2011 (3) GCD 2516

GUJARAT HIGH COURT

Hon'ble Judges:Anant S.Dave, J.

Kalpesh Navindchandra Daftary Versus State Of Gujarat

SPECIAL CRIMINAL APPLICATION No. 550 of 2011 ; *J.Date :- JUNE 13, 2011

- CONSTITUTION OF INDIA Article - 226 , 227
- CUSTOMS ACT, 1962 Section - 135
- INDIAN PENAL CODE, 1860 Section - 34 , 120B , 406 , 420 , 466 , 467 , 468 , 471 , 472 , 474
- CODE OF CRIMINAL PROCEDURE, 1973 Section - 167(1) , 167(2)

Constitution of India - Art. 226, 227 - Customs Act, 1962 - S. 135 - Indian Penal Code, 1860 - S. 34, 120B, 406, 420, 466, 467, 468, 471, 472, 474 - Code of Criminal Procedure, 1973 - S. 167(1), 167(2), Proviso - release on 'default bail' - held, applicant cannot be allowed to 'default bail' because for offences under IPC he was arrested on 15-9-2010 on remand application for offences - charge sheet for said offences was filed on 13-12-2010 within the limitation period of 90 days from date of arrest - his earlier period of arrest and custody under the Act, 1962 being separate and distinct would not serve the purpose - request for release rejected - petition dismissed.

Imp.Para: [11]

Cases Distinguished :

1. Institute Of Chartered Accountants Of India V/s. Vimal Kumar Surana, 2011 1 SCC 254
2. State Of Haryana V/s. Dinesh Kumar, 2008 1 GLH 447 : 2008 (1) CLR 250 : 2008 (3) SCC 222 : 2008 (63) AIC 265 : 2008 (1) Scale 268

Cases Referred To :

1. Babubhai V/s. State Of Gujarat, 2010 12 SCC 254

2. Directorate Of Enforcement V/s. Deepak Mahajan And Another, 1994 3 SCC 440 : 1994 (2) GLH 603 : 1994 CrLJ 2269 : 1994 (1) Scale 294 : JT 1994 (1) 290

3. Kolla Veera Raghav Rao V/s. Gorantla Venkatewara Rao, 2011 2 SCC 703

4. Magbool Hussain V/s. State Of Bombay, AIR 1953 SC 325

5. State Of Maharashtra V/s. Bharti Chandmal Varma, 2002 2 SCC 121

Cases Relied on :

1. Chaganti Satyanarayana And Others V/s. State Of A.P, AIR 1986 SC 2130

2. State Of West Bengal V/s. Dinesh Dalmia, 2007 5 SCC 773

3. Uday Mohanlal Acharya V/s. State Of Maharashtra, 2001 5 SCC 453 : 2001 (2) GLR 1148 : 2001 (2) GLH 493 : 2001 CrLJ 1832 : 2001 (3) Scale 29

Equivalent Citation(s):

2011 (3) GCD 2516 : 2011 JX(Guj) 737

JUDGMENT :-

1 This Special Criminal Application/Writ Petition is preferred by the petitioner [original accused] under Article 226 and 227 of the Constitution of India and in the matter of the provisions of Section 167(2) of the Code of Criminal Procedure, 1973 [for short, 'the Code'] with a prayer to release the petitioner on 'default bail' in connection with first information report being C.R. No.I-45 of 2010 registered with Dahej Police Station, District Bharuch, on 18th July 2010, for the offences punishable under Sections 406, 420, 466, 467,468, 471, 472, 474, 120B and 34 of the Indian Penal Code.

2 It is not in dispute that earlier the petitioner came to be arrested by the Directorate of Revenue Intelligence under Section 135 of the Customs Act being DRI/AZU/INQ-03/00 on 14th July 2010 and the petitioner was sent to judicial custody and since then the petitioner was in Sabarmati Central Prison, at Ahmedabad.

3 It is alleged in the first information report being C.R. No.I-45 of 2010 registered with Dahej Police Station that the petitioner and other co-accused have in connivance with each other forged licences and such licences were transferred through different traders which were ultimately utilized by M/s.

Hindalco Industries Limited, Dahej, while importing certain goods. The said forged licences were obtained by the complainant through the accused and were transferred to M/s. Hindalco Industries Limited, Dahej, and the petitioner and other accused had submitted forged licences from 1.4.2008 to 31.3.2010 and collected Rs.41,94,81,068/-. Before filing of the charge sheet, an application under Section 439 of the Code was preferred before the learned Sessions Judge, at Bharuch, which came to be rejected and the said order came to be challenged before this Court but, ultimately, the above application for bail came to be withdrawn on 26th November 2010.

4 In the above back-drop of the facts, it is the case of the petitioner that the petitioner was in Sabarmati Central Prison, at Ahmedabad, pursuant to the order of judicial custody passed in the earlier offence registered under Section 135 of the Customs Act by the Directorate of Revenue Intelligence. That, the Investigating Officer of first information report being C.R. No.I-45 of 2010 registered with Dahej Police Station for the offences punishable under the Indian Penal Code submitted an application before the learned Judicial Magistrate, First Class, Waghra Link Court, Bharuch, seeking custody of the petitioner by 'transfer warrant' from Sabarmati Central Prison, at Ahmedabad. Accordingly, on 14th September 2010, the learned Judicial Magistrate, First Class, Waghra Link Court, Bharuch, passed an order of 'transfer warrant' requesting the learned Additional Chief Metropolitan Magistrate, Ahmedabad, to hand over the petitioner to the Investigating Officer of first information report being C.R. No.I-45 of 2010 registered with Dahej Police Station. The Investigating Officer, accordingly, submitted an application and requested the learned Additional Chief Metropolitan Magistrate, Metropolitan Court, Gheekantha, Ahmedabad, to hand over custody of the petitioner on the basis of 'transfer warrant' issued by the learned Judicial Magistrate, First Class, Waghra Link Court, Bharuch. The above application was preferred by the Investigating Officer on 14th September 2010 and, accordingly, on the very same day, the learned Additional Chief Metropolitan Magistrate, Ahmedabad, passed an order intimating the Superintendent, Sabarmati Central Prison, at Ahmedabad to hand over the custody of the petitioner to the Investigating Officer of first information report being C.R. No.I-45 of 2010 registered with Dahej Police Station. The Superintendent, Sabarmati Central Prison, at Ahmedabad, complied with the above order and addressed a communication to the learned Judicial Magistrate, First Class, Waghra Link Court, Bharuch, handing over the custody of the petitioner to the Investigating Officer also on 14th September 2010. The Investigating Officer, Dahej Police Station, arrested the petitioner on 15th September 2010 in connection with the offences of the first information report being C.R. No.I-45 of 2010 registered with Dahej Police Station and produced before the learned Judicial

Magistrate, First Class, Waghra Link Court, Bharuch, on 15th September 2010 and also filed a remand application on 15th September 2010 seeking police remand of the petitioner for 14 days and the learned Judicial Magistrate, First Class, Waghra Link Court, Bharuch, granted remand and, thereafter, the petitioner-accused was sent to judicial custody.

5 On 13th December 2010, an application was filed by the petitioner before the learned Judicial Magistrate, First Class, Waghra Link Court, Bharuch, claiming right under the proviso to sub-section (2) of Section 167 of the Code on the ground that the statutory period of filing charge-sheet/challans was over, but the Investigating Officer could not do so and, therefore, the petitioner may be enlarged on bail. The learned Magistrate, upon considering the rival submissions and the law laid down by the Apex Court in this regard in the case of Uday Mohanlal Acharya vs. State of Maharashtra, reported in (2001) 5 SCC 453, held that the petitioner was not entitled to the benefit of 'default bail' and the charge sheet was filed on the very day i.e. 13th December 2010 within the period of 90 days from the date of arrest, namely, 15th September 2010 when the petitioner was physically produced before the learned Judicial Magistrate, First Class, Waghra Link Court, Bharuch, and the application of the petitioner was accordingly rejected by order dated 7th January 2011.

6 Being aggrieved by the aforesaid order dated 7th January 2011, the petitioner filed Revision Application No.2 of 2011 in the District & Sessions Court, Bharuch, and the learned 2nd Additional Sessions Judge, Bharuch, by order dated 7th February 2011, dismissed the said revision application and confirmed the order of the learned Magistrate. While considering the above revision application, the learned Additional Sessions Judge, Bharuch, has elaborately discussed the factual aspects as well as the law laid down by the Apex Court in various cases.

7 Against the orders dated 7th January 2011 and 7th February 2011 passed by the Courts below, this writ petition is preferred claiming the benefit of 'default bail' as contemplated in proviso to sub-section (2) of Section 167 of the Code, on various grounds as contended by the learned Senior Counsel for the petitioner.

8 The following events emanating from the present proceedings, as relied upon by the learned counsel for both the parties, are not in dispute:

14.7.2010

The petitioner came to be arrested for the offence under Section 135 of the Customs Act and since then he was in judicial custody at Sabarmati Central Prison, at Ahmedabad.

18.7.2010

FIR C.R. No.I-45 of 2010 was registered against the petitioner with Dahej Police Station under IPC.

13.9.2010

The I.O. of C.R. No.I-45 of 2010 submitted an application before the Judicial Magistrate, First Class, Waghra Link Court, Bharuch, seeking custody of the petitioner by 'transfer warrant' from Sabarmati Central Prison, at Ahmedabad.

14.9.2010

The Magistrate, Waghra, passed an order of 'transfer warrant'

14.9.2010

The I.O. of C.R. No.I-45 of 2010 submitted an application and requested the Additional Chief Metropolitan Magistrate, Ahmedabad, to hand over custody of the petitioner on the basis of 'transfer warrant' issued by the learned Magistrate, Waghra.

14.9.2010

The Additional Chief Metropolitan Magistrate, Ahmedabad, passed an order intimating the Superintendent, Sabarmati Central Prison, at Ahmedabad to hand over the custody of the petitioner to I.O. of C.R. No.I-45 of 2010

14.9.2010

The Superintendent, Sabarmati Central Prison, at Ahmedabad, complied with the above order and addressed a communication to the Magistrate, Waghra handing over the custody of the petitioner to the Investigating Officer.

15.9.2010

I.O. of C.R. No.I-45 of 2010 arrested the petitioner and produced before the Magistrate, Waghra.

15.9.2010

I.O. of C.R. No.I-45 of 2010 filed a remand application and the Magistrate, Waghra ordered for custody.

12.12.2010

Sunday - public holiday

13.12.2010

Application was filed by the petitioner before the Magistrate, Waghra, claiming right under the proviso to sub-section (2) of Section 167 of the Code.

13.12.2010

Charge sheet was filed

7.1.2011

The Magistrate, Waghra rejected the said application of the petitioner for 'default bail'

7.2.2011

In revision, the said order is confirmed by the 2nd Additional Sessions Judge, Bharuch.

9 The learned Senior Counsel for the petitioner has vehemently contended that the Courts below have failed to understand the concept of 'custody' and 'arrest' and, for all purpose, when the petitioner was under-trial prisoner under Section 135 of the Customs Act , by way of transfer warrant on 14th September 2010, the Investigating Officer of C.R. No.I-45 of 2010 took custody of the petitioner and shown the arrest of the petitioner on 15th September 2010 when he was produced before the learned Magistrate seeking his remand. The aforesaid factor was not taken into consideration by the Courts below while construing the statutory period mentioned in proviso to sub-section (2) of Section 167 of the Code. It is next contended that, since the Investigating Officer could not file charge sheet within 90 days as prescribed under sub-section (2) of Section 167 of the Code and in the facts of the present case when the petitioner was taken into custody on 14th September 2010 by the Investigating Officer, 90 days period would come to an end on 12th December 2010 and, admittedly, the charge sheet was filed by the Investigating Officer on 13th December 2010 after the application for bail under S.167(2) of the Code was preferred by the petitioner at 11 a.m. on the same day. Thus, indefeasible right to be released on bail had accrued to the petitioner and the Courts below have failed to consider the above aspect and, therefore, in exercise of powers under Articles 226 and 227 of the Constitution of India, this Court would set aside the orders of the Courts below by releasing the petitioner on bail. Relying upon the events mentioned in the tabular form hereinabove, it is contended that for all purpose the petitioner was taken into custody on 14th September 2010 and, therefore, was entitled to his right to be released on

bail since the Investigating Officer of C.R. No.I-45 of 2010 could not complete investigation within the statutory period of 90 days.

9.1 The learned Senior Counsel for the petitioner has next contended that benefit of Section 10 of the General Clauses Act, 1897 will not be available to the Investigating Officer since 90 days were over on 12th December 2010 which happened to be Sunday - a public holiday and the charge sheet was submitted on the next working day i.e. 13th December 2010, Monday.

9.2 In support of his arguments, the learned Senior Counsel for the petitioner has relied upon the following judgments;

[i] Uday Mohanlal Acharya vs. State of Maharashtra, reported in (2001) 5 SCC 453, on the principle of 'default bail'.

[ii] State of Maharashtra vs. Bharti Chandmal Varma, reported in (2002) 2 SCC 121 - second offence, if connected with first offence - period under Section 167(2) proviso remains un-extendable.

[iii] State of West Bengal vs. Dinesh Dalmia reported in (2007) 5 SCC 773 - in the context of statutory period is to be counted from the date of authorization for investigation by the learned Magistrate.

[iv] Babubhai V/s. State of Gujarat, reported in (2010) 12 SCC 254 - Test of sameness or connected offence - incidence are of two or more parts of the same transaction;

[v] Institute of Chartered Accountants of India vs. Vimal Kumar Surana, reported in 2011(1) SCC 254 in support of the contention that different offences under the Special Act and the IPC cannot be punished twice.

[vi] Kolla Veera Raghav Rao vs. Gorantla Venkatewara Rao, reported in (2011) 2 SCC 703 in support of the contention that the accused cannot be tried again on the same facts.

9.3 In view of the above, it is submitted that the writ petition is to be allowed as prayed for.

10 Learned APP and the learned Senior Counsel for the complainant have vehemently opposed the above submissions of the learned counsel for the petitioner and it was urged that no illegality or error of law much less of jurisdiction is committed by the Courts below while rejecting the application of the petitioner under Section 167(2) of the Code, warranting interference of this Court in exercise of extraordinary jurisdiction under Articles 226 and 227 of the Constitution of India and the writ petition requires to be rejected in limine. According to the learned Senior Counsel for the complainant, relying upon the events mentioned in the tabular form hereinabove, it

cannot be said that the custody of the petitioner was handed over to the Investigating Officer for the purpose of Section 167(2) of the Code. It is further contended that, if the language of Section 167 of the Code is seen, what is envisaged in sub-section (2) of Section 167 of the Code is that the statutory period commences from the date when the accused is forwarded to the Magistrate and, in the facts of the case, the accused was forwarded to the learned Judicial Magistrate, First Class, Waghra Link Court, Bharuch, on 15th September 2010 and the said Magistrate authorized custody of the accused from 15th September 2010 when the accused was physically produced before him and not prior to any date and, when the 'transfer warrant' was issued by the learned Judicial Magistrate, First Class, Waghra Link Court, Bharuch, it was only for the limited purpose of bringing the accused and to be produced before the said Court and not authorizing custody of the accused as required under Section 167 of the Code. The learned Senior Counsel for the complainant has emphasized that the law in this regard is well settled by the decision of the Apex Court in the case of Chaganti Satyanarayana and others vs. State of A.P, reported in AIR 1986 SC 2130. It is submitted that initial period of custody of the arrested person till he is produced before a Magistrate is neither referable to nor in pursuance of the order of remand passed by a Magistrate and such period when the accused is in custody of the police officer in exercise of powers under Section 57 stands excluded from the total statutory period of 90 or 60 days as the case may be and it will begin to run only from the order of remand. The learned Senior Counsel for the complainant has however submitted that provision of Section 10 of the General Clauses Act would be attracted if the proviso is to be interpreted otherwise. It is further submitted that both the cases registered against the accused under Section 135 of the Customs Act and various offences punishable under the Indian Penal Code are different and cannot be said to be same and similar as contended by the learned counsel for the petitioner so as to attract the benefit of law laid down by the Apex Court in the cases as relied upon by him. It is humbly submitted that in view of the above when the charge sheet is filed on 13th December 2010 on the very same day, before completion of 90 days of statutory period as envisaged under Section 167(2) of the Code and also on the day when the application claiming right under the same Section was preferred by the petitioner before the learned Magistrate, the rejection of application of the petitioner by the Courts below would not require any interference.

11 Having heard the learned counsel for the parties, on perusal of the orders passed by the learned Judicial Magistrate, First Class, Waghra Link Court, Bharuch, and the learned Additional Chief Metropolitan Magistrate, Ahmedabad, arrest memo and subsequent order granting custody and the

decisions relied upon by the learned counsel for both the parties, I am of the opinion that there is no force in the contention of the learned counsel for the petitioner that the petitioner has acquired indefeasible right of getting himself released on bail in view of the proviso to sub-section (2) of Section 167 of the Code. Recapitulating the events mentioned in the tabular form, in my view, issuance of 'transfer warrant' by the learned Judicial Magistrate, First Class, Waghra Link Court, Bharuch, cannot be said to be a direction issued by the learned Magistrate to any authority or court, but it was an order passed permitting the Investigating Officer of first information report being C.R. No.I-45 of 2010 registered with Dahej Police Station to submit a request letter to the learned Metropolitan Magistrate, Ahmedabad, who had earlier passed an order authorizing judicial custody of the petitioner pursuant to the case registered under Section 135 of the Customs Act and the petitioner was sent to Sabarmati Central Prison, at Ahmedabad. The events took place on 14th September 2010 would go to show that for producing the petitioner before the learned Judicial Magistrate, First Class, Waghra Link Court, Bharuch, the formalities were completed in accordance with law and, for all purposes, the petitioner was arrested on 15th September 2010 and was physically produced before the learned Judicial Magistrate, First Class, Waghra Link Court, Bharuch, who authorized police remand upon an application submitted on the same day. Therefore, the powers came to be exercised by the learned Magistrate as envisaged under sub-section (2) of Section 167 of the Code on 15th September 2010 only.

12 The above aspect is clear if the decision in the case of State of West Bengal vs. Dinesh Dalmia reported in (2007) 5 SCC 773 is seen. In the above case, the accused, against whom various cases came to be registered initially and was arrested in New Delhi by the CBI, and against whom the first information report was lodged in Calcutta, had also certain cases registered in Chennai and, in the back-drop of above facts, on 'transit remand' the accused was produced before the Additional Chief Metropolitan Magistrate, Chennai and, in the meantime, on 13.2.2006 the Officer investigating the case also prayed for issuance of production warrant against the accused before the learned Chief Metropolitan Magistrate, Calcutta, who allowed the prayer of the Investigating Officer directing the accused to be produced before it on or before 22.2.2006. A copy of the said order was brought to the notice of the Additional Chief Metropolitan Magistrate, Egmore, Chennai by the CBI on 14.2.2006. On 17.2.2006, the Investigating Officer of the case filed an application before the learned Chief Metropolitan Magistrate, Calcutta, intimating that the accused was in custody of the CBI team on 24.2.2006 and sought direction for production of the accused in Calcutta on 8.3.2006. In the meanwhile, the accused surrendered on 27.2.2006 before the learned Additional Chief Metropolitan

Magistrate, Chennai and the accused was remanded to judicial custody till 13.3.2006. Later on, the learned Magistrate directed the Superintendent, Central Jail, Chennai, to hand over the accused for polygraphic test to the Inspector, CBI, and to produce him before the Court on 9.3.2006 and, thereafter, on 11.3.2006 on the request of Calcutta police, the accused was handed over to Calcutta police to be escorted to Calcutta for production before the Magistrate at Calcutta. On 13.3.2006, pursuant to the order of the learned Magistrate, Calcutta, the accused was produced in the Court of learned Chief Metropolitan Magistrate, Calcutta, and a request was made for police remand for 15 days by the Investigating Officer and, thus, the question arises before the Apex Court that what would be the date for commencing statutory period as envisaged under proviso to sub-section (2) of Section 167 of the Code whether the police custody be treated from 13.3.2006 or 27.2.2006 when the accused was already in custody in relation to the CBI case and surrendered on the said date. After considering various case-law, the Apex Court noted that, reading sub-sections (1) and (2) with proviso, it clearly transpires that the accused should be, in fact, under the detention of the police for investigation and it was held that the police custody will be treated from 13.3.2006 and not from 27.2.2006. Therefore, in the above case, the Apex Court, though noticed a fact that the accused was authorized to be handed over to Calcutta police on 11.3.2006 and the accused was to be escorted to Calcutta for production before the Magistrate at Calcutta, the period of police custody is considered only from 13.3.2006 when the accused was actually produced in the Court at Calcutta and, if the similar analogy is applied in the facts of the present case, handing over the accused of this case on 14th September 2010 by the learned Additional Metropolitan Magistrate, Ahmedabad, by directing the Superintendent, Sabarmati Central Prison, at Ahmedabad to hand over custody of the accused which was done on 14th September 2010 itself cannot be said to be the date of police custody and it would only commence when the accused was actually physically produced before the learned Judicial Magistrate, First Class, Waghra Link Court, Bharuch, on 15th September 2010 upon his arrest on the very day.

13 The law in this regard is no more res-integra in view of the decision of the Apex Court in the case of Uday Mohan Acharya [2001 (5) SCC 453) [supra], wherein, the Apex Court has broadly laid down the parameters to be considered, as under:

"1. Under sub-sec(2) of Sec.167, a Magistrate before whom an accused is produced while the police is investigating into the offence can authorize detention of the accused in such custody as the Magistrate thinks fit for a term not exceeding 15 days in the whole.

2. Under the proviso to aforesaid sub-sec(2) of Sec.167, the Magistrate may authorize detention of the accused otherwise than the custody of police for a total period not exceeding 90 days where the investigation relates to offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, and 60 days where the investigation relates to any other offence.

3. On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the Investigating Agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnish the bail, as directed by the Magistrate.

4. When an application for bail is filed by an accused for enforcement of his indefeasible right alleged to have been accrued in his favour on account of default on the part of the Investigating Agency in completion of the investigation within the specified period, the Magistrate/Court must dispose it of forthwith, on being satisfied that in fact the accused has been in custody for the period of 90 days or 60 days, as specified and no charge-sheet has been filed by the Investigating Agency. Such prompt action on the part of the Magistrate/Court will not enable the prosecution to frustrate the object of the Act and the legislative mandate of an accused being released on bail on account of the default on the part of the Investigating Agency in completing the investigation within the period stipulated.

5. If the accused is unable to furnish bail, as directed by the Magistrate, then the conjoint reading of Explanation I and proviso to sub-sec.2 of Sec.167, the continued custody of the accused even beyond the specified period in paragraph (1) will not be unauthorized and therefore, if during that period the investigation is complete and charge-sheet is filed then the so-called indefeasible right of the accused would stand extinguished.

6. The expression 'if not already availed of' used by this Court in Sanjay Dutt's case [supra] must be understood to mean when the accused filed an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in paragraph (a) of proviso to sub-sec.2 of Sec.167 if the accused filed an application for bail and offers also to furnish the bail, on being directed, then it has to be held that the accused has availed of his indefeasible right even though the Court has not considered the said application and has not indicated the terms and conditions of bail, and the accused has not furnished the same."

13.1 If the aforesaid conclusion of the Apex Court is applied in the facts of the present case, then also, no case is made out by the petitioner to be released on bail as prayed for

14 The aforesaid view taken by this Court is further fortified in view of the law laid down in the case of Chaganti Satyanarayana and others vs. State of A.P, reported in AIR 1986 SC 2130. The relevant paragraphs 12, 13, 14, 16, 17, 20, 24 and 25 read as under:

"12. On a reading of the sub-sections (1) and (2) it may be seen that sub-section (1) is a mandatory provision governing what a police officer should do when a person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of 24 hours fixed by Section 57. Sub-section (2) on the other hand pertains to the powers of remand available to a Magistrate and the manner in which such powers should be exercised. The terms of sub-section (1) of Section 167 have to be read in conjunction with Section 57. Section 57 interdicts a police officer from keeping in custody a person without warrant for a longer period than 24 hours without production before a Magistrate, subject to the exception that the time taken for performing the journey from the place of arrest to the Magistrate's Court can be excluded from the prescribed period of 24 hours. Since sub-section (1) provides that if that investigation cannot be completed within the period of 24 hours fixed by Section 57 the accused has to be forwarded to the Magistrate along with the entries in the Diary, it follows that a police officer is entitled to keep an arrested person in custody for a maximum period of 24 hours for purposes of investigation. The resultant position is that the initial period of custody of an arrested person till he is produced before a Magistrate is neither referable to nor in pursuance of an order of remand passed by a Magistrate. In fact the powers of remand given to a Magistrate become execisable only after an accused is produced before him in terms of sub-section (1) of Section 167.

13. Keeping proviso (a) out of mind for some time let us look at the wording of sub-section (2) of Section 167. This sub-section empowers the Magistrate before whom an accused is produced for purpose of remand, whether he has jurisdiction or not to try the case, to order the detention of the accused, either in police custody or in judicial custody, for a term not exceeding 15 days in the whole. It was argued by Mr. Rao that the words "in the whole" would govern the words "for a term not exceeding 15 days' and, therefore, the only interpretation that can be made is that the detention period would commence from the date of arrest itself and not from the date of production of the accused before the Magistrate. Attractive as the contention may be, we find that it cannot stand the test of scrutiny. In the first place, if the initial order of remand is to be made with reference to the date of arrest then

the order will have retrospective coverage for the period of custody prior to the production of the accused before the Magistrate, i.e. the period of 24 hours' custody which a police officer is entitled to have under section 57 besides the time taken for the journey. Such a construction will not only be in discord with the terms of Section 57 but will also be at variance with the terms of sub-section (2) itself. The operative words in sub- section (2) viz. "authorise the detention of the accused ... for a term not exceeding 15 days in the whole" will have to be read differently in so far as the first order of remand is concerned so as to read as "for a term not exceeding 15 days in the whole from the date of arrest". This would necessitate the adding of more words to the section than what the Legislature has provided. Another anomaly that would occur is that while sub-section (2) empowers the Magistrate to order the detention of an accused "in such custody as such Magistrate thinks fit, for a term not exceeding 15 days in the whole" the Magistrate will be disentitled to placing an accused in police custody for a full period of 15 days or in judicial custody for a full period of 15 days if the period of custody is to be reckoned from the date of arrest because the period of custody prior to the production of the accused will have to be excluded from the total period of 15 days.

14. Apart from these anomalous features, if an accused were to contend that he was taken into custody more than 24 hours before his production before the Magistrate and the police officer refutes the statement, the Magistrate will have to indulge in a fact finding inquiry to determine when exactly the accused was arrested and from what point of time the remand period of 15 days is to be reckoned. Such an exercise by a Magistrate ordering remand is not contemplated or provided for in the Code. It would, therefore, be proper to give the plain meaning of the words occurring in sub-section (2) and holding that a Magistrate is empowered to authorize the detention of an accused produced before him for a full period of 15 days from the date of production of the accused.

16. As sub-section (2) of Section 167 as well as proviso (1) of sub-section (2) of Section 309 relate to the powers of remand of a Magistrate, though under different situations, the two provisions call for a harmonious reading in so far as the periods of remand are concerned. It would, therefore, follow that the words "15 days in the whole" occurring in sub-section (2) of Section 167 would be tantamount to a period of "15 days at a time" but subject to the condition that if the accused is to be remanded to police custody the remand should be for such period as is commensurate with the requirements of a case with provision for further extensions for restricted periods, if need be, but in no case should the total period of remand to police custody exceed 15 days. Where an accused is placed in police custody for the maximum period

of 15 days allowed under law either pursuant to a single order of remand or to more than one order, when the remand is restricted on each occasion to a lesser number of days, further detention of the accused, if warranted, has to be necessarily to judicial custody and not otherwise. The Legislature having provided for an accused being placed under police custody under orders of remand for effective investigation of cases has at the same time taken care to see that the interests of the accused are not jeopardized by his being placed under police custody beyond a total period of 15 days, under any circumstances, irrespective of the gravity of the offence or the serious nature of the case.

17. Thus in the light of our discussion and conclusions reached we do not find merit or force in the contention of the appellants' counsel that the words 'for a term not exceeding 15 days in the whole" occurring in sub-section (2) of Section 167 should be so construed as to include also the period of custody of the accused from the time of arrest till the time of production before the Magistrate. A Magistrate can, therefore, authorise the detention of the accused for a maximum period of 15 days from the date of remand and place the accused either in police custody or in judicial custody during the period of 15 days' remand. It has, however, to be borne in mind that if an accused is remanded to police custody the maximum period during which he can be placed in police custody is only 15 days. Beyond that period no Magistrate can authorise the detention of the accused in police custody.

20. The words used in proviso (a) are "no Magistrate shall authorise the detention of the accused person in custody", "under this paragraph", "for a total period exceeding i.e. 90 days/60 days". Detention can be authorised by the Magistrate only from the time the order of remand is passed. The earlier period when the accused is in the custody of a police officer in exercise of his powers under Section 57 cannot constitute detention pursuant to an authorisation issued by the Magistrate. It, therefore, stands to reason that the total period of 90 days or 60 days can begin to run only from the date of order of remand.

24. Turning now to the alternate argument of Mr. Ram Reddy, the contention is that even if there is scope for contending that the total period of detention should be reckoned from the date of arrest there is no room at all for any such contention being raised after the amendment of the proviso by Act 45 of 1978. We have already referred to the fact that the amending Act has substituted the words "under this paragraph" for the words "under this section" in proviso (a). We have also adverted to Explanation 1 and sub-section (2A) which also refer to "the period specified in paragraph (a)". The change of wording in the proviso has to be given its due significance because

the Legislature would not have effected the change without any purpose or objective. We must bear in mind that significant changes have been made in Section 167 as well as to the proviso by Act 45 of 1978 such as increasing the period for investigation in grave cases from 60 to 90 days, conferring of powers of remand on Executive Magistrates in certain situations etc. Therefore, it can be legitimately contended that the words occurring in proviso (a) should be construed within the frame work of the proviso itself without any reference to Section 167(2). If such a construction is made, it may be seen that the proviso forbids the extension of remands only beyond a total period of 90 days under clause (i) and beyond a total period of 60 days under clause (ii). Thus if proviso (a) is treated as a separate paragraph it necessarily follows that the period of 90 days or 60 days as the case may be, will commence running only from the date of remand and not from any anterior date in spite of the fact that the accused may have been taken into custody earlier by a police officer and deprived of his liberty.

25. Thus in any view of the matter i.e. construing proviso (a) either in conjunction with sub-section (2) of Section 167 or as an independent paragraph, we find that the total period of 90 days under clause (i) and the total period of 60 days under clause (ii) has to be calculated only from the date of remand and not from the date of arrest."

15 In view of the above clear pronouncement of law, the statutory period as envisaged in proviso to sub-section (2) of Section 167 would commence only from 15th September 2010 when the accused after the arrest was produced before the learned Magistrate, Bharuch-Waghra and ordered for custody on the same day. Thus, there is no substance in the contention that the Courts below have considered the proviso to sub-section (2) of Section 167 of the Code contrary to the law laid down by the Apex Court or against the spirit of the language contained in the above provision and, therefore, the petition lacks merit not warranting interference under Articles 226 and 227 of the Constitution of India.

16 With regard to the decision of the Apex Court in the case of Directorate of Enforcement vs. Deepak Mahajan and another, reported in (1994) 3 SCC 440, it was with regard to jurisdiction of the Magistrate to authorize detention of a person arrested under the Special Act, under Section 35(1) of FERA or under Section 104(1) of the Customs Act and the Apex Court held that the Magistrate had jurisdiction under Section 167(2) to authorize detention of such a person arrested by the Authorized Officer under FERA. In paragraphs 44 and 45, it is held as under:

"44. Section 167 is one of the provisions falling under Chapter XII of the Code commencing from Section 154 and ending with Section 176 under the

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

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

16.1 The above decision also takes into consideration the distinction between 'arrest' and 'custody'. However, in paragraph 48 of the above judgment, the Apex Court found and observed that:

"Needless to emphasize that the arrest of a person is a condition precedent for taking him into judicial custody thereof. To put it differently, the taking of the person into judicial custody is followed after the arrest of the person concerned by the Magistrate on appearance or surrender. It will be appropriate, at this stage, to note that in every arrest, there is custody but not vice versa and that both the words 'custody' and 'arrest' are not synonymous terms. Though 'custody' may amount to an arrest in certain circumstances but not under all circumstances."

17 Thus, the language of sub-sections (1) and (2) of Section 167 of the Code refers to only that person arrested and detained in custody. The above decision is of no help to the petitioner-accused who came to be arrested only on 15th September 2010 and produced physically before the learned Magistrate, Bharuch-Waghra on the same day.

18 The offence under Section 135 of the Customs Act pursuant to which judicial custody of the accused is ordered by the learned Metropolitan Magistrate, Ahmedabad, and the first information report being C.R. No.I-45 of 2010 registered with Dahej Police Station, District Bharuch, on 18th July 2010, for the offences punishable under Sections 406, 420, 466, 467,468, 471, 472, 474, 120B and 34 of the Indian Penal Code, cannot be said to be same or similar in as much as the offence under Section 135 of the Customs Act was registered for breach of the provisions of the Customs Act while C.R. No.I-45 of 2010 was registered with Dahej Police Station, District Bharuch, for forgery, fabrication and creation of bogus licences along with other allegations and, therefore also, the accused is not entitled to the benefit of

law laid down by the Apex Court based on the factual aspects of this case whether the offence had arisen out of the same and one transaction.

19 The reliance placed by the learned counsel for the petitioner in the case of State of Haryana vs. Dinesh Kumar, 2008 (1) GLH 447, was in the context of custody within the meaning of Section 439 of the Code and the concept of 'arrest' as well as 'custody' discussed therein has no application in the facts of this case in view of clear language of sub-section (2) of Section 167 of the Code as discussed earlier.

20 Other decisions in the cases of Institute of Chartered Accountants of India vs. Vimal Kumar Surana, reported in 2011(1) SCC 254 and Babubhai V/s. State of Gujarat, reported in (2010) 12 SCC 254, have no application in the facts of the present case in as much as in the case of Institute of Chartered Accountants of India vs. Vimal Kumar Surana, [supra], the Apex Court was confronted with altogether different point of law, namely, filing of more than one complaint under different Statutes for the same set of facts. However, it is worth-noting the following paragraphs Nos. 23, 24, 25 and 36 of the judgment of the Apex Court in the case of Institute of Chartered Accountants of India vs. Vimal Kumar Surana, [supra]:

"23. The provisions contained in Chapter VII of the Act neither define cheating by personation or forgery or counterfeiting of seal, etc. nor provide for punishment for such offences. If it is held that a person acting in violation of Section 24 or contravening sub-section (1) of Sections 24-A and 26 of the Act can be punished only under the Act and that too on a complaint made in accordance with Section 28, then the provisions of Chapter VII will become discriminatory and may have to be struck down on the ground of violation of Article 14.

24. Such an unintended consequence can be and deserves to be avoided in interpreting Sections 24-A, 25 and 26 keeping in view the settled law that if there are two possible constructions of a statute, then the one which leads to anomaly or absurdity and makes the statute vulnerable to the attack of unconstitutionality should be avoided in preference to the other which makes it rational and immune from the charge of unconstitutionality. That apart, the court cannot interpret the provisions of the Act in a manner which will deprive the victim of the offences defined in Sections 416, 463, 464, 468 and 471 of his right to prosecute the wrongdoer by filing the first information report or complaint under the relevant provisions of Cr.PC.

25. We may add that the respondent could have been simultaneously prosecuted for contravention of Sections 24, 24-A and 26 of the Act and for the offences defined under IPC but in view of the bar contained in Article 20(2) of the Constitution read with Section 26 of the General Clauses Act,

1897 and Section 300 CrPC, he could not have been punished twice for the same offence.

36. In view of the above discussion, the argument of the learned Senior Counsel appearing for the respondent that the Act is a special legislation vis-a-vis IPC and a person who is said to have contravened the provisions of sub-section (1) of Sections 24, 24-A, 25 and 26 cannot be prosecuted for an offence defined under IPC, which found favour with the High Court does not commend acceptance."

20.1 In the above decision in the case of Institute of Chartered Accountants of India vs. Vimal Kumar Surana, [supra], the Apex Court, after referring to Section 26 of the General Clauses Act, 1897, Section 300 of the Code and Article 20(2) of the Constitution of India, along with the decision in the case of Magbool Hussain V/s. State of Bombay, AIR 1953 SC 325, and other cases, in above paragraph 36, in no uncertain terms, held that, so far as offence punishable under the IPC vis-a-vis a special legislation is concerned, the accused can be prosecuted simultaneously upholding the principle that the accused could not have been punished twice for the same offence. In the facts of the present case, the prosecution of the petitioner-accused under the IPC as well as the Customs Act cannot be said to be in any manner illegal even if the above decision is considered in view of the submissions made by the learned counsel for the petitioner.

21 Considering overall aspects about the facts and law discussed hereinabove, none of the contentions raised by the learned Senior Counsel for the petitioner merits acceptance. No error of law much less of jurisdiction appears in the orders passed by the Courts below warranting this Court to exercise extraordinary jurisdiction under Articles 226 and 227 of the Constitution of India.

22 In the result, this petition is rejected summarily.