

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPLICATION NO. 520 OF 2020

Nilesh Yogesh Jagiwala

..Applicant

V/s.

The Superintendent (Anti Evasion)

Central GST and Central Excise & Anr.

..Respondents

Mr. Sanjeev Kadam a/w. Sagar Kasar, for the Applicant

Mr. Jitendra Mishra, Spl. PP for Respondent No.1.

Mr. Ajay Patil, APP for the Respondent / State.

CORAM : C.V. BHADANG, J.

DATE : 22nd DECEMBER 2020

PC.

. This application is placed before this Bench as the regular Bench (Sandeep K. Shinde, J.) is unable to take up the matter.

2. The challenge in this application, is to the judgment and order dated 7/12/2020 passed by the learned Additional Sessions Judge at Thane in Criminal Misc. Application No.247/2020. By the impugned order, the learned Sessions Judge has set aside the order dated 25/9/2020 passed by the learned Judicial Magistrate, First Class at Vashi, District Thane in Bail Application No.V/AE/BEL/GRANew/12385/Germanium/2019-20. The net

result is that the bail granted to the applicant by the learned Magistrate by order dated 25/9/2020, stands cancelled. The learned Sessions Judge has remitted the application for bail filed by the petitioner to the learned Magistrate for deciding it afresh.

3. The applicant (accused) is one of the Directors in M/s. Germanium Trading Pvt. Ltd., Nerul, Navi Mumbai, which is engaged in the business of trading. According to the prosecution, the said Company was not found operating at its registered address and accordingly a panchanama dated 4/3/2020 was drawn. The investigation conducted by the Anti Evasion Officers of Central Goods and Service Tax and Central Excise (CGST) Belapur revealed that the said Company was engaged in “Circular Trading” and issuance of fake invoices, for the purpose of availing Input Tax Credit (ITC) and passing it off, to other companies, without actual trading / movement of goods, which is an offence under Section 132 (1)(b)(c) of the Central Goods and Services Act, 2017 (‘the CGST Act’ for short). According to the prosecution, said offence is cognizable and non-bailable as per Section 132(5) of the said Act. In short, according to the prosecution, the said Company has evaded GST approximately to the extent of Rs.541 Crores.

4. The applicant came to be arrested on 5/9/2020. The applicant sought bail before the learned Judicial Magistrate First Class at Vashi, on the ground that all the documents / invoices and a laptop of the applicant has already been seized. It was contended that there is nothing further to be recovered or seized from the applicant. It was contended that the applicant was ready and willing to compound the offence and showed readiness to deposit Rs.25 Lakhs, for the time being to show his bonafides. It was contended that further detention of the applicant behind bars is not necessary.

5. The application was opposed stating that the applicant is a habitual offender and has committed offence under Section 132(1) (a) and (c) of the said Act. It was contended that the applicant is directly concerned with the company / companies which is/are involved in the offence of fraudulent availment of ITC to the extent of Rs.541 Crores, through bogus invoices, and there is substantial tax evasion resulting into loss to the Government Exchequer. It was contended that the offence is a serious economic offence and therefore, the applicant may not be released on bail.

6. The learned Magistrate by an order dated 25/9/2020, inter alia, taking note of the fact that the applicant had showed willingness to compound the offence and to pay Rs.25 Lakhs and further noticing that the offence is punishable with maximum imprisonment of 5 years and fine and further having regard to the fact that the documents and the invoices have already been seized and are in the custody of the Investigating Authority, had released the applicant on bail.

7. Feeling aggrieved, the first respondent filed an application for cancellation of bail under Section 439(2) of Cr.P.C. before the learned Additional Sessions Judge at Thane being MA No.247/2020. Before the learned Sessions Judge, reliance was placed on behalf of the applicant on several decisions as noted in para 13 of the order of the learned Sessions Judge. The learned Sessions Judge found that principally the bail was granted, on an undertaking given to the Trial Court that the applicant would compound the offence on payment of the tax amount. The learned Sessions Judge found that compounding under Section 138 of the said Act can be allowed only after making payment of tax, interest and penalty. Thus, in the opinion of the learned Sessions Judge, mere undertaking in this regard could not have been acted upon. In that view of the matter,

the learned Sessions Judge by the impugned order, has partly allowed the application. The learned Sessions Judge while setting aside the order dated 25/9/2020, passed by the learned Magistrate, has directed the learned Magistrate to hear and decide the application, afresh on its own merits and respondent has been directed to surrender within two weeks from the date of the order.

8. I have heard Mr. Kadam, the learned counsel for the applicant and Mr. Mishra, learned Special PP for the first respondent.

9. The learned counsel for the applicant pointed out that the applicant at the outset had shown willingness to compound the offence which is permissible under Section 138 of the said Act. It is submitted that the first respondent has not yet ascertained or adjudicated the exact amount, and in the absence thereof, the amount which is required to be deposited alongwith interest and penalty, if any, cannot be ascertained. It is submitted that to show bonafides, the applicant has already deposited an amount of Rs.25 Lakhs by challans dated 21/10/2020 and 15/11/2020.

10. Mr. Kadam, the learned counsel for the applicant, has submitted that the bail granted, cannot be lightly cancelled, unless

there are compelling circumstances. It is submitted that unless it is shown that the bail is granted arbitrarily or there are objective circumstances, showing any actual or possible misuse of the liberty granted, the bail cannot be cancelled. It is submitted that none of these factors exist in this case. It is submitted that the order passed by the learned Magistrate granting bail, is not only based on the willingness shown by the applicant, to compound the offence. It is submitted that the learned Magistrate has considered other relevant circumstances such as the seizure of all the records and there being no necessity for further detention of the applicant behind the bars, while granting bail. It is submitted that the learned Magistrate was justified in acting on the willingness shown by the applicant for compounding of the offence. It is therefore submitted that the learned Sessions Judge was in error, in cancelling the bail granted by the learned Magistrate.

11. On behalf of the applicant, reliance is placed on the following decisions-

1. **Myakala Dharmarajam and Ors Vs. State of Telangana and Anr. (2020) 2 SCC 743**
2. **State of Andhra Pradesh Vs. Mohd. Hussain Alias Saleem (2014) 1 SCC 258.**

3. Kanwar Singh Meena Vs. State of Rajasthan and Anr. (2012) 12 SCC 180.
4. Dinesh M.N. (S.P) Vs. State of Gujarat (2008) 5 SCC 66.
5. Assistant Engineer, Rajasthan Vs. Ram Charan (2006) 5 SCC 272.
6. Mehboob Dawood Shaikh Vs. State of Maharashtra (2004) 2 SCC 362
7. Puran Vs. Rambilas and Anr. (2001) 6 SCC 338.
8. Dolat Ram and Ors. Vs. State of Haryana (1995) 1 SCC 349.
9. Usmanbhai Dawoodbhai Memon and Ors. Vs. State of Gujarat (1988) 2 SCC 271.
10. Premchand Pratapmal Surana Vs. The State of Maharashtra 1995 (1) Bom.C.R. 72
11. Aslam Babalal Desai Vs. State of Maharashtra (1992) 4 SCC 272.
12. Bhagirathsinh s/o. Mahipat Singh Judeja Vs. State of Gujarat (1984) 1 SCC 284.
13. Kamal K. Chadha Vs. B. S. Subhedar and Anr. 1981 Cri. L.J. 1799.
14. Gurcharan Singh and Ors. Vs. State (Delhi Administration) (1978) 1 SCC 118.
15. The State of West Bengal Vs. Rakesh Kumar Singh 2015 Supreme (Cal) 288.

12. Although, the principal prayer on behalf of the applicant is for restoration of the order passed by the learned Magistrate, it was alternatively submitted that there is no reason or justification to direct the applicant to surrender, even if the application for bail is

required to be reheard by the learned Magistrate. It is submitted that in the facts and circumstances of the case, no purpose would be served by asking the applicant to surrender pending the hearing of the application by the learned Magistrate.

13. The learned Special P.P. for the first respondent, has submitted that the offence is serious. There is evasion of substantial amount of tax from July 2017. It is submitted that till date there is no formal application filed for compounding. It is submitted that it is otherwise pre-mature as the investigation is still in progress. It is submitted that the deposit of Rs.25 Lakhs is otherwise insufficient to show the bonafides, particularly in the context of the amount which is found to be evaded. Reliance is placed on several decisions including the decision of the Supreme Court in the case of **Nimmagadda Prasad Vs. Central Bureau of Investigation (2013) 7 SCC 466**. He submitted that all that the Sessions Judge has done is to remand the applicant to the learned Magistrate. It is submitted that once the bail is cancelled, the applicant is bound to surrender.

14. I have carefully considered the rival circumstances and the submissions made.

15. The principles which are germane while considering the plea for grant of bail to the accused as well as while considering the plea for cancellation of such bail, at the instance of the State / prosecuting agency, are too well settled to be reinstated. In the case of **Myakala Dharmarajam** (supra), the Hon'ble Supreme Court has held that there is distinction between rejection of bail and its cancellation. It has been held that cancellation of bail is an order which interferes with liberty of the individual and hence it must not be lightly resorted to. In the said case, the learned Sessions Judge had granted bail in a murder case, where the investigation was complete. The Supreme Court found that the Sessions Judge has considered the fact that the investigation was complete and there was no likelihood of the appellants / accused tampering with the evidence and therefore, it was held that the High Court was not justified in cancelling the bail so granted. Although, the principles which are relevant are well settled, the matter would depend upon facts and circumstances of each case.

16. Coming to the present case, prima facie, it appears that the investigation is in progress and the allegations are about substantial evasion of tax to the extent of Rs.541 Crores by availing Input Tax Credit without actual trading / movement of goods which is an

offence under Section 132 of the CGST Act. A perusal of the order passed by the learned Magistrate would prima facie indicate that what has principally weighed with the learned Magistrate was that the applicant had given an undertaking seeking permission to compound the offence before the Commissioner, on payment of the tax amount as per rules. The learned Magistrate has observed that even though the offence leveled against the applicant is serious in nature, “no purpose would be served by keeping him behind bars, that too when he is willing to pay the evaded amount and compound the offence”. In the opinion of the learned Magistrate “sitting behind bars, he (the applicant) might not be able to pay the evaded amount.” Prima facie, it appears that the investigation being under progress, the exact amount evaded is not yet ascertained. It is also pointed out on behalf of the respondent that there is no formal application made for compounding. It is further pointed out that compounding envisages payment of tax evaded alongwith interest and penalty as may be decided by the Competent Authority as per rules. It is in this context that the contention on behalf of the first respondent that the claim based on compounding is pre-mature has to be considered. It is necessary to note that the applicant has deposited an amount of Rs.25 Lakhs as against the claim of the prosecution that the evasion is to the extent of Rs.541 Crores. It is

in this context again the contention on behalf of the respondent about the inadequacy or unsustainability of the ground based on compounding has to be considered and appreciated.

17. I am conscious of the fact that the learned Sessions Judge has remitted the matter to the learned Magistrate and therefore it is neither necessary nor appropriate to appreciate the material in details or to record any final conclusion lest it would prejudice either the applicant or the prosecution before the learned Magistrate. I, therefore, refrain from making any comments on the cases cited.

18. I have gone through the order passed by the learned Sessions Judge and in the facts and circumstances of the case, I find that the learned Sessions Judge was justified in interfering with the order passed by the learned Magistrate.

19. Once the bail has been cancelled, the necessary consequence would be the applicant / accused is required to surrender. Thus, it is not possible to concede to the alternate submission on behalf of the learned counsel for the applicant that the applicant may not be

required to surrender pending hearing of the application by the learned Magistrate.

20. Considering the over all circumstances, I do not find that any case for interference in the impugned order passed by the learned Sessions Judge, is made out in this case. In the result, the Criminal Application is dismissed.

21. At this stage, the learned counsel for the applicant requested for extension of time to surrender. He further requested that the hearing of the application before the learned Magistrate may be expedited. The learned counsel, on instructions, from the applicant submitted that the applicant would surrender within the time as may be granted by this Court. The statement so made is accepted. The learned counsel for the applicant submits that the applicant has already surrendered passport.

22. On hearing the learned counsel for the applicant and the learned Special P.P., time to surrender is extended by a period of two weeks. The applicant shall surrender within a period of two weeks. The extension of time shall be further subject to the condition that the applicant shall not leave Mumbai City without intimation to the

Investigating Officer. The learned Magistrate shall proceed to hear and decide the application as expeditiously as possible and preferably within a period of two weeks from the date of surrender.

23. The observations herein are for the limited purpose of examining the challenge to the order cancelling the bail. The learned Magistrate shall decide the application on its own merits and in accordance with law without being influenced by the observations made by the learned Sessions Judge or by this Court.

C.V. BHADANG, J.