction on the basis that while Section 13 of the 1944 Act refers to a "person" and not to an "accused" or "accused person", the power under the Central Excise Act is for arrest of any person who is suspected of having committed an offence and is not an accused, but is a person who would become an accused after the filing of a complaint or lodging of an FIR, as was held by this Court in the case of *Directorate of Enforcement Vs. Deepak Mahajan*¹ The learned ASG submitted that although under the powers reserved under the Customs Act and the Excise Act to a Customs Officer or a Central Excise Officer, as the case may be, the said Officer would be entitled to exercise powers akin to that of a police officer, but that did not mean that such officers are police officers in the eyes of law. The said officers had no authority or power to file an investigation report under Section 173 Cr.P.C. and in all cases the officer concerned has to produce the suspect before the Magistrate after investigation for the purpose of remand. The learned ASG submitted that only on the filing of a complaint, can the criminal law be set in motion.

20. Mr. Prasaran also urged that the power to arrest must necessarily be vested in the Officer concerned under the 1944 Act for the efficient discharge of his functions and duties, inter alia, in order to prevent and tackle the menace of black money and money laundering. Mr. Prasaran submitted that in *Union of India Vs. Padam Narian Aggarwal*² this Court had held that even though personal liberty is taken away, there are norms and guidelines providing safeguards so that such a power is not abused, but is exercised on objective facts with regard to commission of any offence. Reference was also made to the decision of the Punjab & Haryana High Court in *Sunil Gupta Vs. Union of India*³ and *Bhavin Impex Pvt. Ltd. Vs. State of Gujarat*⁴ in which the issue, which is exactly in issue in the present case, was considered and, as submitted by the learned ASG, it has been held that the FIR or complaint or warrant is not a necessary pre-condition for an Officer under the Act to exercise powers of arrest. It was also submitted that the Petitioners had nowhere questioned the vires of the Section granting power to investigate to the Officer under the Act as being unconstitutional and ultra vires and as such in case of any mistake or illegality in the exercise of such statutory powers, the affected persons would always have recourse to the Courts.

21. Coming to the question of the provisions of Section 9A of the 1944 Act wherein in Sub-section (1) it has been clearly mentioned that notwithstanding anything contained in the Code of Criminal Procedure, offences under Section 9 shall be deemed to be non-cognizable within the meaning of the Code, the learned ASG submitted that the aforesaid Section does not state anything as to whether such offences are also bailable or not. It was contended that if the submissions made by Mr. Rohatgi on this point were to be accepted, it would mean that all offences under Section 9, including offences punishable with imprisonment upto seven years, would also be bailable, which could not have been the intention of the legislators enacting the 1944 Act. Mr. Prasaran submitted that the provisions of Section 9A of the 1944 Act merely import the provisions of Section 2(i) Cr.P.C., thereby debarring a "police officer" from arresting a person without warrant for an offence under the Act. It was submitted that

Section 9A does not refer to a Central Excise Officer and as such there is no embargo on an Officer under the 1944 Act from arresting a person.

22. Mr. Prasaran's next submission was with regard to the provisions of part 2 of the First Schedule to the Code of Criminal Procedure and it was submitted that the same has to be given a meaningful interpretation. It was urged that merely because a discretion had been given to the Magistrate to award punishment of less than three years, it must fall under the third head of the said Schedule and, therefore, be non-cognizable and bailable. On the other hand, as long as the Magistrate had the power to sentence a person for imprisonment of three years or more, notwithstanding the fact that he has discretion to provide a sentence of less than three year, the same will make the offence fall under the second head thereby making such offence non-bailable. It was submitted that in essence it is the maximum punishment which has to determine the head under which the offence falls in Part 2 of the First Schedule to the Code and not the use of discretion by the Magistrate to award a lesser sentence.

23. In support of his submissions, Mr. Prasaran referred to the decisions of this Court in *Superintendent of Police, CBI & Ors. Vs. Tapan Kumar Singh*⁵ and *Bhupinder Singh Vs. Jarnail Singh*⁶ to which reference will be made, if necessary.

24. As we have indicated in the first paragraph of this judgment, the question which we are required to answer in this batch of matters relating to the Central Excise Act, 1944, is whether all offences under the said Act are non-cognizable and, if so, whether such offences are bailable? In order to answer the said question, it would be necessary to first of all look into the provisions of the said Act on the said question. Sub-section (1) of Section 9A, which has been extracted hereinbefore, states in completely unambiguous terms that notwithstanding anything contained in the Code of Criminal Procedure, offences under Section 9 shall be deemed to be non-cognizable within the meaning of that Code. There is, therefore, no scope to hold otherwise. It is in the said context that we will have to consider the submissions made by Mr. Rohatgi that since all offences under Section 9 are to be deemed to be non-cognizable within the meaning of the Code of Criminal Procedure, such offences must also be held to be bailable. The expression "bailable offence" has been defined in Section 2(a) of the Code and set out hereinabove in paragraph 3 of the judgment, to mean an offence which is either shown to be bailable in the First Schedule to the Code or which is made bailable by any other law for the time being in force. As noticed earlier, the First Schedule to the Code consists of Part 1 and Part 2. While Part 1 deals with offences under the Indian Penal Code, Part 2 deals with offences under other laws. Accordingly, if the provisions of Part 2 of the First Schedule are to be applied, an offence in order to be cognizable and bailable would have to be an offence which is punishable with imprisonment for less than three years or with fine only, being the third item under the category of offences indicated in the said Part. An offence punishable with imprisonment for three years and upwards, but not more than seven years, has been shown to be cognizable and non-bailable. If, however, all offences under Section 9 of the 1944 Act are deemed to be non-cognizable, then, in such event, even the second item of offences in Part 2 could be attracted for the purpose of granting bail since, as indicated above, all offences under Section 9 of the 1944 Act are deemed to be non-cognizable.

25. This leads us to the next question as to meaning of the expression "non-cognizable".

26. Section 2(i) Cr.P.C. defines a "non-cognizable offence", in respect whereof a police officer has no authority to arrest without warrant. The said definition defines the general rule since even under the Code some offences, though "non-cognizable" have been included in Part I of the First Schedule to the Code as being non-bailable. For example, Sections 194, 195, 466, 467, 476, 477 and 505 deal with non-cognizable offences which are yet non-bailable. Of course, here we are concerned with offences under a specific Statute which falls in Part 2 of the First Schedule to the Code. However, the language of the Scheme of 1944 Act seem to suggest that the main object of the enactment of the said Act was the recovery of excise duties and not really to punish for infringement of its provisions. The introduction of Section 9A into the 1944 Act by way of amendment reveals the thinking of the legislature that offences under the 1944 Act should be non-cognizable and, therefore, bailable. From Part 1 of the First Schedule to the Code, it will be clear that as a general rule all non-cognizable offences are bailable, except those indicated hereinabove. The said provisions, which are excluded from the normal rule, relate to grave offences which are likely to affect the safety and security of the nation or lead to a consequence which cannot be revoked. One example of such a case would be the evidence of a witness on whose false evidence a person may be sent to the gallows.

27. 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.

28. 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.

29. However, Sub-section (2) of Section 9A makes provision for compounding of all offences under Chapter II. Significantly, Chapter II of the 1944 Act deals with levy and collection of duty and offences under the said Act have been specified in Section 9, which provides that whoever commits any of the offences set out in Section 9, would be punishable in the manner indicated under Sub-section (1) itself. What is even more significant is that

Section 20 of the 1944 Act, which has been extracted hereinabove, provides that the Officer in-Charge of a police station to whom any person is forwarded under Section 19, shall (emphasis supplied) either admit him to bail to appear before the Magistrate having jurisdiction, or on his failure to provide bail, forward him in custody to such Magistrate. The said provision clearly indicates that offences under the Central Excise Act, as set out in Section 9 of the Act, are bailable, since the Officer in-Charge of a police station has been mandated to grant bail to the person arrested and brought before him in terms of Section 19 of the Act. The decisions which have been cited by Mr. Parasaran deal mainly with powers of arrest under the Customs Act. The only cited decision which deals with the provisions of the Central Excise Act is the decision of the Division Bench of the Punjab & Haryana High Court in the case of Sunil Gupta Vs. Union of India. In the said case also, the emphasis is on search and arrest and the learned Judges in paragraph 22 of the judgment specifically indicated that the basic issue before the Bench was whether arrest without warrant was barred under the provisions of the 1944 Act and the Courts had no occasion to look into the aspect as to whether the offences under the said Act were bailable or not.

30. In the circumstances, we are inclined to agree with Mr. Rohatgi that in view of the provisions of Sections 9 and 9A read with Section 20 of the 1944 Act, offences under the Central Excise Act, 1944, besides being non-cognizable, are also bailable, though not on the logic that all non-cognizable offences are bailable, but in view of the aforesaid provisions of the 1944 Act, which indicate that offences under the said Act are bailable in nature.

31. Consequently, this batch of Writ Petitions in regard to the Central Excise Act, 1944, must succeed and are, accordingly, allowed in terms of the determination hereinabove, and we hold that the offences under the Central Excise Act, 1944, are bailable.

32. The remaining writ petitions which deal with offences under the Customs Act, 1962, namely, Writ Petition (Crl.) No.74 of 2010, Choith Nanikram Harchandani Vs. Union of India & others, which has been heard as the lead case, and Writ Petition (Crl.) Nos.36, 37, 51, 76 and 84 of 2011 and Crl. M.P. No.10673 of 2011 in W.P. (Crl.) No.76 of 2011, all deal with offences under the Customs Act, though the issues are exactly the same as those canvassed in the cases relating to the provisions of the Central Excise Act, 1944. Mr. Mukul Rohatgi, learned Senior Advocate, appearing for the Writ Petitioners in these matters submitted that the provisions of the Customs Act, 1962, are in pari materia with the provisions of the Central Excise Act, 1944, which are relevant to the facts of these cases. The same submissions as were made by Mr. Rohtagi in relation to Writ Petitions filed in respect of offences under the Central Excise Act, 1944, were also advanced by him with regard to offences under the Customs Act. In addition, certain decisions were also referred to and relied upon by him in support of the contention that offences under the Customs Act were also intended to be bailable and they aimed at recovery of unpaid and/or avoided custom duties. Mr. Rohatgi submitted that, as in the case of the provisions of the 1944 Act, the ultimate object of the Customs Act is to recover revenue which the State was being wrongly deprived of.

33. Mr. Rohatgi submitted that the provisions of Section 104(4) of the Customs Act are the same as the provisions of Section 9A of the Central Excise Act, 1944. Section 104 of the Customs Act empowers an officer of Customs to arrest a person in case of offences alleged to have been committed and punishable under Sections 132, 133, 135, 135A or Section 136 of the Act. In addition, Sub-section (4) of Section 104, which is similar to Section 9A(i) of the Central Excise Act, 1944, provides as follows :-

"104. Power to arrest. -

(1) to (3) (4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, an offence under this Act shall not be cognizable."

34. It was further pointed out that as in the case of Section 20 of the Central Excise Act, 1944, under Sub-section (3) of Section 104 of the Customs Act, an Officer of Customs has been vested with the same power and is subject to the same provisions as an Officer in-Charge of a police station has under the Code of Criminal Procedure, for the purpose of releasing the arrested person on bail or otherwise. Mr. Rohatgi submitted that as in the case of Section 20 of the 1944 Act, the provisions of Sub-section (3) of Section 104 of the Customs Act, 1962, indicate that offences under the Customs Act would not only be non-cognizable, but would also be bailable.

35. Reverting to his submissions in relation to the Writ Petitions under the Central Excise Act, 1944, Mr. Rohatgi submitted that if it is assumed that the bailability in respect of an offence was to be determined by the length of punishment in relation to Part 2 of the First Schedule to Cr.P.C., it would be necessary that the duty leviable under the provisions of the Customs Act would first have to be adjudicated upon and determined. It was further submitted that there has to be a process of adjudication to determine the amount of levy before any punitive action by way of arrest could be taken. Reference was also made to the decision of this Court in Commissioner of Customs Vs. Kanhaiya Exports (P) Ltd. (Civil Appeal No.81 of 2002), in which it had been held that a show cause notice is mandatory before initiation of any action under the Customs Act. Mr. Rohatgi contended that arrest by prosecution could follow only thereafter.

36. Appearing for the Union of India in the matters relating to the Customs Act, 1962, the learned Additional Solicitor General, Mr. P.P. Malhotra, urged that the submissions made by Mr. Rohatgi that since offences under the Customs Act are non-cognizable, they are, therefore, bailable, was wholly incorrect, as all non-cognizable offences are not bailable. The learned ASG submitted that from the First Schedule to the Cr.P.C., it would be clear that offences under Sections 194, 195, 274, 466, 467, 476, 493 and 505 IPC, though non-cognizable are yet non-bailable. It was submitted that Section 505 IPC is punishable with imprisonment upto 3 years or with fine or both. The said offence being both non-cognizable and non-bailable is in consonance with the last entry of Part 2 of Schedule I to the Code, dealing with offences under other laws. The learned ASG submitted that the bailability or non-bailability

of an offence is not dependent upon the offence being cognizable or non-cognizable. It was submitted that the bailable offences are those which are made bailable in terms of Section 2(a) Cr.P.C. which are defined as such under the First Schedule itself. The learned ASG contended that whether an offence was bailable or not, was to be determined with reference to the First Schedule to the Code of Criminal Procedure, 1973.

37. Referring to Part 2 of Schedule I to the Code, the learned ASG submitted that in terms of the third entry if the offence was punishable with imprisonment which was less than three years or with fine only, in that event, the offence would be bailable. If, however, the punishment was for three years and upwards, it would be non-bailable. It was further submitted that the offences under Section 135 of the Customs Act, 1962, being punishable upto three years and seven years depending on the facts, would be non-bailable.

38. In response to Mr. Rohatgi's submissions that since offences under Section 9A of the Excise Act were non-cognizable and the Excise Officer, therefore, had no power to arrest such a person, the learned ASG submitted that such an argument was fallacious since it was only for the purposes of the Code of Criminal Procedure that the offences would be non-cognizable, but it did not mean that the concerned officer, who had been authorized to investigate into the evasion of excise duty, would have no power to investigate or arrest a person involved in such offences. In support of his submissions, Mr. Malhotra referred to the decision of this Court in *Union of India Vs. Padam Narain Aggarwal*⁷ wherein this Court had considered powers of arrest under other provisions such as the Customs Act. While deciding the matter, this Court had held that the power to arrest a person by a Customs Officer is statutory in character and cannot be interfered with. However, such power of arrest can be exercised only in such cases where the Customs Officer has reasons to believe that a person has committed an offence punishable under Sections 132, 133, 135, 135-A or 136 of the Customs Act. It was further observed that the power of arrest was circumscribed by objective considerations and could not be exercised on whims, caprice or fancies of the officer.

39. The learned ASG submitted that in *N.H. Dave, Inspector of Customs Vs. Mohd. Akhtar Hussain Ibrahim Iqbal Kadar Amad Wagher (Bhatt) & Ors*⁸, the Division Bench of the Gujarat High Court, inter alia, observed that since offences under Section 135 of the Customs Act, 1962, are punishable with imprisonment exceeding three years, the offences would be non-bailable. The learned ASG submitted that the aforesaid view had been confirmed by this Court in Deepak Mahajan's case (supra), wherein it was held that although the powers of the Customs Officer and Enforcement Officer are not identical to those of Police Officers in relation to investigation under Chapter XII of the Code, yet Officers under the Foreign Exchange Regulation Act and the Customs Act are vested with powers which are similar to the powers of a police officer. The learned ASG submitted further that such officers, who have the power to arrest, do not derive their power from the Code, but under the special statutes, such as the Central Excise Act, 1944, and the Customs Act, 1962.

40. The learned ASG submitted further that the powers of the Customs Officer to release an arrested person on bail is limited and when an accused is to be produced before the Court, it is the Court which would grant bail and not the Customs Officer. He only ensures that the

person is produced before the Magistrate. According to the learned ASG, what is of paramount importance is the nature of the offence which would determine whether a person is to be released by the Court on bail. The learned ASG submitted that while in a cognizable case a police officer could arrest without warrant and in non-cognizable cases he could not, the offences under the Excise Act, Customs Act or Foreign Exchange Regulation Act, 1973, are offences under special Acts which deal in the evasion of excise, custom and foreign exchange. According to the learned ASG, in such matters, police officers have been restrained from investigating into the offences and arresting without warrant, but the concerned Customs, Excise, Foreign Exchange, Food Authorities, were not police officers within the meaning of the Code, and, they could, accordingly arrest such persons for the purposes of the investigation, their interrogation and for finding out the manner and extent of evasion of the excise duty, customs duty and foreign exchange etc. The learned ASG submitted that cognizability of an offence did not mean that the person could not be arrested by the officials of the Department for the purpose of the investigation and interrogation. It was further submitted that Section 104(4) of the Customs Act, 1962, indicates that the offences thereunder would be non-cognizable within the meaning of the Code and would prevent police officers under the Code from exercising powers of arrest, but such restriction do not apply to the special officers under various special statutes.

41. Mr. Malhotra submitted that the offences which were non-cognizable were not always bailable and special officers under special Statutes would continue to have the power to arrest offenders, even if under the Code police officers were prevented from doing so.

42. The submissions advanced by Mr. Rohatgi and the learned ASG, Mr. Malhotra, with regard to the question of bailability of offences under the Customs Act, 1962, are identical to those involving the provisions of the Central Excise Act, 1944. The provisions of the two above-mentioned enactments on the issue whether offences under both the said Acts are bailable, are not only similar, but the provisions of the two enactments are also in pari materia in respect thereof.

43. 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. The arguments advanced on behalf of respective parties in *Om Prakash & Anr. Vs. Union of India & Anr*⁹. and other similar cases under the Central Excise Act, 1944, are equally applicable in the case of *Choith Nanikram Harchandani Vs. Union of India & Ors.* (Writ Petition (Crl) No.74 of 2010 and the other connected Writ Petitions in respect of the Customs Act, 1962.

44. 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.

Judgment Referred.

¹(1994) 3 SCC 0440

²(2008) 231 ELT 0397(SC)

³(2000) 118 ELT 8 P&H

⁴(2010) 260 ELT 526 (Guj)

⁵(2003) 6 SCC 175

⁶(2006) 6 SCC 207

⁷(2008) 13 SCC 305

⁸(1984) 15 ELT 353 (Guj.)

⁹W.P.(Crl) No.66 of 2011)