

**Md. Reshedur Rahaman**

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**Court :** Kolkata

**Decided On :** Aug-26-1994

**Reported in :** 1995CriLJ1177

**Judge :** A.K. Chatterjee and ;S. Narayan, JJ.

**Acts :** Code of Criminal Procedure (CrPC) , 1974 - Sections 4(2), 167, 167(2) and 439; ;Customs Act - Section 104

**Appeal No. :** Petition No. Nil of 1994

**Appellant :** Md. Reshedur Rahaman

**Advocate for Def. :** P.R. Roy and ;Sadhan Roy Chowdhury, Adv.

**Advocate for Pet/Ap. :** Milon Mukherjee and ;Sanjoy Ranjan Paul, Adv.

**Disposition :** Application allowed

**Judgement :**

ORDER

1. Short point for determination in this application under Section 439 of the Code of Criminal Procedure (hereinafter Code for short) 1973 is whether a person arrested under Section 104 of the Customs Act, is entitled to be released on bail, if he is prepared to and does furnish bail, in accordance with the provisions of proviso (a) to Section 167(2) of the Code on the expiry of period of detention

prescribed therein. There was no controversy that if the answer to this question is in the affirmative, then the petitioner before us has to be released on bail without entering into the merits of the case.

2. Mr. Mukherjee, the learned Counsel appearing for the petitioner has urged that the provisions of Section 167(2) in its entirety apply squarely to a person arrested under Section 104 of the Customs Act and he has relied heavily upon the decision of the Supreme Court in the Directorate of Enforcement v. Deepak Mahajan, : 1994 CriLJ2269 . In answer to this contention, Mr. Roy, the learned Counsel for the Collector of Customs has contended that Section 167 of the Code is not attracted to any enquiry made by the Customs Officers relating to an offence under the Customs Act and in support of this proposition, he has relied upon the Single Bench decision of his Court in Sri Bijan Haider v. The State of West Bengal, 1994 C Cr LR (Cal) 348 : (1993 Cri LJ 3082). In order to appreciate the correct position of law, it may be useful to trace a brief history in this regard. In Union of India v. O. P. Gupta, 1990 (2) Delhi Lawyer, 23, it was held by Delhi High Court, with one of the learned Judges dissenting, that a Magistrate has got jurisdiction under Section 167(2) of the Code to authorise detention of a person arrested under Section 104 of the Customs Act and overruled an earlier decision to the contrary of the same Court. When the ruling in O. P. Gupta's case (supra) was holding the ground one Deepak Mahajan was arrested for an offence punishable under the provisions of FERA and an application under Section 167(2) Code of Criminal Procedure was made by the Enforcement Directorate for remanding Deepak Mahajan in judicial custody for a fortnight which was allowed by the learned Magistrate who subsequently also extended the period of detention. The order made by the learned Magistrate was challenged by Deepak Mahajan before the High Court and ultimately the matter came up for hearing before a Full Bench of five Judges, 1991 Cri LJ 1124 (Delhi). Three of the Hon'ble Judges overruled the decision in O. P. Gupta's case (supra), with two of the Hon'ble Judges delivering a dissenting judgment. Thus at that point of time, the position was that the Magistrate had no power to remand a person produced before him in accordance with the Section 35(2) of FERA or for that matter under Section 104 of the Customs Act. Against this decision, there was an appeal before the Supreme Court by special leave upon which reliance has been placed by the learned

Counsel for the petitioner. After a very through and exhaustive consideration of all the relevant laws, the Supreme Court set aside the judgment of Full Bench of Delhi High Court and restored the law enunciated in O.P Gupta's case (supra). In other words, according to the Supreme Court, a Magistrate has got enough jurisdiction under Section 167 of the Code of Criminal Procedure to authorise detention of a person arrested under Section 104 of the Customs Act. Mr. Roy, the learned Counsel for the Collector of Customs has, however, joined issue and relied upon the single Bench decision of this Court in Bijan Haider's case (supra) in which the learned Judge has held, inter alia, relying upon the majority view of the Delhi High Court in Deepak Mahajan case (supra), 1991 Cri LJ 1124, that Section 167, Cr. P. C. is not applicable when a person is arrested and produced before a Magistrate under Section 104 of the Customs Act. It is not necessary for us to point out the logical fallacy in the decision in Bijan Haider's case (supra) so far as this finding is concerned and suffice it to say that in view of the declaration of law by the Supreme Court in Deepak Mahajan's case (supra), the decision of the learned single Judge referred to above can no longer be held to be good law. Therefore, there is no manner of doubt that a Magistrate has enough jurisdiction to authorise detention under Section 167(2) of the Code, even when a person is arrested under Section 104 of the Customs Act and produced before him.

3. The other limb of the argument of Mr. Roy, the learned Counsel for the Collector of Customs was that in Deepak Mahajan's case, (1991 Cri LJ 1124 (FB) (Delhi)) (supra), the Supreme Court was not seized with the question whether it was incumbent upon the Magistrate to release a person, arrested under Section 104 of the Customs Act, if such person had suffered detention for the period prescribed in the proviso to Section 167(2) of the Code. In this connection, our attention was also drawn to certain observations made by the learned Judges of the Supreme Court in Deepak Mahajan case (supra), in paragraph 45 of the Judgment wherein their Lordships had stated that a doubtful question might arise as to whether the Magistrate could detain the accused person for further period beyond the prescribed period of 90 or 60 days if the accused was not prepared to and did not furnish bail. In the case before us, we are not concerned with the question whether the petitioner can be detained if he is not prepared to and does not furnish bail and indeed, if the provisions of Section 167(2) apply in its entirety, this doubt is

immediately cleared by Explanation 1 of Section 167(2) expressly providing that notwithstanding the expiry of the specified period the accused shall be detained in custody till he furnished bail. However, this question need not engage our attention as the petitioner before us is very much prepared to furnish bail as stated in the application itself. Now it is true that in Deepak Mahajan's case (supra) the very power of a Magistrate to authorise detention under Section 167(2) of the Code was in question, when the person was arrested for an offence punishable under the provisions of FERA. Since it has been held by the Supreme Court that the Magistrate did have such power, the question which arises for consideration before us is whether in case of a person arrested under Section 104 of the Customs Act, he is entitled to be released on bail under the provision to Section 167(2) of the Code of Criminal Procedure. We are in no doubt that in such a case the provisions of Section 167(2) of the Code are attracted in its entirety and there is no scope for dissection or for holding that one part of Section 167(2) applies while the proviso does not. In this connection, reference may be made with profit to the provisions of Section 4(2) of the Code which lays down that all offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the provisions of the Code but subject to any enactment regulating the manner or place of investigation, inquiring into or otherwise dealing with such offences. The power of a Magistrate to remand to custody under Section 167 of the Code or the entitlement of an accused person to be released on bail after suffering detention for the period prescribed in the proviso to Section 167(2) of the code are co.-existent with the power of investigation by the police and this section occurs in the chapter on information to the police and their powers to investigate. The words of Section 4(2) of the Code are of wide amplitude and take within its fold, the provisions of Section 167(2) of the Code including the proviso thereto. In other words, this Section in its entirety will apply in case of offences under the Customs Act unless any contrary provision is found in this Act. There is undoubtedly no provision anywhere in the Customs Act expressly or even by necessary implication restricting the operation of the proviso to Section 167(2) of the Code. In coming to this decision, we are also inspired by certain observations of the Supreme Court in Deepak Mahajan' s case (supra) wherein Their Lordships have stated in unambiguous terms that the provisions of the 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 such circumstances, we hold that Section 167 of the Code of Criminal Procedure in its entirety applies squarely with regard to the production and detention of a person arrested under Section 104 of the Customs Act and such a person is entitled to be released on bail after expiry of the period prescribed therein.

4. In the result, the petitioner who is in custody since the 16th May, 1994 has to be released on bail. We, accordingly direct that the petitioner be released on bail to the satisfaction of the learned Chief Judicial Magistrate, Barasat. The application under Section 439, Code of Criminal Procedure is thus allowed.

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