

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

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**CRM-M-32331-2020
Decided on : 12.03.2021**

Rakesh Garg

... Petitioner(s)

Versus

State of Haryana and another

... Respondent(s)

CORAM: HON'BLE MRS. JUSTICE MANJARI NEHRU KAUL

PRESENT: Mr. Sirdhar Potaraju, Advocate
for the petitioner(s).

Ms. Tanushree Gupta, DAG, Haryana.

MANJARI NEHRU KAUL, J. (Oral)

The instant petition has been filed under Section 482 Cr.P.C., for quashing of FIR No.321, dated 19.07.2019, under Section 132 of the Central Goods and Services Tax Act, 2017 and Sections 420, 467, 468 & 471 IPC, registered at Police Station Sector 50, Gurugram (Annexure P-1) along with consequential proceedings arising therefrom.

It has been *inter alia* contended that no doubt petitioner was the Managing Director of M/s Moksh Alloys Pvt. Ltd., Gurugram (hereinafter referred to as 'the Company'), but he had submitted his resignation as such on 05.01.2018, which had duly been communicated to the Ministry of Corporate Affairs on 13th January, 2018. Thereafter, the petitioner had no role to play in the affairs of the Company. In support thereof, learned counsel for the petitioner has invited the attention of this Court to Annexure P-2 (Colly), which are the copies of the Form No. DIR 11, DIR 12 and certain other relevant documents. It was also submitted that the company was allotted GST No. 06AAHCM4191J1Z8 on 17.11.2017 and which was

got cancelled on 01.10.2018 i.e. after the resignation of the petitioner from the Company. Still further, while referring to the allegations levelled in the impugned FIR, learned counsel for the petitioner has submitted that it was totally incorrect and false that the Company had claimed Input Tax Credit (in short 'ITC') of Rs. 5,49,68,735/-, which was contrary to the material and other records as the Company had claimed 'NIL' transactions for the financial year 2017-18. In support of this, learned counsel for the petitioner invited the attention of this Court to Annexure P-4 (Colly). It was thus urged that respondent No.2 – Excise Taxation Officer, Ward No.8, Gurugram (East), without as much as carrying out the necessary verifications went ahead and made a complaint leading to the registration of the FIR in question. Learned counsel for the petitioner has further submitted that since the petitioner was not associated with the Company after his resignation on 05.01.2018, he could not be held culpable of wrong doings, if any, committed by the Company after the date of his resignation. He has further submitted that in fact, even prior to his resignation from the Company on 05.01.2018, there was nothing on record from which it could be shown that a wrong claim had been made by the Company, as not even a single transaction had been carried out by it.

Lastly, learned counsel for the petitioner has submitted that it was very apparent that respondent No.2 had been very casual in filing the complaint without even issuing a show cause notice to the Company or the petitioner. Not only this, respondent No.2 went way beyond his jurisdiction as he could not have set the criminal law in motion without the prior permission of the Commissioner of Central Government as provided for under Section 132(6) of the Central Goods and Service Tax (CGST) Act,

2017 (for brevity, 'the CGST Act'). In support of his contention, learned counsel for the petitioner has placed reliance upon the the judgment of the Apex Court rendered in **Union of India Vs. Ashok Kumar Sharma and others, 2020 (3) RCR (CrI.) 726**.

On being put to notice, written statement dated 22.02.2021, on behalf of respondent No.2, has been filed in the Registry. Same is taken on record, subject to all just exceptions.

Learned State counsel has vehemently controverted and opposed the submissions made by learned counsel for the petitioner. While inviting the attention of this Court to the written statement filed on behalf of respondent No.2, learned State counsel has submitted that the business activities of the Company in the State of Haryana were carried out under the overall supervision of the petitioner during the financial years 2017-18 and 2018-19. He has further submitted that the Company, which had been got registered at Gurugram by none other than the petitioner, was not only found to be a fake and non-existent Company, but was shown to be procuring bogus purchase invoices from other firms i.e. M/s Kamboj Brothers, GST Reg. No. 06BIQPK7797B1ZN. It was also submitted by the learned State counsel that the petitioner had moved an application under his own signatures under the CGST Act for registration of M/s Moksh Alloys Pvt. Ltd., Ground Floor, Q-8, South City-II, Gurugram, Haryana (a Company duly incorporated under the provisions of the Companies Act, 1956). This Company was granted Registration Certificate No.06AAHCM4191J1Z8 in form GST REG-06 with liability to pay GST w.e.f. 17.11.2017. The petitioner, who functioned as the Managing Director of the Company, did business during the financial years 2017-18 and 2018-19.

Learned State counsel has further submitted that as per the online returns submitted on GST portal, the Company admittedly did not affect any purchase or sale during 2017-18. However, the returns submitted by the Company for the financial year 2018-19 showed purchases, sale and claims of huge ITC. Learned State counsel while further controverting the submissions of the petitioner that he had ceased to be a Director of the Company and hence had no role to play in the affairs of the said Company, submitted that the petitioner's name continues to be on the GST portal even as on date. Learned State counsel in support of her submissions referred to Annexure R-5, which was a print out of the GST portal, wherein, the name of the petitioner duly finds mention on 19.07.2019 i.e. the date of the registration of the FIR in question. Learned State counsel has further submitted that had his claim of having resigned from the Company been genuine, some application as envisaged under Section 28 of the CGST Act, for amendment of the registration certificate would have been made, but that was clearly not the case, which made it abundantly clear that the claim of resignation w.e.f. 05.01.2018, was an eye wash with an oblique motive to get away from the GST as well as penal liability.

Learned State counsel has strongly disputed and controverted the submission made by the learned counsel for the petitioner that respondent No.2 had exceeded his jurisdiction while filing the complaint leading to the registration of FIR in question. She has submitted that Govt. of India, Ministry of Finance, Department of Revenue had issued clarification dated 05.10.2018, intimating therein that the officers of both Central Tax and State Tax are authorized to initiate intelligence based enforcement action on the entire taxpayers' base irrespective of the

administrative assignment of the taxpayer to any authority. It was also submitted that the business premises of the petitioner's company was physically inspected and it was then that it came to be revealed that the firm was non-existent and further the petitioner had not done any business during the year 2017-18. However, the Electronic Credit Ledger for the financial year 2018-19 (Annexure R-2), on the contrary showed that petitioner had claimed ITC worth Rs. 5,49,68,735/- , which had already been utilized by the petitioner against its output tax liability, thereby causing a huge loss to the State exchequer. Learned State counsel has submitted that sufficient documentary evidence had been collected during the preliminary inquiry from which it could be inferred that the *modus operandi* of the petitioner was that he in collusion with the fake firms had been obtaining bogus purchase invoices and then claiming false ITC from the Taxation Department (Annexure R-3). In addition, no physical movement of goods took place, rather only purchase tax invoices were obtained in black and white with the *mala fide* intention to claim ITC. Learned State counsel has further submitted that the *mala fides* on the part of the petitioner were evident from the fact that the GSTIN was retained for only 10 to 11 months for procuring bogus purchase invoices and in turn to avail ITC benefit.

Replying to the submissions of the learned counsel for the petitioner, that no show cause notice was served to the Firm by respondent No.2, it was submitted by the learned State counsel that since the status of the firm was non-existent, it could not have been possible to either issue or serve show cause notice to the firm. It was in this background, the Department was left with no other option but to move a complaint leading to the registration of the FIR against the petitioner since his name continued

to exist on the GST portal on the date of registration of FIR on 19.07.2019.

I have heard learned counsel for the parties and perused the material on record.

Since the inherent powers vested under Section 482 Cr.P.C. are extremely wide and undefined, a great deal of circumspection needs to be exercised. In the case in hand, as also stated by the learned counsel for the petitioner, investigation is still underway and final report under Section 173 Cr.P.C. has not yet been presented by the investigating agency. Therefore, this Court would not be justified in embarking upon the truthfulness or falsehood of the allegations levelled in the complaint. Moreover, a perusal of the FIR in question does *prima facie* disclose the commission of offences alleged against the petitioner. Needless to add the correctness or otherwise of the allegations would be gone into by the trial Court as and when the evidence is adduced by both the parties.

Adverting to the grievance of the petitioner that respondent No.2, who was an ETO and thus, could not have set the criminal law in motion without the previous sanction/permission of the Commissioner of Central Government as provided for under Section 132(6) of the CGST Act, is devoid of merit. It would be apposite to reproduce Section 132 of the CGST Act:-

“SECTION 132. Punishment for certain offences.-- (1) Whoever commits any of the following offences, namely :--

(a) supplies any goods or services or both without issue of any invoice, in violation of the provisions of this Act or the rules made thereunder, with the intention to evade tax;

(b) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act, or the rules made

thereunder leading to wrongful availment or utilisation of input tax credit or refund of tax;

(c) avails input tax credit using such invoice or bill referred to in clause (b);

(d) collects any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;

(e) evades tax, fraudulently avails input tax credit or fraudulently obtains refund and where such offence is not covered under clauses (a) to (d);

(f) falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information with an intention to evade payment of tax due under this Act;

(g) obstructs or prevents any officer in the discharge of his duties under this Act;

(h) acquires possession of, or in any way concerns himself in transporting, removing, depositing, keeping, concealing, supplying, or purchasing or in any other manner deals with, any goods which he knows or has reasons to believe are liable to confiscation under this Act or the rules made thereunder;

(i) receives or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reasons to believe are in contravention of any provisions of this Act or the rules made thereunder;

(j) tampers with or destroys any material evidence or documents;

(k) fails to supply any information which he is required to supply under this Act or the rules made thereunder or (unless with a reasonable belief, the burden of proving which shall be upon him, that the information supplied by him is true) supplies false information; or

(l) attempts to commit, or abets the commission of any of the offences mentioned in clauses (a) to (k) of this section, shall be punishable—

(i) in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds five hundred

lakh rupees, with imprisonment for a term which may extend to five years and with fine;

(ii) in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds two hundred lakh rupees but does not exceed five hundred lakh rupees, with imprisonment for a term which may extend to three years and with fine;

(iii) in the case of any other offence where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds one hundred lakh rupees but does not exceed two hundred lakh rupees, with imprisonment for a term which may extend to one year and with fine;

(iv) in cases where he commits or abets the commission of an offence specified in clause (f) or clause (g) or clause (j), he shall be punishable with imprisonment for a term which may extend to six months or with fine or with both.

(2) Where any person convicted of an offence under this section is again convicted of an offence under this section, then, he shall be punishable for the second and for every subsequent offence with imprisonment for a term which may extend to five years and with fine.

(3) The imprisonment referred to in clauses (i), (ii) and (iii) of sub-section (1) and sub-section (2) shall, in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the Court, be for a term not less than six months.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, all offences under this Act, except the offences referred to in sub-section (5) shall be non-cognizable and bailable.

(5) The offences specified in clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) and punishable under clause (i) of that sub-section shall be cognizable and non-bailable.

(6) A person shall not be prosecuted for any offence under this section except with the previous sanction of the Commissioner. ”

No doubt, Section 4(2) Cr.P.C. does stipulate that if a special procedure is prescribed under a special enactment then the procedure would have to be followed as per the enactment and not under the Code and perusal of Section 132(6) of the CGST Act, also makes it abundantly clear and leaves no manner of doubt that a person under this section can be prosecuted for an offence only with the previous sanction of the Commissioner. However, in the case in hand the 'prosecution' of the petitioner has not even been initiated.

Prosecution of a person or an accused commences only when the Magistrate or Court concerned takes cognizance of the same. In other words, prosecution means the initiation or commencement of the criminal proceedings when formal charge-sheet is presented before a Court of law.

Coming to the instant case, as already admitted by the learned counsel for the petitioner, investigation is still underway and charge-sheet/final report under Section 173 Cr.P.C. has not yet been presented before the Court concerned. The complaint filed by respondent No.2 cannot be said to be beyond his jurisdiction because the previous sanction of the Commissioner as provided for under Section 132(6) of CGST Act, would be required only after the conclusion of the investigation and at the stage of presentation of charge-sheet/final report under Section 173 Cr.P.C. , when judicial notice of the offence(s) are taken for the first time by a Court of law. Lodging of the FIR does not amount to prosecution and is clearly distinguishable from prosecution.

It need not be over emphasized that the trial of a case follows cognizance and cognizance has to be preceded by investigation.

As a sequel to the above, this Court is not inclined to quash the

FIR in question by invoking its inherent power under Section 482 Cr.P.C.

Petition stands Dismissed.

(MANJARI NEHRU KAUL)
JUDGE

March 12, 2021

J.Ram

Whether speaking/reasoned: *Yes/No*
Whether Reportable: *Yes/No*