IN THE HIGH COURT OF JUDICATURE AT BOMBAY, NAGPUR BENCH, NAGPUR.

CRIMINAL APPLICATION (BA) NO.585/2024
Sanket s/o Vijay Murkute
..vs..
Director General of Goods and Service Tax Intelligence, Nagpur Zonal Unit represent through Senior Intelligence Officer, Nagpur

Office Notes, Office Memoranda of Coram, appearances, Court orders or directions and Registrar's orders	Court's or Judge's Order

Shri S.V.Manohar, Senior Counsel assisted by Shri P.S.Dhenge, Advocate for the Applicant.
Shri S.N.Bhattad, Counsel for the Non-applicant.

CORAM : URMILA JOSHI-PHALKE, J.
CLOSED ON : 25/06/2024
PRONOUNCED ON : 28/06/2024

1. By this application under Section 439 of the Code of Criminal Procedure, the applicant arrested on 13.3.2024 seeks regular bail in connection with Case No.DGGI/INT/INTL/505/2023-GR C-O/o ADG-DGGI-ZU-Nagpur registered for offences punishable under Section 132(1)(b), 132(1)(c), 132(1)(1)(i) read with 132(5) of the CGST Act, 2017 by the non-applicant.

2. Heard learned Senior Counsel Shri S.V.Manohar for the applicant and learned counsel Shri S.N.Bhattad for the non-applicant.

3. The allegations against the applicant are that he is proprietor of M/s.Om Sai Enterprises and his father is proprietor of S.P.Enterprises. The applicant is responsible for management and affairs of both firms registered on PAN. The investigating agency has seized a laptop from premises of the applicant and on forensic investigation, it revealed that 89 different firms are maintained by separate folders by the applicant. It further revealed that the applicant has carried out transactions of sale and supply by showing vexatious documents of existence of other firms and has never conducted any business activities through the said firms and illegally claimed Input Tax Credit (ITC) over the said transactions and thereby committed an offence.

4. The Directorate General of GST Intelligence (DGGI) Nagpur Zonal Unit conducted a search on 22.12.2023 and found that another firm namely “Shri Krishna Traders” in the name of Manoj Khobragade is also managed and operated by the applicant. The said firm is also engaged in availing and passing on fake ITC and has individually passed around Rs.12.00 crores involving

invoice value of Rs.67.00 crores. The three Shell Firms owned and operated by the applicant cumulatively availed and passed on fake ITC around Rs.37.00 crores. On the basis of these allegations, the crime was registered.

5. Learned Senior Counsel for the applicant submitted that the laptop seized by the investigating agency does not belong to the applicant, but the same belongs to Vijay Akre and Vikesh Joshi. When the search was conducted by the investigating agency, 22.11.2023, at resident and office of the applicant, said Vijay Akre was at the house of the applicant who handed over the said laptop to the investigating agency. The applicant has not created any firm as alleged by the investigating agency. The applicant is operating only two firm i.e. M/s.Om Sai Enterprises and S.P.Enterprises. He submitted that alleging false allegations, summons was issued to the applicant and he was arrested. The applicant was arrested without complying notice under Section 41 of the Code of Criminal Procedure. The investigating agency has not ascertained allegation whether the applicant was operating and managing affairs of other firms. The allegations of

contravention of provisions and availing excess ITC are baseless. The offences alleged are punishable with imprisonment less than seven years. The investigating agency has not followed guidelines issued by the Honourable Apex Court in the case of **Satender Kumar Antil vs. CBI, reported in 2022 SCC OnLine SC 825.**

6. In support of his contentions, learned Senior Counsel for the applicant placed reliance on the decision of the Honourable Apex Court in the case of **Ratnambar Kaushik vs. Union of India, reported in (2023)2 SCC 621,** wherein it is held that bail by considering period of custody and submission of chargesheet and trial would take its own time and bail was granted subject to certain conditions. He also placed reliance on order passed by this court in Criminal Application (BA) No.19/2024 (**Rahul s/o Kamalkumar Jain vs. Director General of Goods and Service Tax Intelligence, Nagpur Zonal Unit, thr. Sr. Intelligence Officer, Nagpur)** on 25.1.2024.

7. *Per contra*, learned counsel for the non-applicant submitted that Section 69 of the CGST Act empowers the Commissioner to arrest a person when he

has reasons to believe that a person has committed offence specified in clause (a) or (b) or (c) or (d) of sub-section (1) of Section 132 which is punishable under clauses (i) or (ii) of sub-section (1) of sub-section 2 of the said section. He may by order authorizes any officer of the Central Tax to arrest such person. He further submitted that the applicant has systematically planned and flouted in all 92 GST Firms in his name, in the names of his relatives, and dummy persons and effected total bogus supply worth of Rs.850.71 crores and availed fraudulent ITC of Rs.153.11 crores and passed on bogus credit of Rs.141.27 crores. Thus, there is evasion of tax. The investigation regarding evasion of tax in respect of other firms is in progress. Considering large magnitude of amount involved, the application deserves to be rejected.

8. In the light of the above submissions, if Scheme contemplated under Section 132 of the CGST Act, 2017 is considered, it provides punishment for certain offences and it is urged that it is only when a person supplies any goods or services or both without issue of any invoice, in violation of the provisions of the Act and with an intention to evade

taxes or issues any invoice or bill without supply of goods or services or both in violation of the provisions of the Act, leading wrongful availment of the utilization of ITC or refund of the tax or avails ITC using such invoice or bill or collects any amount as tax but fails to pay same to the Government beyond a period of three months, he can be said to have committed offences under clauses (a) or (b) or (d) of the Ac which is cognizable and non bailable and the imprisonment imposed by way of punishment, on being convicted for the said offences, may extend to five years or fine, if the amount of ITC is wrongly availed or the amount of refund wrongly taken exceeds Rs.500 lacs. In all other cases, punishment prescribed is imprisonment which may extend to three years and with fine.

9. In the light of the above provisions prescribing the punishment, learned counsel for the applicant would invoke the law laid down by the Honourable Apex Court in the cases of **Satender Kumar Antil vs. CBI** *supra* and **State of Gujarat etc. vs. Choodamani Parmeshwaran Iyer and anr, reported in 2023 SCC OnLine SC 1043** and submitted that considering penalty to be imposed on conviction for

the offence alleged to have been committed, the arrest of the applicant was unwarranted but the investigating agency has not considered the same. Admittedly, principles of paramount importance is, 'bail is rule and jail is exception'. Now, investigation is completed and further incarceration of the applicant in jail is not required.

10. Insofar as submissions of learned counsel for the non-applicant are concerned, as regards applicability of Section 41A of the Code of Criminal Procedure, the same has been dealt with by the Honourable Apex Court in the case of **State of Gujarat etc. vs. Choodamani Parmeshwaran Iyer and anr** *supra* wherein it is observed that it is well settled position of law that power to arrest a person by an empowered authority under the GST Act and could be termed as statutory in character and ordinarily the writ court should not interfere with exercise of such power. We say so because such power of arrest can be exercised only in those cases where the Commissioner or his delegatee has reasons to believe that the person has committed any offence specified in clause (a) or clause (b) or clause(c) or clause (d) of sub-Section (1) of Section 132 which is

punishable under clause (i) or (ii) or sub-section (1) or sub-section (2) of the said Section.

It is further held by the Honourable Apex Court that in the light of the fact that Section 69(1) of the CGST Act, 2017 authorizes the arrest only of persons who are believed to have committed cognizable and non-bailable offences, but Section 69(3) of the CGST Act, 2017 deals with the grant of bail and the procedure for grant of bail even to persons who are arrested in connection with non-cognizable and bailable offences and (2) in the light of the fact that the Commissioner of GST is conferred with the powers of search and seizure under Section 67(10) of the CGST Act, 2017, in the same manner as provided in Section 165 of the Cr.P.C., 1973, the contention of the Additional Solicitor General that the petitioners cannot take umbrage under Section 41 and 41A of Cr.P.C. may not be correct.

It is further held by the Honourable Apex Court that it may be remembered that Section 41(3) of Code of Criminal Procedure, does not provide an absolute irrevocable guarantee against arrest. Despite the compliance with the notices of appearance, a Police Officer himself is entitled under Section 41A(3) Code of Criminal Procedure, for reasons to be recorded, arrest a person. At this stage, we may notice the difference in language between Section 41A(3) of the Code of Criminal Procedure and 69(1) of the CGST Act, 2017. Under Section 41A(3) of the Code of Criminal Procedure, "reasons are to be recorded", once the Police Officer is of the opinion that the persons concerned ought to be arrested. In contrast, Section 69(1) uses the phrase "reasons to believe". There is a vast difference between "reasons to be recorded" and "reasons to believe."

11. This Court at Principal Seat in the case of **Daulat Samirmal Mehta vs. Union of India, thr.the Secretary and ors, reported in 2021 SCC OnLine Bom 200** dealt with the issue and held that power to arrest is provided in Section 69. As per sub-section (1), where the Commissioner has reasons to believe that the person has committed any offence specified in clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) of Section 132, which is punishable under clause (i) or (ii) of sub-

section (1) or sub-section (2) of the said section, he may by order authorize any officer of central tax to arrest such person. Chapter XIX deals with offences and penalties. Section 132 is part of Chapter XIX. It provides for punishment for committing certain offences. As per sub-section (1), whoever commits any of the twelve offences mentioned therein shall be punished in the manner provided in clauses (i) to (iv) of sub-section (1).

12. In this case, we are concerned about Section 132(1)(b) and 132(1)(c) of the CGST Act, 2017.

As per clause (c) of sub-section (1) of Section 132, the offences are availing ITC using invoice or bill without the supply of goods or services or both in violation of the CGST Act.

As per clause (b), a person who issues any invoice or bill without supply of goods or services or both in violation of the provisions of the CGST Act or the rules made thereunder leading to wrongful availment or utilization of ITC or refund of tax.

If a person commits the above two offences as per clauses (b) and (c), he shall be punishable under clause (i) if the amount of tax is evaded or the amount or ITC wrongly availed of or utilized or the amount of refund wrongly taken exceeds Rs.500 lacs with imprisonment for a term which may extend to five years. All other penalties are below five years. Therefore, maximum penalty that can be imposed for committing offence under clauses (b) and (c) of sub-section (1) of Section 132 is imprisonment which may extend to five years and with fine.

As per sub-section 5, the offences specified in clause (a) or (b) or (c) or (d) of sub-section (1) and punishable under clause (i) of that sub-section are cognizable and non-bailable.

13. Reverting back to the of the present case, it is alleged that the applicant, by using a single PAN and without conducting any business and supply of any goods from the registered premises, illegally claimed refund of the accumulated ITC on account of trade/supply of goods and contravened provisions of the CGST Act. The office of the non-applicant recorded statements of the applicant and various witnesses. The non-applicant relied upon

statements of witnesses including the applicant and submitted that the arrest of the applicant is justified. Section 136 of the CGST Act deals with relevancy of statement under certain circumstances. As per the said Section, a statement made and signed by a person on appearance in response to any summons issued under section 70 during the course of any inquiry or proceedings under this Act shall be relevant. For the purpose of proving an offence, As per the said Section, a statement made and signed by a person on appearance in response to any summons issued under section 70 during the course of any inquiry or proceedings under this Act shall be relevant. For for the purpose of proving an offence under this Act, the truth of the facts which it contains, (a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or (b) when the person who made the statement is examined as a witness in the case before the court and the court is of the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice.

Thus, Section 136 will only come into play at the time where the trial commences and the said provision is important to highlight the fact that an admission made by person before the officials under the CGST Act, 2012 would be *per se* admissible in evidence unless it receives imprimatur of the Court.

14. From the material collected on record, reasons recorded are that during search, some documents were found showing that the applicant is running several firms on one PAN and without supplying any goods and though the said firms are not in existence, claimed ITC on account of trade/supply of goods.

15. In the case of **Arnesh Kumar vs. State of Bihar, reported in (2014)8 SCC 273**, the Honourable Apex Court while laying down some guidelines clarified that directions issued would not only be applicable to cases under 498-A of the Indian Penal Code or Section 4 of the Dowry Prohibition Act but also would cover cases where offence is

punishable with imprisonment for a terms which may be less than seven years or which may extend to seven years whether with or without fine.

16. The Honourable Apex Court in the case of **Satender Kumar Antil vs. CBI** *supra* has reiterated the above principle in paragraph Nos.26 & 27 which is reproduced as under:

> “26. We only reiterate that the directions aforesaid ought to be complied with in letter and spirit by the investigating and prosecuting agencies, while the view expressed by us on the non-compliance of Section 41 and the consequences that flow from it has to be kept in mind by the Court, which is expected to be reflected in the orders.
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> 27. Despite the dictum of this Court in Arnesh Kumar (supra), no concrete step has been taken to comply with the mandate of Section 41A of the Code. This Court has clearly interpreted Section 41(1)(b)(i) and (ii) inter alia holding that notwithstanding the existence of a reason to believe qua a police officer, the satisfaction for the need to arrest shall also be present. Thus, sub-clause (1)(b)(i) of Section 41 has to be read along with sub-clause (ii) and therefore both the elements of ‘reason to believe’ and ‘satisfaction qua an arrest’ are mandated and accordingly are to be recorded by the police officer.”

17. Upon considering the Scheme contained in Section 132 of Chap (XIX) of the CGST Act, 2017 and after taking into account the punishment provided, the decision in the case of **Arnesh Kumar vs. State of Bihar** *supra* was extensively reproduced in the case of **Daulat Samirmal Mehta vs. Union of India, thr.the Secretary and ors** supra which is reproduced as under:

> "The requirement under sub-section (1) of Section 69 is reasons to believe that not only a person has committed any offence as specified but also as to why such person needs to be arrested. From a perusal of the reasons recorded by the Principal Additional Director General, we find that other than paraphrasing the requirement of Section 41 Cr.P.C., no concrete incident has been mentioned therein recording any act of tampering of evidence by the petitioner or threatening / inducing any witness besides not co-operating with the investigation, not to speak of fleeing from investigation. In such circumstances, we are of the view that the Principal Additional Director General could not have formed a reason to believe that the petitioner should be arrested."

18. In the light of the above observations and in the light of the decision of the Honourable Apex Court in the case of **Ratnambar Kaushik vs. Union of India** *supra,* in the present case, the necessary investigation is already

carried out and chargesheet is already filed. The maximum punishment provided is five years. Further detention of the applicant in jail is not required. As such, the application deserves to be allowed, as per order below:

ORDER

(1) The criminal application is **allowed**.

(2) The applicant shall be released on bail, in connection with Case No.DGGI/INT/INTL/505/2023-GR C-O/o ADG-DGGI-ZU-Nagpur registered for offences punishable under Section 132(1)(b), 132(1)(c), 132(1)(1)(i) read with 132(5) of the CGST Act, 2017 by the non-applicant, on his executing a P.R.Bond in the sum of Rs.2.00 lacs with one solvent surety of the like amount.

(3) The applicant shall attend the office of the non-applicant as and when required for the investigation purpose.

(4) The applicant shall surrender his passport, if any, before the trial court within a week from the date of his release from the jail.

(5) The applicant shall not leave the jurisdiction of the Nagpur district without prior permission of the Court.

The application stands **disposed of**.

(**URMILA JOSHI-PHALKE, J.**)

!! BrWankhede !!