

Neutral Citation No. 2024:PHHC:

IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH

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CRM-M-37860-2024 (O&M)
Date of decision: 14.08.2024

Vishal Chauhan ...Petitioner

Versus

Haryana State GST (Intelligence Unit) through
Excise Taxation Officer-cum-Proper Officer, Rohtak ...Respondent

CORAM: HON'BLE MRS. JUSTICE MANISHA BATRA

Present:- Mr. Rana Gurtej Singh, Advocate &
Mr. Nikhil Goyal, Advocate
for the petitioner (Through VC)

Ms. Nidhi Garg, AAG, Haryana.

MANISHA BATRA, J. (Oral)

1. Prayer in this petition, filed under Section 439 of Cr.P.C., is for grant of regular bail to the petitioner in Criminal Complaint bearing No. COMA/1410/2024, filed under Section 132 of the Haryana Goods & Services Tax Act, 2017 (*for short 'HGST Act'*) and Central Goods & Services Tax Act, 2017 (*for short 'CGST Act'*) read with Section 20 of the Integrated Goods & Services Tax, 2017 (*for short 'IGST Act'*), tiled as ***Excise & Taxation Officer-cum-Proper Officer (State Tax), Haryana vs. Vishal Chauhan***, pending before the Court of learned Chief Judicial Magistrate, Rohtak.

2. Brief facts of the case relevant for the purpose of disposal of the present petition are that the aforementioned complaint has been filed by the respondent-complainant on the allegations that the petitioner was proprietor of

M/s Jai Shree Balaji Traders, registered under the provisions of HGST Act, CGST Act and IGST Act, which was a trading concern engaged in the business of iron scrap/ferrous scrap. On examination of GST returns of this firm, it was found that the firm had shown inward supplies of iron scrap/purchases from various suspicious dealers/tax payers of the State of Delhi, had been availing wrongful Input Tax Credit (*for short 'ITC'*) and was discharging its GST liability mainly through utilization of credit ledger by discharging less than 1% of its liability through cash ledger. Inquiry was initiated. Inspection/search proceedings were carried out in the business premises of the firm of the petitioner and it was found that no business was in fact being carried out at the given address. The additional place of business of his firm, as disclosed by the petitioner, was also checked and documents kept therein were taken into possession. Reports were sought from the jurisdictional authority of the State of Delhi, as per which, all the 29 firms shown as suppliers of the firm of the petitioner were either non-existent or were non-functional or were carrying out no business activity or were involved in fraudulent activities and none of those firms was registered for dealing in the business of iron scrap. It was revealed that the firm of the petitioner had availed and utilized wrongful ITC worth Rs. 12,48,60,671/-.

3. As per further allegations, the bank account of the petitioner/his firm was attached and it came to notice that the petitioner, on 12.04.2023, had transferred an amount of Rs. 75,00,000/- to one unknown bank account, which was not related to any purported supplier of the firm. Summons were issued against the petitioner. He appeared before the competent authority under the HGST Act on 03.05.2023. His statement was recorded. Some Stock register, ledgers etc. were produced by him. He was directed to produce sale/purchase

invoices pertaining to the month of April, 2023 along with Fastag statements of his own vehicles. Some invoices/e-way bills were produced by the petitioner. Those invoices were not found to be bearing signatures of suppliers/authorized signatories as mandatorily required. The petitioner had not made payments in the bank account of its purported suppliers but still availed ITC on the strength of fictitious invoices shown to be issued by non-existent/suspicious firms. The petitioner failed to provide the complete information sought from him and gave evasive replies. He was arrested on 20.02.2024, as per orders passed by the Commissioner of State Tax on 19.02.2024. A formal complaint has been filed against him before the competent Court after completion of necessary investigation/inquiry and formalities. The petitioner moved applications for grant of bail, all of which have been dismissed by the trial Magistrate and then by the Court of learned Additional Sessions Judge, Rohtak.

4. It is argued by learned counsel for the petitioner that he has been illegally arrested in this case since he had never failed to comply with the summons issued by the respondent and made compliances of the notices so issued, thereby appearing either in person and supplying requisite documents or by putting appearance through some authorized representative, whenever called to do so. It is submitted that the offences punishable under Sections 132(1)(b) and (c) of the HGST Act are punishable with imprisonment for a maximum period of 05 years and, therefore, the provisions of Sections 41 and 41-A of the Cr.P.C. were to be necessarily complied with, which have not been complied with by the respondent and, hence, his arrest is illegal. In this regard, learned counsel for the petitioner has relied upon the authorities cited

as ***Arnesh Kumar vs. State of Bihar : 2014 AIR (SC) 2756*** and ***Dr. Rini***

Johar and another vs. State of M.P. & others : 2016 (3) RCR (Criminal) 300.

5. It is further argued by learned counsel for the petitioner that he was arrested in this case on 20.02.2024 without adjudication and assessment of tax liability of his firm under the provisions of HGST Act and CGST Act, which prescribe a specific procedure for assessment and unless such assessment or adjudication was conducted determining the liability of his firm, no offence was made out and even prosecution could not be launched against him. He has further argued that the petitioner was under a *bonafide* belief that the investigation stood culminated on cancellation of GST certificate of his firm, which stood cancelled w.e.f. 01.04.2020, vide order dated 10.10.2023 and he was given to believe that the proceedings under Sections 73 and 74 of HGST Act for adjudication of the allegations would be conducted to determine the legal tax liability of his firm but instead of making adjudication, he was arrested in this case, which was illegal and, therefore, it is urged that on this ground alone, he deserves to be extended benefit of bail. To substantiate his argument, learned counsel for the petitioner has relied upon the authorities cited as ***Akhil Krishan Maggu & another vs. Deputy Director, Directorate General of GST Intelligence & others : 2020 (77) GST 279, Jayachandran Alloys (P) Ltd. vs. Superintendent of GST & Central Excise : (2019) 105 Taxmann.com 245 (Madras) and Sanjay Chandra vs. CBI : Criminal Appeal No. 2178 of 2011, decided on 23.11.2011.***

6. Learned counsel for the petitioner has further argued that he has been arrested merely on the basis of suspicion of evasion of tax without any credible piece of information. He does not have any criminal antecedents. He has a permanent place of business. There is no flight risk as he is ready to surrender his passport and to abide by other terms and conditions of bail to be

imposed by this Court. No incriminating concrete document has been placed on record by the respondent showing his involvement in tax evasion. There is no determination by the competent authority that he is liable to pay some penalty. The respondent has not been able to show reasons to believe his involvement in the subject offences. The investigation against him stands completed. Pre-charge evidence is yet to be recorded. The trial is to take time. No useful purpose would be served by keeping the petitioner in custody anymore.

7. It is further argued by learned counsel for the petitioner that a show cause notice under Section 74(1) of the HGST Act, which provide for determination of tax not paid has been issued against the firm of the petitioner jointly with M/s Tata Steel Ltd., who is alleged to be the major recipient of ITC from his firm. The adjudication of this notice is impossible without his participation, which cannot be made by him while being in custody. The exercise of power to arrest was done by the respondent in derogation of procedure envisaged under the HGST Act. He has further argued that since M/s Tata Steel Ltd., who is allegedly the ultimate beneficiary of sum amounting to Rs. 3,81,02,254/- under CGST Act and Rs. 3,81,02,254/- under the HGST Act of wrongful claim of ITC for some transaction i.e. total sum of Rs. 7,62,04,508/-, as such, on reconciliation, these amounts would bring alleged determinable tax attributed to the firm of the petitioner to be below Rs. 5 crores, which makes offences alleged to be committed by him as bailable and non-cognizable in nature consequently making him entitled to be released on bail as the respondent in complete derogation to settled judicial precedents has initiated criminal steps by bypassing the scheme of HGST/CGST Acts merely on the basis of suspicion of evasion of tax and in the absence of any

credible piece of information. It is further submitted that even otherwise since the maximum sentence for commission of offences punishable under Sections 132(1)(b) and (c) of the HGST Act/CGST Act is 05 years and he has remained in custody for about a period of 06 months, therefore, he deserves to be released on bail. To buttress his argument on this point, learned counsel for the petitioner has relied upon the authorities cited as ***Ashutosh Garg vs. Union of India***, Special Leave to Appeal (Crl.) No. 8740 of 2024, decided on 26.07.2024 and ***Yash Goyal vs. Union of India*** : Criminal Appeal No. 2784 of 2024, decided on 28.06.2024 by Hon'ble Supreme Court.

8. Respondent has filed reply resisting the claim made by the petitioner. Learned State counsel, assisted by Mr. Mukesh Gautam, authorized representative of GST Department, while not disputing the fact that on completion of investigation, a complaint has been presented against the petitioner before the concerned Court and pre-charge evidence is yet to be recorded and also admitting that a show cause notice for adjudication and assessment of tax liability of the firm of the petitioner and M/s Tata Steels Ltd. has been issued under Section 74(1) of HGST/CGST Acts, has argued that since the petitioner evaded the tax liability of huge amount of money and availed ITC by misusing his position, thereby causing loss to government exchequer, therefore, under the given circumstances, the petitioner is not entitled to get indulgence of bail by this Court. Accordingly, it is urged that the petition is liable to be dismissed.

9. The submissions made by both the parties have been heard and carefully considered, besides going through the material placed on record.

10. As per the allegations, the petitioner, who was proprietor of M/s Jaishree Balaji Traders engaged in the trading of iron scrap/ferrous scrap, had

shown inward supplies of iron scrap/purchases from different dealers from the State of Delhi and on examination of GST returns of his firm and finding them to be suspicious, inquiry was conducted, which revealed that he availed wrongful ITC worth Rs. 12,48,671/- by showing purchases of scrap from suppliers of the State of Delhi as well as Haryana during the period from April, 2018 to April, 2023 through those suppliers/firms were found to be non-existent or non-functional or carrying out no business or involved in fraudulent activities and were not even registered for dealing in iron scrap. Power to arrest is provided under Section 69 of the HGST Act, as per which, where the Commissioner has reasons to believe that a person has committed offences specified in different clauses of Section 132 of HGST Act, he may authorize any Officer of State Tax to arrest such person and such Officer shall inform such person grounds of arrest and produce him before a Magistrate. Section 132 of the HGST Act provides for punishment for committing certain offences. Relevant for the purpose of this case are offences under Section 132(1)(b) and (c) of the HGST Act, as per which, any person committing or causing to commit and retaining benefit by issuing 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 utilization of input tax credit or refund of tax or avails input tax credit using such invoice or bill, shall be liable to punishment. As per this provision, in cases where the offence of tax evaded or the amount of ITC wrongfully availed or utilized or the amount of refund wrongfully taken exceeds Rs. 500 Lakhs, the concerned person shall be liable to undergo imprisonment for a term which may extend to 05 years with fine.

11. The provisions of Section 132 of HGST Act, which are

pari materia with Section 132 of CGST Act are relevant for the purpose. As per Section 132 (1)(b) and (c), whoever issues an invoice or bill without supply of goods or service or both in violation of provisions of this Act, leading to wrongful availment or utilization of Input Tax Credit or refund of tax or avails Input Tax Credit using such invoice or bill ‘**commits**’ the offence under this Section and is liable for punishment with imprisonment for a term which may extend to 05 years and with fine in cases where the amount of tax evaded or the amount of Input Tax Credit wrongly availed or utilized or the amount of refund wrongly taken exceeds Rs. 500 Lakhs. In *Jayachandran’s* case (supra), the allegation of the revenue was that the petitioner-company had contravened the provisions of Section 16(2) of the CGST Act and availed excess ITC insofar as there had been no movement of goods as against the supplier and the petitioner and the transactions were bogus and fictitious, created only on paper solely to avail ITC. A Division Bench of the Madras High Court in the said case observed that the use of word ‘**commits**’ makes it more than amply clear that act of committal of the offences is to be fixed first before punishment is imposed. Section 21 of the CGST Act provides that where Input Service Distributor distributes credit in contravention of the provisions contained in Section 20 resulting in excess distribution of credit to one or more recipients, the excess credit so distributed shall be recovered from such recipients along with interest and the provisions of Section 73 and 74, as the case may be, shall *mutatis mutandis* apply for determination of the amount to be recovered. It further observed that ‘**determination**’ of the excess credit by way of procedure set out in Sections 73 and 74 as the case may be is a pre-requisite for the recovery thereof. Sections 73 and 74 deal with the assessment and as such, it is clear and unambiguous that such recovery can only be

initiated once the amount of excess credit has been quantified and determined in an assessment. It was also observed that when recovery is made subject to **‘determination’** in an assessment, the argument of the department that punishment for the offence alleged can be imposed even prior to such assessment is clearly incorrect and amounts to putting cart before the horse. **The only exceptions to the rule of determination as discussed in this case, are that where the assessee was a habitual offender, who had visited consistently and often with penalties and fines for contraventions of statutory provisions. It is only in such cases that the authorities might be justified in proceedings to pre-empt the assessment and initiate action against the assessee in terms of section 132, for reasons to be recorded in writing.**

12. In the instant case, the petitioner jointly with M/s Tata Steel Ltd., who is alleged to be the major recipient of ITC from the firm of the petitioner, is alleged to have submitted the documents/issued invoices in favour of M/s Tata Steels Ltd. Annexure P-18 is copy of show cause notice issued under Section 74(1) of HGST Act/CGST Act read with relevant provisions of IGST jointly against the petitioner and M/s Tata Steels Ltd alleging therein that M/s Tata Steels Ltd. had made wrongful claim of ITC for a sum of Rs. 3,81,02,254/- under CGST Act and Rs. 3,81,02,254/- under the HGST Act i.e. a total sum of Rs. 7,62,04,508/-. The said claim is yet to be determined by the competent authority of the respondent by making proper assessment/adjudication. As such, it is only after the adjudication/assessment that the liability of the firm of the petitioner with regard to exact amount of evasion of tax is to be determined and, therefore, the question as to the exact liability of the petitioner would be decided only after adjudication of the same

under Section 74 of the HGST/CGST Acts. Hence, assuming that the petitioner is liable for punishment under Section 132(1)(b) and (c) of the HGST Act is yet to be decided and is pre-mature at this stage.

13. In **Akhil Krishan Maggu**'s case (supra), a Division Bench of this Court, while relying upon **Jayachandran**'s case (supra), had observed that keeping in mind the provisions of Sections 69 and 132 of HGST Act which empower Proper Officer to arrest a person who has committed any offence involving evasion of tax more than Rs.5 Crore and prescribe maximum sentence of 5 years which fell within the purview of Section 41A of Cr. P.C., the power of arrest should not be exercised at the whims and caprices of any officer or for the sake of recovery or terrorizing any businessman or create an atmosphere of fear, whereas it should be exercised in exceptional circumstances during investigation. The said circumstances had been illustrated as under:

- (i) a person is involved in evasion of huge amount of tax and is having no permanent place of business,
- (ii) a person is not appearing inspite of repeated summons and is involved in huge amount of evasion of tax,
- (iii) a person is a habitual offender and he has been prosecuted or convicted on earlier occasion,
- (iv) a person is likely to flee from country,
- (v) a person is originator of fake invoices i.e. invoices without payment of tax,
- (vi) when direct documentary or otherwise concrete evidence is available on file/record of active involvement of a person in tax evasion.

14. In **Ashutosh Garg**'s case (supra), which has relied upon by the petitioner, the High Court of judicature for Rajasthan at Jaipur had dismissed the prayer made by the petitioner, who was accused of creating and operating

294 fake firms and evading tax liability of Rs. 1032 crore by observing that the petitioner was not to be held entitled to get bail merely because the offence under Section 132 of the CGST was punishable with imprisonment for 05 years and was triable by the Magistrate. The Hon'ble Supreme Court allowed the Special Leave to Appeal by taking into consideration the fact that he was in custody for a period of 09 months and further that the offence carried maximum punishment for 05 years of imprisonment. The facts of **Ashutosh Garg's** case (supra) are squarely applicable to the facts of the present case. In **Yash Goyal's** case (supra), the appellant/accused was in custody for a period of more than 06 months. It was submitted by his counsel that the maximum sentence, which could be awarded for the offence, for which the appellant was incarcerated, was 05 years. While considering the maximum sentence, which could be awarded, the period of incarceration suffered by the appellant and the fact that the trial was likely to take time, Hon'ble Supreme Court had directed the appellant to be released on bail.

15. In the instant case, the petitioner is in custody since 20.02.2024. He has no criminal antecedents. He has a permanent abode. As such, there is no likelihood of the petitioner's fleeing from the country. He is also ready to surrender his passport. The investigation has completed and a complaint under Section 132 of the HGST Act read with the provisions of IGST Act has been filed against him. The trial is likely to take time. Show cause notice issued under Section 74(1) of the HGST Act/CGST Act upon him is yet to be adjudicated upon and the exact liability of the petitioner/his firm is yet to be fixed. The sentence to be awarded in this case is directly linked with the quantum of evasion of tax and the prosecution of the petitioner is also linked with determination of evasion of tax because if there is no evasion of tax, there

can be no criminal liability. The determination of tax liability is subject to the challenge before tribunals and courts and does not fall within the realm of criminal courts. Further in view of the fact that one M/s Tata Steels Ltd. has also been issued notice under Section 74(1) of the HGST Act/CGST Act jointly with the petitioner on the allegations of being major recipient of the ITC and its liability is also to be adjudicated upon, which obviously may reduce the liability to be imposed upon the petitioner, coupled with the fact that maximum period of punishment to be awarded under Section 132 of the HGST Act is 05 years and also in view of the ratio of law as laid down in afore-cited authorities and the discussion as made above, I am of the considered opinion that this petition deserves to be allowed.

16. Accordingly, the present petition is allowed. The petitioner is directed to be released on regular bail, subject to his executing personal bonds with two solvent sureties each in the sum of Rs. 50 Lakhs to the satisfaction of the trial Court and further subject to the condition that he will surrender his passport before the trial Court and shall not leave the country during trial without prior permission of the Court.

17. It is made clear that the observations made herein above are only for the purpose of deciding the present bail petition and the same shall have no bearing on the merits of the case.

14.08.2024
Waseem Ansari

(MANISHA BATRA)
JUDGE

Whether speaking/reasoned

Yes/No

Whether reportable

Yes/No