PRASHANT VILAS RANE
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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5001 OF 2025

1. Amit Manilal Haria
2. Hiren Uday Gada
3. Atul Hirji Maru ...Petitioners

VS

1. The Joint Commissioner, CGST & Central Excise.
2. The Superintendent, CGST & CX, Range-V, Division V, Mumbai East Commissionerate. ...Respondents

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Mr. Abhishek A. Rastogi with Pooja M. Rastogi, Meenal Songire, Aarya More, for Petitioners.
Mr. Ram Ochani with Sangeeta Yadav, for Respondent Nos.1 and 2.

CORAM: G. S. KULKARNI &
AARTI SATHE, JJ.

RESERVED ON : 27 JANUARY 2026.
PRONOUNCED ON : 25 FEBRUARY 2026

JUDGMENT (Per G. S. Kulkarni, J.).

1. This petition under Article 226 of the Constitution of India challenges an order-in-original dated 1 February 2025 whereby the show cause notice dated 2 August 2024 issued to the petitioners by the Joint Commissioner (AE), CGST & C.Ex. Mumbai East, in the proceedings of one 'M/s. Shemaroo Entertainment Limited', has been confirmed not only against the said entity but also against the petitioners who are the Chief Financial Officer, Chief Executive Officer and Director and Joint Managing Director respectively, being the employees of the said entity, to the extent that the petitioners have been ordered with a penalty of

Rs.1,33,60,60,889/- each. The operative portion of the impugned order passed against the petitioners is required to be noted which reads thus:

> "(F). In respect of Shri, Atul Hirji Mara, Joint Managing Director; Shri, Hiren Gada, Chief Executive Officer, and Shri, Amit Haria, Chief Financial Officer of M/s. Shemaroo Entertainment Limited
>
> (i) I impose penalty amounting to Rs. 1,33,60,60,889/- (Rupees One hundred thirty three crores sixty lakh sixty thousand eight hundred and eighty nine only) (inadmissible Input Tax Credit (ITC) availed amounting to Rs. 70,25,61,996/-(CGST of Rs. 35,12,80,998/- & SGST of Rs. 35,12,80,998/-) and ineligible ITC passed on amounting to Rs. 63,34,98,893/- (CGST of Rs. 31,67,49,446/- & SGST of Rs. 31,67,49,446/-)) on Shri, Atul Hirji Maru, Joint Managing Director of M/s Shemaroo Entertainment Limited of an amount equivalent to the fake input- tax credit availed of or passed on, under Section 122(1A) of the CGST Act, 2017 and MGST Act, 2017;
>
> (ii) I impose penalty amounting to Rs. 1,33,60,60,889/- (Rupees One hundred thirty three crores sixty lakh sixty thousand eight hundred and eighty nine only) (inadmissible Input Tax Credit (ITC) availed amounting to Rs. 70,25,61,996/-(CGST of Rs. 35,12,80,998/- & SGST of Rs. 35,12,80,998/-) and ineligible ITC passed on amounting to Rs. 63,34,98,893/- (CGST of Rs. 31,67,49,446/- & SGST of Rs. 31,67,49,446/-)) on Shri, Hiren Gada, Chief Executive Officer of M/s Shemaroo Entertainment Limited of an amount equivalent to the fake input tax credit availed of or passed on, under Section 122(1A) of the CGST Act, 2017 and MGST Act, 2017;
>
> (iii) I impose penalty amounting to Rs. 1,33,60,60,889/- (Rupees One hundred thirty three cGaramond Classicorores sixty lakh sixty thousand eight hundred and eighty nine only) (inadmissible Input Tax Credit (ITC) availed amounting to Rs. 70,25,61,996/-(CGST of Rs. 35,12,80,998/- & SGST of Rs. 35,12,80,998/-) and ineligible ITC passed on amounting to Rs. 63,34,98,893/- (CGST of Rs. 31,67,49,446/- & SGST of Rs. 31,67,49,446/-)) on Shri, Amit Haria, Chief Financial Officer of M/s Shemaroo Entertainment Limited of an amount equivalent to the fake input tax credit availed of or passed on, under Section 122(1A) of the CGST Act, 2017 and MGST Act, 2017."

2. The facts in brief are required to be noted.

The petitioners are individuals and are the employees/officers of M/s. Shemaroo Entertainment Ltd. (for short '**the company**') duly incorporated under the provisions of the Companies Act, 1956, having its principal place of business at Marol Naka, Andheri (East), Mumbai. The genesis of the dispute appears to be

a search action, which was initiated on 5 September 2023 in terms of authorization issued under Section 67(2) of the Central Goods And Services Tax Act, 2017 (for short '**CGST Act**') in respect of four firms namely M/s. Uttam Movies, M/s. Mangal Entertainment, M/s. JDS Motion Pictures and M/s. JV Media Solutions. A statement of Jhaverchand Devraj Soni, the partner and authorized signatory of the said firms was also recorded. It is the petitioner's case that based on the statement of Mr. Jhaverchand Soni, the investigation was extended to the company. The principal place of business of the company was also searched on 5 September 2023 in terms of authorization as also a panchanama was drawn by the respondent authorities.

3. On 6 September 2023, summonses were issued to the petitioners and statements of the petitioners were recorded. The petitioners were also arrested for allegedly committing offences under Section 132(1)(b) and 132(1)(c) of the CGST Act. The petitioners were produced before the Additional Chief Metropolitan Magistrate, 19th Court, Esplanade, Mumbai on 7 September 2023 and were granted bail. Significantly, the statements of the petitioners recorded before the CGST authorities on 6 September 2023, were retracted on 7 September 2023 before the Court of Additional Chief Metropolitan Magistrate, 19th Court, Esplanade, Mumbai.

4. On such backdrop, various summonses were issued to the petitioners from 11 September 2023 to 12 October 2023 and further statements were recorded from time to time. It is the petitioners' case that on 18 September 2023, the company deposited an amount of Rs.12,00,00,000/- under protest in Form GST

DRC-03. An amount of Rs.2,00,00,000/- was paid in cash and the balance of Rs.10,00,00,000/- was paid through the Electronic Credit Ledger.

5. On 5 October 2023, the company filed a representation cum letter submitting various documents relating to purchase and sale of rights undertaken by the Company in the course of its business. The company also denied all the allegations of fake invoicing and circular trading levelled against the Company. On 5 March 2024, a prosecution was lodged against the company and the petitioners (Registration No.1900032/2024) under the provisions of Section 132(1), Section 132(5) and Section 137 of the CGST Act.

6. On 8 March 2024, the company filed a letter before the Principal Commissioner and Chief Commissioner, CGST and Central Excise, Mumbai – North requesting for issuance of show cause notice pursuant to the investigations conducted against the company and its officials.

7. On 11 June 2024, an intimation of tax ascertained as being payable under Section 74(5) of the CGST Act, was issued to the company in Form GST DRC-01A. The company filed its reply to the intimation issued in Form GST DRC-01A on 19 June 2024 thereby not accepting the alleged tax and penalty liability proposed to be recovered from the Company.

8. On 21 June 2024, a Criminal Revision Application No.943 of 2023 filed by the Department seeking revision of order dated 7 September 2023 passed by the Additional Chief Metropolitan Magistrate, 19th Court, Esplanade, Mumbai, which came to be dismissed by the learned Additional Sessions Judge, Greater

Mumbai, Mazgaon.

9. On such backdrop, on 2 August 2024, a separate show cause notice in Form GST DRC-01 for the Financial Year 2017-2018 to Financial Year 2021-2022 was issued to the company, in which it was *inter alia* alleged that the company had availed and passed on ineligible Input Tax Credit (**ITC**) of Rs.70.25 crores and Rs.63.35 crores, by fake invoices without actual supply, violating Section 16(2)(b) of the CGST Act and the proposed penalties under Section 122. On 2 August 2024, show cause notices which were common to the notices issued to the company, were separately issued to the petitioners proposing imposition of penalty under Section 122(1A) of the CGST Act for the Financial Year 2017-2018 to Financial Year 2021-2022. The show cause notices were contested by the company by its reply dated 24 September 2024. The petitioners also filed their replies to the show cause notices on 26 September 2024 contending that no penalty under Section 122(1A) was imposable in view of the decision of this Court in **Shantanu Sanjay Hundekari vs. Union of India**[1] against which a Special Leave Petition was dismissed by the Supreme Court in **Union of India vs. Shantanu Sanjay Hundekari**[2].

10. On 2 December 2024, a personal hearing was granted on the show cause notices issued to the company, as also issued to the petitioners. Consequent thereto on 1 February 2025 respondent No.1 has passed an impugned Order in Original imposing penalties of Rs.133,60,60,889/- each on the petitioners. Thus,

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the impugned order to the extent it relates to the petitioners, confirmed the penalties of Rs.133.60 crores each under Section 122(1A) of the CGST Act and MGST Act which is the subject matter of challenge in the present Writ Petition.

11. It is the case of the petitioners that this penalty equals the alleged wrongful ITC availed of Rs.70.25 crores and passed on of Rs.63.35 crores by the company, and thus the cumulative penalty as imposed on the petitioners comes to about Rs.400,81,82,667/- (400.81 crs). Respondent No. 2 issued an electronic summary of the impugned order in Form DRC-07 dated 5 February 2025. It is also the petitioners' contention that on 6 March 2025, the bail order dated 7 September 2023 passed in the case of the petitioners, was modified and the conditions for grant of bail were relaxed permitting the petitioners to travel abroad for a period of one year from the date of the said order. It is on these circumstances, this petition is filed praying for the following substantive reliefs:-

> "(a) Declare that the Impugned Order dated 01.02.2025 [Exhibit- 'A'] to the extent it has been issued to the Petitioners is without the authority of law, is without jurisdiction and is unsustainable in law;
>
> (b) Declare that the Impugned Order dated 01.02.2025 issued and uploaded on 05.02.2025 [Exhibit- 'A'] to the extent it has been passed by the Respondent No. 1 in respect of the Petitioners is bad in law, is void ab initio, and, is ultra vires the scheme of Section 122 of the CGST Act read with the MGST Act;
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> (c) Issue a Writ of Certiorari or any other appropriate writ, order, or direction in the nature of Certiorari under Article 226 of the Constitution of India calling for all papers, records, and proceedings leading to the passing of the Impugned Order dated 01.02.2025 [Exhibit-'A'] and, after examining their validity and propriety, quash and set aside the Impugned Order dated 01.02.2025 [Exhibit- 'A'] passed by the Respondent No.1;
>
> (d) declare that the Impugned Order dated 01.02.2025 [Exhibit- 'A'] which aggregates multiple assessment periods, is fundamentally flawed as also ultra vires the statutory provisions governing assessment specifically Sections 2(11) and 59 of the CGST Act;
>
> (e) this Hon'ble Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ or order or direction under

Article 226 of the Constitution of India ordering and directing the Respondents to rescind and/or withdraw the Impugned Order dated 01.02.2025 [Exhibit-'A'] to the extent it has been passed against the Petitioners;

(f) that pending the hearing and final disposal of this Petition, the Respondents by themselves, their officers, subordinates, servants and agents be directed:

i. Not to act on or in consequence of the Impugned Order dated 01.02.2025 [Exhibit 'A'] to the extent it has been passed against the Petitioners;

ii. Not to take any coercive steps in any manner, in consequence of, or in relation to the Impugned Order dated 01.02.2025 [Exhibit- 'A'] to the extent it has been passed against the Petitioners;"

12. A reply affidavit on behalf of the respondents is filed of Shri.Rajanikant I. Pandey, Assistant Commissioner of CGST & Central Excise, Mumbai East. It is contended that the impugned order does not travel beyond the period for which the show cause notice was issued, and that a typographical error in the Summary of Order and the period mentioned in the Summary of Order was amended by way of issuance of Corrigendum to the order dated 22 May 2025 and dated 3 June 2025, and also copies of the corrigendum were provided to the petitioners. Insofar as the petitioners' contention on the jurisdictional issue of applicability of Section 122(1A) of the CGST Act is concerned, it is contended that it is an integral part of the CGST Act 2017. It is contended that on the date of issuance of the show cause notice covering the period from July 2017 to March 2022, the provision of Section 122(1A) of the CGST Act was in effect and for such reason the provision of Section 122(1A) was correctly invoked in the show cause notice, issued to the petitioners. It is next contended that by the very wording of the provision, the provision is applicable to the petitioners. It is further contended that in the present case, the petitioners, who are the Joint Managing Director, the Chief Executive Officer and Director and the Chief Financial Officer are found

responsible for causing fake financial transactions, as seen from their statements. It is also contended that penalty can be imposed on any person under Section 122(1A) of the CGST Act, 2017, considering the definition of 'any person' under Section 2(84) of the CGST Act. In such context, reliance is placed on the decision of this Court in **Bharat Parihar Vs. State of Maharashtra & Ors.**[3] to contend that even a non-taxable person can be held to be liable. The reply affidavit further states that the petitioners are not the employees of the company, rather by the posts held by them, they were controlling and managing the company, and it is at their instance, a conspiracy was planned and executed and they were responsible for playing an active role to defraud the revenue. It is next contended that reliance on the decision of this Court in Shantanu Hundekari (supra) as upheld by the Supreme Court, is distinguishable as in the said case the petitioner was only an employee who could not have been fastened with the liability. It is further contended that the CGST Act, in none of its provisions gives any discretionary powers to the adjudicating authority to either distribute, reduce or enhance the penalty. The CGST Act clearly provides that penalty of an amount equivalent to the tax evaded or input tax credit availed of or passed on, can be imposed.

13. It is next contended that the petitioners have challenged the Circular No.171/03/2022-GST dated 6 July 2022 which itself recognizes such transaction as revenue neutral as it does not qualify as a supply. It is contended that the petitioners' case that the adjudicating authority has not properly applied the

3 WRIT PETITION NO.3742 OF 2023, decision dt.30/06/2023

proviso below this circular, is also not correct, for the reason that the intention behind the circular is that any fake or bogus tax invoice, when issued by the petitioners, it is accounted as a sale in their ledger which leads to receipts of funds (income), and this is used to increase the Overdraw Facility provided by the banks, and then it turns out into a NPA. Secondly, it is stated that any fake or bogus tax invoice when received by the petitioner, it is accounted as a purchase in their ledger which leads to outflow of funds /expense. The petitioners utilized the input tax credit (ITC) of the GST paid on all such expenses. However, later with the help of such fake /bogus ITC, the GST outward liability was discharged. It is further contended that also fake/bogus expense reduced the total income accrued to the petitioners, hence, the assessees paid lesser direct taxes, as the income is artificially reduced.

14. It is next contended that there is no bar under the CGST Act, to issue consolidated Show Cause Notices and Order-In-Original, to cover several financial years, when the same are issued within the limitation provided under the CGST Act and more particularly, when it is an issue within the limitation as prescribed under Section 74(10) of the CGST Act, and for such reason the writ petition ought not to be entertained. Also, reliance is placed on the decision of the learned Single Judge of the Delhi High Court in **Mukesh Kumar Garg vs Union Of India & Ors.**[4] to contend that even in the said case the Court was dealing with fake Input Tax Credit and such factual aspect ought not to be gone into in the proceedings of a writ petition.

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Submissions

15. Mr. Rastogi, learned Counsel for the petitioners has made the following extensive submissions.

(i) The Petitioners are employees who are not registered under the CGST Act in their individual capacity. As such, they are not "taxable persons" under Section 2(107) and personal liability under Section 122(1A) is legally unsustainable.

(ii) There is clearly a jurisdictional error in issuing the impugned show cause notices against the petitioners who are employees of the company and that too for recovery of any tax liability as alleged in the show cause notices and in the impugned order. It is his submission that the jurisdiction, in the case of the petitioners, is clearly sought to be drawn from the provisions of Section 122(1A) of the CGST Act, which *per se* are applicable only to the 'taxable persons' as defined under Section 2(107) of the CGST Act and not to a 'person' as defined under Section 2(84) of the CGST Act. This more particularly considering the clear contents of sub-section (1A) of Section 122 of the CGST Act. It is, therefore, his submission that once there was a lack of jurisdiction to issue such show cause notice to the petitioners who are merely the employees of the company, for proceedings to be initiated for recovery of any tax liability of the company, the show cause notices were clearly untenable and not maintainable against the petitioners. It is submitted that as a consequence

thereof, the impugned order issued against the petitioners itself was without jurisdiction. It is also Mr. Rastogi's submission that in any event, the impugned order, on the face of it, is disproportionate, inasmuch as it seeks recovery of a large amount of ₹400,81,82,667/- which by no rationale can be the subject matter of any legal recovery from the petitioners. It is hence submitted that on the ground of proportionality and in the absence of any sanctity to proportionality, the impugned order is required to be interfered with. This apart, from the contention that a penalty can be imposed only on a person who is a taxable person, and not on a person who is not taxable.

(iii) The petitioners' objection is to the applicability of the provision of Section 122(1A). It is submitted that the Petitioners are challenging the Impugned Order-in-Original dated 01.02.2025 issued by Respondent No.1 for the period July 2017 to July 2023, whereby penalties of ₹133,60,60,889/- each have been imposed upon the Petitioners under Section 122(1A) of the CGSTax Act, 2017. The penalty has been imposed on the basis of alleged wrongful availment and utilisation of input tax credit of ₹70,25,61,996/- and alleged erroneous passing on of input tax credit of ₹63,34,98,893/-, resulting in a total cumulative penalty of ₹400,81,82,667/- imposed upon the Petitioners. In such context, it is submitted that Section 122(1A) was brought into force prospectively with effect from 1st January 2021 vide Notification No. 92/2020–Central Tax dated 22nd December 2020 whereas the impugned order seeks to impose

penalties under Section 122(1A) for a period prior to 1st January 2021. It is the petitioners case that such retrospective application of a penal provision was impermissible apart from the same being unconstitutional and barred under Article 20(1) of the Constitution of India. It is submitted that no person can be penalised under a law which was not in force at the time of the alleged act and, therefore, the invocation of Section 122(1A) for the period prior to 1st January 2021 was ultra vires and non est in law.

(iv) The imposition of personal penalties upon the Petitioners, who are employees cannot be sustained as they are unimaginably excessive and disproportionate. The underlying disputed tax liability is only around ₹70 crore, whereas personal penalties of approximately ₹400 crore have been imposed upon the Petitioners. It is submitted that the Petitioners have not derived or retained any personal financial benefit from the transactions in question and, in these circumstances, the penalties imposed are legally unsustainable.

(v) This Court, in *Shantanu Sanjay Hundekari v. Union of India*, has held that the imposition of exorbitant personal penalties on employees for tax disputes is impermissible. The failure of the Respondents to apply the said binding precedent is a direct affront to the rule of law and the principle of judicial discipline. Such decision has been confirmed by the Supreme Court.

(vi) The operation of Section 122(1A) is derivative and conditional. In the absence of a valid determination under Section 122(1)(ii), including issuance of invoices without supply, penalties under Section 122(1A) cannot be sustained. The impugned order does not establish this precondition and, therefore, the penalty imposed is void ab initio.

(vii) The Show Cause Notices cover the period from July 2017 to March 2022, whereas the impugned order seeks to penalise the Petitioners for an extended period up to July 2023. Such expansion of the period without a revised notice or hearing is a violation of the principles of natural justice and is ultra vires the show cause jurisdiction.

16. Lastly, the impugned orders are vitiated by failure to consider the judgment in *Shantanu Sanjay Hundekari*, which governs the issues involved in the present case.

17. On the other hand, Mr. Ochani, learned Counsel for the respondents has limited submissions which are not different from what has been set out in the reply affidavit to which we have made extensive reference hereinabove. He submits that the impugned order-in-original is passed validly exercising the jurisdiction. It is also his submission that the petitioners need to take recourse to the alternative remedy as available to them under law. It is accordingly submitted that the Writ Petition needs to be dismissed.

Analysis

18. We have heard learned Counsel for the parties, we have also perused the record with their assistance. The primary issue which falls for our consideration is 'whether the impugned show cause notices and the order passed i.e. the impugned Order-in-Original can be said to be bad, illegal and invalid for want of jurisdiction, considering the provisions of Section 122(1A) of the CGST Act, 2017.

19. Section 122 of the CGST Act falls under Chapter XIX which provides for 'Offences and Penalties'. Section 122 provides for 'Penalty for certain offences'. To appreciate as to whether the basic jurisdictional requirements were present in respondent No.2 exercising authority against the petitioners who are employees of the company, at the outset, it would be imperative to extract Section 122 which reads thus:

> **"Section 122. Penalty for certain offences.**
>
> **(1) Where a taxable person who---**
>
> **(i) supplies any goods or services or both without issue of any invoice or issues an incorrect or false invoice with regard to any such supply;**
>
> **(ii) 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;**
>
> (iii) 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;
>
> (iv) collects any tax in contravention of the provisions of this Act but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;
>
> (v) fails to deduct the tax in accordance with the provisions of sub-section (1) of section 51, or deducts an amount which is less than the amount required to be deducted under the said sub-section, or where he fails to pay to the Government under sub-section (2) thereof, the amount deducted as tax;

(vi) fails to collect tax in accordance with the provisions of sub-section (1) of section 52, or collects an amount which is less than the amount required to be collected under the said sub-section or where he fails to pay to the Government the amount collected as tax under sub-section (3) of section 52;

(vii) takes or utilises input tax credit without actual receipt of goods or services or both either fully or partially, in contravention of the provisions of this Act or the rules made thereunder;

(viii) fraudulently obtains refund of tax under this Act;

(ix) takes or distributes input tax credit in contravention of section 20, or the rules made thereunder;

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

(xi) is liable to be registered under this Act but fails to obtain registration;

(xii) furnishes any false information with regard to registration particulars, either at the time of applying for registration, or subsequently;

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

(xiv) transports any taxable goods without the cover of documents as may be specified in this behalf;

(xv) suppresses his turnover leading to evasion of tax under this Act;

(xvi) fails to keep, maintain or retain books of account and other documents in accordance with the provisions of this Act or the rules made thereunder;

(xvii) fails to furnish information or documents called for by an officer in accordance with the provisions of this Act or the rules made thereunder or furnishes false information or documents during any proceedings under this Act;

(xviii) supplies, transports or stores any goods which he has reasons to believe are liable to confiscation under this Act;

(xix) issues any invoice or document by using the registration number of another registered person;

(xx) tampers with, or destroys any material evidence or document;

(xxi) disposes of or tampers with any goods that have been detained, seized, or attached under this Act,

shall be liable to pay a penalty of ten thousand rupees or an amount equivalent to the tax evaded or the tax not deducted under section 51 or short deducted or deducted but not paid to the Government or tax not collected under section 52 or short collected or collected but not paid to the Government or input tax credit availed of or passed on or distributed irregularly, or the refund claimed fraudulently, whichever is higher.

[(1A) Any person who retains the benefit of a transaction covered under clauses *(i), (ii), (vii)* or clause *(ix)* of sub-section *(1)* and at whose instance such transaction is conducted, shall be liable to a penalty of an amount equivalent to the tax evaded or input tax credit availed of or passed on.]

(2) Any registered person who supplies any goods or services or both on which any tax has not been paid or short-paid or erroneously refunded, or

where the input tax credit has been wrongly availed or utilised,---
(a) for any reason, other than the reason of fraud or any willful misstatement or suppression of facts to evade tax, shall be liable to a penalty of ten thousand rupees or ten per cent. of the tax due from such person, whichever is higher;
(b) for reason of fraud or any willful misstatement or suppression of facts to evade tax, shall be liable to a penalty equal to ten thousand rupees or the tax due from such person, whichever is higher.

(3) Any person who---
(a) aids or abets any of the offences specified in clauses (i) to (xxi) of sub-section (1);
(b) 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;
(c) 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;
(d) fails to appear before the officer of central tax, when issued with a summons for appearance to give evidence or produce a document in an inquiry;
(e) fails to issue invoice in accordance with the provisions of this Act or the rules made thereunder or fails to account for an invoice in his books of account,
shall be liable to a penalty which may extend to twenty-five thousand rupees.

[(1B) [Any electronic commerce operator, who is liable to collect tax at source under section 52,]---

(i) allows a supply of goods or services or both through it by an unregistered person other than a person exempted from registration by a notification issued under this Act to make such supply;

(ii) allows an inter-State supply of goods or services or both through it by a person who is not eligible to make such inter-State supply; or

(iii) fails to furnish the correct details in the statement to be furnished under sub-section *(4)* of section 52 of any outward supply of goods effected through it by a person exempted from obtaining registration under this Act,
shall be liable to pay a penalty of ten thousand rupees, or an amount equivalent to the amount of tax involved had such supply been made by a registered person other than a person paying tax under section 10, whichever is higher.]"

(emphasis supplied)

20. We may observe that as the opening words of sub-section (1) of Section 122 of the CGST categorically uses the expression a '**taxable person**', to whom the said provision would be applicable. In such context, the definition of term '**person**' as set out in Section 2(84) as also definition of term '**taxable person**' as

set out in Section 2(107) are required to be noted, which read thus:

> "Section 2 - Definition
> … … …
> (84) "person" includes---
> (a) an individual;
> (b) a Hindu Undivided Family;
> (c) a company;
> (d) a firm;
> (e) a Limited Liability Partnership;
> (f) an association of persons or a body of individuals, whether incorporated or not, in India or outside India;
> (g) any corporation established by or under any Central Act, State Act or Provincial Act or a Government company as defined in clause *(45)* of section 2 of the Companies Act, 2013 (18 of 2013);
> (h) any body corporate incorporated by or under the laws of a country outside India;
> (i) a co-operative society registered under any law relating to co-operative societies;
> (j) a local authority;
> (k) Central Government or a State Government;
> (l) society as defined under the Societies Registration Act, 1860 (21 of 1860);
> (m) trust; and
> (n) every artificial juridical person, not falling within any of the above;
> .. … … ..
>
> (107) "taxable person" means a person who is registered or liable to be registered under section 22 or section 24;"

21. On a plain reading of the provisions of sub-section (1) of Section 122, it is clear that it pertains to a 'taxable person' as defined under Section 2(107) (supra), who in the circumstances which may fall in sub-clauses (i) to (xxi) of Section 122 shall be liable to penalty as stipulated by such provision (supra). Thus, such penalty becomes imposable on the taxable person as defined under Section 2(107), namely who is liable to be registered under Section 22 or Section 24 of the CGST Act.

22. Now coming to the provisions of Section 122 sub-section (1A) (supra), it stipulates that any person who retains the benefit of a transaction covered under clauses (i), (ii), (vii) or clause (ix) of sub-section (1), and at whose instance such

transaction is conducted, shall be liable to a penalty of an amount equivalent to the tax evaded or input tax credit availed of or passed on. It is thus a two-fold requirement, the provision envisages **firstly** that any person who retains the benefit of a transaction covered under the different clauses as set out in the said provision; **secondly** the provision uses the words "and" at whose instance such transaction is conducted shall be liable for a penalty. Thus, unless such two-fold requirement is fulfilled, it would not be possible to recognize any jurisdiction being available, in the concerned official, to invoke the said provision.

23. Further there is another facet of sub-section (1A), namely that sub-section (1A) is clearly applicable in the circumstances falling in clauses (i), (ii), (vii) or clause (ix) of sub-section (1) of Section 122, i.e., necessarily to a 'taxable person', **firstly** who supplies any goods or services or both without issue of any invoice or issues an incorrect or false invoice with regard to any such supply; **secondly**, 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; **thirdly**, who takes or utilises input tax credit without actual receipt of goods or services or both either fully or partially, in contravention of the provisions of this Act or the rules made thereunder; **fourthly**, who takes or distributes input tax credit in contravention of Section 20, or the rules made thereunder. It is thus seen that the said violations are purely attributable to a taxable person. Hence, there is substance in the contentions as urged on behalf of the petitioners, as to how in the absence of the petitioners being taxable persons, qua the business of the company-M/s. Shemaroo Entertainment Ltd., the petitioners can be held liable for any penalty

under the provisions of sub-section (1A).

24. We are of the clear opinion that the legislative intent of sub-section (1A) is quite clear, as necessarily clauses (i), (ii), (vii) or clause (ix) of sub-section (1) are required to be conjointly read with Section (1A), which itself stands incorporated in the provision. Hence, the opening words of sub-section (1A) when it uses the words "any person", it would be required to be understood in the context of a 'taxable person' as sub-section (1) itself applies to a taxable person. In the absence of such interpretation, we find it difficult as to how the provisions of clauses (i), (ii), (vii) or clause (ix) of sub-section (1) of Section 122 can at all apply, so as to give effect and/or in invoking/implementing the provision of sub-section (1A) of Section 122 of the CGST Act.

25. It is clear from the facts of the case that an action was initiated against a company namely M/s. Shemaroo Entertainment Ltd.. It appears to be not in dispute that the petitioners who for the period in question, were the Chief Financial Officer, Chief Executive Officer and Director & Joint Managing Director, being employees of the company could not be held liable for a penalty to be imposed under the provisions of Section 122(1A). In such context, we find substance in the contention as urged on behalf of the petitioners that the decision of this Court in **Shantanu Sanjay Hundekari** (supra) would become squarely applicable. Such decision concerned the petitioners who were employees of one M/s. Maersk Line India Pvt. Ltd. were issued the demand cum show cause notice by the Joint Director, Director General of Goods and Services Tax Intelligence, whereby the petitioners along with other noticees were called upon to show cause

as to why a large penalty equivalent to the tax alleged to be evaded by M/s. Maersk amounting to Rs.3731,00,38,326/- as detailed in the show cause notice, be not imposed upon the petitioners *inter alia* applying the provisions of Section 122(1A) and Section 137 of the CGST Act, 2017 and the corresponding provisions of the MGST Act, 2017. The Court in such context considering the rival contentions observed that the GST Council in its 38th meeting held on 18 December 2019 had proposed insertion of sub-section (1A) in Section 122, to specifically address the cases of fake invoices, and accordingly, with effect from 1 January, 2021. Accordingly, the legislature has introduced the penal provision being sub-section (1A) in Section 122 of the CGST Act, by an amendment brought about by the Finance Act, 2020. The contentions as asserted on behalf of the petitioners in such context in assailing the show cause notice were quite similar, namely that the provisions of Section 122(1A) and Section 137 of the of the CGST Act did not apply to the petitioners therein, in the absence of retention of any personal benefit by the petitioners. The contention as urged on behalf of the revenue was also quite similar to one as asserted in the present proceedings to contend that the show cause notice indicated that there was responsibility fastened on the petitioners, in regard to the affairs of the company, hence, the petitioners cannot disown the involvement in the loss of revenue in the manner as described in the show cause notice. It is in such context, the Court observed that as a jurisdictional issue on the validity of the show cause notice was raised, in the context of the only allegation as made against the petitioner in the show cause notice, which was to the effect that he was a Senior Tax Operations Manager cum

Authorised Person of M/s Maersk. The petitioner was called upon to show cause as to why penalty equivalent to the tax evaded by M/s Maersk amounting to 3731,00,38,326/- be not imposed as the petitioner had committed an offence. In the reply to the show cause notice, the petitioner had taken a clear position that they were employees of the company and hence, no penalty proceedings of that nature could be initiated against the petitioners. It is in such context, considering the relevant provisions of the CGST Act namely Section 2(94), Section 2(107) Section 122 and Section 137, the Court upholding the petitioner's contentions, made the following observations.:

> "26. A plain reading of Section 122 clearly implies that it provides for levy of penalty for "certain offences" by taxable person. Such taxable person would render himself liable for a penalty for acts provided in clauses (i) to (xxi) of sub-section (1). Insofar as sub-section (1A) of Section 122 is concerned, it provides that any person (who would necessarily be a taxable person) retains the benefit of the transactions covered under clause (i), (ii), (vii) or clause (ix) of sub section (1), and at whose instance, such transaction is conducted, "shall be liable to a penalty of an amount equal to the tax evaded or input tax credit availed of or passed on". This necessarily implies that sub-section (1A) applies to a taxable person as it specifically speaks about the applicability of the provisions of clauses (i), (ii), (vii) or clause (ix) of sub-section (1), with a further emphasis added by the words as underscored by us. This clearly depict the intention of the legislature that a person who would fall within the purview of sub-section (1A) of Section 122 is necessarily a taxable person as defined under Section 2(107) of the CGST Act read with the provisions of Section 2(94) of the CGST Act and a person who retains the benefits of transactions covered under clauses (i), (ii), (vii) or clause (ix) of sub-section (1) of Section 122.
>
> 27. Further, as noted above, Section 122(1A) also cannot be attracted qua the person, in a situation when any person does riot retain the benefit of a transaction covered under clauses (i), (ii), (vii) or clause (ix) of sub-section (1) and/or it is applicable at whose instance such transactions are conducted, could be the only person, who shall be liable to a penalty of an amount equivalent to the tax evaded or input tax credit, wrongly availed of or passed on. The relevant provisions as discussed hereinabove would show that such person can only be a taxable person as defined under Section 2(107) of the CGST Act read with the provisions of Section 2(94) of the CGST Act, who would be in a legal position, to retain the benefit of tax on the ransaction covered under clauses (i), (ii), (vii) or clause (ix) of sub-section (1), and at whose instance, such transaction is conducted. In the absence of these basic elements being present, any show cause notice of the nature as issued, would be rendered illegal, for want of jurisdiction as also would stand vitiated by patent non-application of mind.

> 28. If this is the plain meaning and consequence of the provisions of Section 122(1A), then necessarily the provision would manifest that person like the petitioner, who is a mere employee of MLIPL which is although a group company of Maersk, cannot fall within the purview of the said provision, as the petitioner cannot be a 'taxable' or a 'registered person' within the meaning and purview of the CGST Act so as to retain such benefits as the provision ordains. Hence, there was no question of respondent No. 3 invoking Section 122(1A) against the petitioner. Thus, the designated officer (respondent No. 3) invoking the said provision against the petitioner is an act wholly without jurisdiction, so as to issue the show cause notice. A provision, which ex facies inapplicable to the petitioner who is an individual, has been invoked and applied in issuing the impugned show cause notice.
>
> 29. It is, hence, difficult to accept the case of the revenue that the petitioner as an employee of MLIPL was in any legal position under the CGST Act, who could retain the benefit of a transaction, which would be covered under the said clauses of sub-section (1) as sub-section (1A) of Section 122 would provide. At the cost of this imagination which would be too far-fetched, even assuming that the respondent is correct in its contention as raised in the show cause notice that the said provisions are applicable to an individual like the petitioner (when they are not), there is no material that it is at the instance of petitioner, transactions are conducted, so as to make the petitioner liable for such a penalty, that too of an amount equivalent to the tax alleged to be evaded or ITC availed or passed on. Thus, there is no material to support that any of the ingredients as specified in sub-section (1A) of Section 122 would stand attracted so as to confer jurisdiction on respondent No. 3 to adjudicate any allegations/charges as made under sub-section (1A) of Section 122. This is abundantly clear from the bare contents of paragraph 20 and 5.19.1 of the show cause notice as noted by us hereinabove.
> … … … …
> 32. For the aforesaid reasons, it is clear from the relevant contents of the show cause notice that the basic jurisdictional requirements/ingredients, are not attracted for issuance of the show cause notice under Section 74 of the CGST Act so as to inter alia invoke Section 122(1A) and Section 137 against the petitioner. Even otherwise, it is ill-conceivable to read and recognize into the provisions of Section 122 and Section 137, of the CGST Act any principle of vicarious liability being attracted. There could be none. Thus, Respondent No. 3 clearly lacks jurisdiction to adjudicate the show cause notice in its applicability to the petitioner. Thus qua the petitioner, the impugned show cause notice is rendered bad and illegal, deserving it to be quashed and set aside.

26. We may observe that the decision of this Court in **Shantanu Sanjay Hundekari** (supra) was assailed by the Revenue before the Supreme Court in the proceedings of **Union of India vs. Shantanu Sanjay Hundekari** (supra). The Supreme Court dismissed the special leave petitions by the following order :-

> "1. Heard Mr. N. Venkataraman, the learned Additional Solicitor General appearing for the Revenue and Ms. Anuradha Dutt, the learned counsel appearing for the respondents.

2. Delay condoned.

3. The High Court while allowing the Writ Petitions filed by the respondents, quashed the show cause notices issued by the Revenue seeking recovery of Rs.3731 Crore holding as under in Paras 32 and 33 respectively:-

> 32. For the aforesaid reasons, it is clear from the relevant contents of the show cause notice that the basic jurisdictional requirements/ingredients, are nor attracted for issuance of the show cause notice under Section 74 of the COST Act so as to inter alia invoke Section 122(1-A) and Section 137 against the petitioner. Even otherwise, it is ill-conceivable to read and recognize into the provisions of Section 122 and Section 137, of the CGST Act any principle of vicarious liability being attracted. There could be none. Thus, Respondent no. 3 clearly lacks Jurisdiction to adjudicate the show cause notice in its applicability to the petitioner. Thus qua the petitioner, the impugned show cause notice is rendered bad and illegal, deserving it to be quashed and set aside.
>
> 33. The foregoing discussion would also lead us to conclude that it is highly unconscionable and disproportionate for the concerned officer of the Revenue to demand from the petitioner an amount of Rs.3731 crores, which in fact is clearly alleged to be the liability of Maersk, as the contents of the show cause notice itself would demonstrate, The petitioner would not be incorrect in contending that the purpose of issuing the show cause notice to the petitioner who is merely an employee, was designed to threaten and pressurize the petitioner."

4. The issue before the High Court was one relating to the interpretation of Section 122(1-A) and Section 137 of the GST Act.

5. The High Court after assigning cogent reasons took the view that the respondent herein was merely an employee of the Company and he could not have been fastened with the liability of Rs.3731 Crore.

6. We see no good reason to interfere with the common impugned Orders passed by the High Court.

7. However, the question of law as regards the two provisions, referred to above, is kept open.

8. The Special Leave Petitions are, accordingly, dismissed.

9. Pending applications, if any, shall also stand disposed of."

27. We do not find, as to why, the decision in **Shantanu Sanjay Hundekari** (supra) would not be applicable in the facts of the present case, insofar as the petitioners are concerned, when they are the employees of the company namely M/s. Shemaroo Entertainment Limited, who cannot be held to be liable and more

particularly in the absence of any material that the petitioners are taxable persons and who have in fact retained the benefits of the transactions covered under clauses (i), (ii), (vii) or clause (ix) of sub-section (1) of Section 122. To this effect, we do not find any specific finding recorded in the impugned order fastening penalty on the petitioners, that any benefit of the transactions covered under the said clauses was retained by the petitioners. In the absence of any such material and findings, we do not find, as to how the jurisdictional requirement of applicability of Section 122(1A) can at all be said to be present and applicable, in the designated officer passing the impugned order-in-original, against the petitioners. This is also clear from the reading of the reply affidavit which do not in any manner sets out as to how such basic ingredients of sub-section (1A) of Section 122 stood attracted and/or present in the designated officers passing the impugned order-in-original against the petitioners.

28. As a result of the aforesaid discussion, the only conclusion, which can be arrived at, is that the show cause notices and the consequent impugned order-in-original as passed against the petitioners would be required to be held to be illegal, being without jurisdiction.

29. The other contention as urged on behalf of the petitioners is that the Competent Authority did not have jurisdiction to retrospectively apply the provisions of sub-section (1A) of Section 122 which came to be incorporated in the CGST Act by Act No.12 of 2020 with effect from 1 January 2021. Admittedly, the period in question, subject matter of the show cause notice is the period from July 2017 to July 2023. Thus, according to the petitioners, the

period from July 2017 to 1 January 2021 is the period, when such penal provision was not in existence. Thus, there could not have been any retrospective application of any penalty provision. The law in this regard is well settled including considering the clear provision of Article 20(1) of the Constitution which reads thus:

> "**20. Protection in respect of conviction for offences**
>
> (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.
>
> (2) ….."
>
> (emphasis supplied)

30. Thus, a person cannot be penalized under the law/provision which was not in force for the period in which such alleged acts are stated to have been committed. There could not have been any retrospective application of Section 122(1A) of the CGST Act in issuing the impugned show cause notice for the period July 2017 to 1 January 2021, and for such reason also the impugned order-in-original insofar as such period is concerned, cannot be sustained.

31. Mr. Ochani's reliance on **Mukesh Kumar Garg vs Union of India** (supra) in the facts of the present case is quite misplaced inasmuch as in such decision the Court was concerned in respect of the penalty imposed for incorporating fake firms and availing fake ITC without supply of goods. It was held that such order was appealable and a writ petition could not be entertained as the Writ Court cannot go into the factual aspects on the issue, whether the penalty imposed was justified or not, and whether the same was required to be reduced proportionately

in terms of invoices raised by the petitioner, being an adjudication on factual matrix. There cannot be any dispute on the observations as made by the Court in the facts of the said case. However, we do not find that the issue of jurisdiction in a manner which was considered by this Court in the case of *Shantanu Sanjay Hundekari* (supra) and confirmed by the Supreme Court in its judgment (supra) was subject matter of consideration of the learned Single of the Delhi High Court. Reliance on the said decision hence is not well founded.

32. In the light of the above discussion, the petition needs to succeed. It is accordingly allowed in terms of prayer clause (a) (supra).

33. No costs.

(AARTI SATHE, J.) (G. S. KULKARNI, J.)