

GAHC010276082024



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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/6963/2024

DHARMENDRA AGARWAL
SON OF LATE BRIJ BHUSHAN LAL AGARWAL, RESIDENT OF 183, NEAR
ANGAMI PLYWOOD FACTORY, WARD NO. 10, NORTH TOWN, P.S.
CHUMOUKEDIMA, DIMAPUR, NAGALAND, PIN- 797103

VERSUS

THE UNION OF INDIA AND 2 ORS
REPRESENTED BY DIRECTORATE GENERAL OF GOODS AND SERVICES
TAX, INTELLIGENCE, GUWAHATI ZONAL UNIT H.NO. 77, RUPKONWAR
JYOTI PRASAD AGARWALA ROAD, PANJABARI, GUWAHATI 781027

2:THE DIRECTORATE GENERAL OF GOODS AND SERVICES TAX
INTELLIGENCE
GUWAHATI ZONAL UNIT H.NO. 77
RUPKONWAR JYOTI PRASAD AGARWALA ROAD
PANJABARI
GUWAHATI 781027

3:INTELLIGENCE OFFICER
O/O DIRECTORATE GENERAL OF GOODS AND SERVICES TAX
INTELLIGENCE
GUWAHATI ZONAL UNIT H.NO. 77
PANJABARI
GUWAHATI 78102

Advocate for the Petitioner : MR. B K MAHAJAN, MR. P MAHANTA,MR. P K DAS,MR. N
MAHAJAN,MR. D BORA,MR. A CHAUDHURY

Advocate for the Respondent : SC, GST,

**BEFORE
HONOURABLE MR. JUSTICE SOUMITRA SAIKIA**

ORDER

Date : 09.01.2025

Heard Mr. B.K. Mahajan, learned counsel for the petitioner. Also heard Mr. S. C. Keyal, learned Standing Counsel, GST for the respondent.

2. This writ petition is directed against the proceedings initiated against the petitioner vide Case No. DGGI/INT/INTL/1362/2024 under Section 132(1) (c) of the Central Goods and Services Tax, (CGST) Act, 2017 as well as the subsequent arrest of the petitioner who has been detained custody since 12.12.2024.

3. The learned counsel for the petitioner submits that there is an allegation against the petitioner for evasion of GST by falsely claiming ITC (Input Tax Credit) to the tune of Rs. 9,11,87,126/- (Rupees Nine Crore Eleven Lakhs Eighty Seven Thousand One Hundred and Twenty Six) as alleged by the respondent authorities. It is submitted that the quantum of demand has not yet been assessed by the authorities. The amount specified by the respondent authorities is only an assumption based on their investigation so far. It is submitted that the petitioner has cooperated with the authorities concerned and therefore, there was no need or necessity to keep him under detention. The learned counsel has referred to the Judgment of the Bombay High Court rendered in *Daulat Samirmal Mehta Vs. Union of India & Others*, reported in 2021 SCC OnLine Bom 200 wherein in a similar situation, a Division Bench of the Bombay High Court had invoked its power to pass an order releasing the petitioner from detention on the conditions mentioned in the order. The learned counsel has also referred to the order of the Apex Court which was rendered in an appeal which was preferred against the said Judgment of the Bombay High Court. The Apex Court

by the order dated 01.03.2023 had confirmed the release order passed by the Division Bench of the Bombay High Court while interfering with the conditions imposed by the Bombay High Court for release on bail. It is submitted that following this order, another such order was passed by the Division Bench of the Bombay High Court in *Sunil Kumar Jha Vs. Union of India & Ors. [W.P.(ST) No. 5484/2021]* & ors interfering with the detention of the assessee concerned who was detained in judicial custody. It is submitted that though there is a power of the detention under Section 69 of the GST Act, considering the investigations undertaken and in view of the fact that the actual quantum of demand has not been determined till date, the assessments not having been finalized, the detention of the petitioner was uncalled for and therefore, the impugned order of the detention is required to be set aside and quashed.

4. Mr. S. C. Keyal, learned Standing Counsel, GST on the other hand refers to the Judgment of the Apex Court rendered in *State of the Gujarat Vs. Choodamani Parmeshwaran Iyer & Ors*, reported in *2023 0 Supreme (SC) 1154* to submit that powers under Article 226 of the Constitution of India is ordinarily not required to be invoked seeking release of a person from detention. He further submits that the petitioner was produced before the competent Court who had remanded him to custody for 14 (fourteen) days and an application has also been filed praying for extension of the detention. The learned Standing Counsel, GST has also relied upon a Judgment of the Delhi High Court rendered in *Dhruv Krishan Maggu & Others Vs. Union of India & Others* reported in *2021 0 Supreme (Del) 17* to submit that in a similar matter the Division Bench of Delhi High Court had rejected such prayers made. The learned Standing Counsel, GST has also placed before the court the relevant records available to show that there was an authorization duly issued by the Commissioner towards

the arrest and detention of the petitioner and the grounds of arrest has also been communicated to the petitioner.

5. The learned counsel for the parties have been heard. Pleadings available on record in the writ petition are carefully perused and the judgment cited at the bar has been carefully noted.

6. In *Daulat Samirmal Mehta Vs. Union of India & Others*, reported in 2021 SCC OnLine Bom 200, the Bombay High Court had extensively considered the various Judgments placed before the court and had elaborately discussed on the provisions of Section 69 as well as the provisions of Section 132 of the CGST Act and thereafter interfered with this order of detention passed by the respondent authorities. This order came to be appealed against by the Revenue Authorities and the Apex Court by the order dated 01.03.2023 upheld the bail granted while interfering with the conditions prescribed. The conditional bail granted was sustained by the Apex Court and two of the conditions imposed by the Bombay High Court were interfered with. Following this judgment, another judgment was rendered by the Division Bench of Bombay High Court in WP(ST) No.5484 of 2021 *Sunil Kumar Jha Vs. Union of India & Others* along with WP(ST) No.5486 of 2021 (*Akshay Chhabra Vs. Union of India & Others*).

7. In the subsequent writ petition also the Bomaby High Court following the earlier order had interfered with the detention orders passed by the respondent authorities.

8. The judgment of the Apex Court referred by the respondents on the question whether for grant of the pre arrest bail, the powers under Article 226 can be invoked. The Apex Court held that while the power is available but the same has to be sparingly used and in the facts of that case held that the power

ought not to have been invoked.

9. In so far as the Delhi High Court judgment placed by the respondent it is seen that the Delhi High Court rejected the claim of the writ petitioners therein for the grant of Pre-arrest bail leaving them to avail the statutory remedies.

10. Section 69 of the CGST Act, 2017 confers the power to arrest, where the Commissioner has reasons to believe that the persons had 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) (II) of Sub-section (1) for (2) of the said Section, he, the Commissioner may by order authorize any officer of central excise to arrest such a person.

11. Having notice to the provisions of Section 69 of the Central GST Act, a reference to Section 132 which provides for punishments for certain offences is also necessary for the purposes of this proceedings. Only the relevant portion of this section is referred to. Under Section 132 (1) (c) whoever commits or causes to commit and retain the benefits arising out of input tax credit using invoice and bill referred to in Clause (B) or fraudulently avails input tax credit without any invoice or bill shall be punishable - in cases where the amount of tax evaded or the input tax credit wrongly availed or used the amount of refund wrongly taken exceeds Rs. 500 Lakhs, with imprisonment for a term which may extend to 5 years and with fine.

12. Having taken note of provisions under the GST Act, 2017, it is seen that the allegations against the petitioner is that he has availed of input tax credit by without actual receipt of the good and thereby availing the benefit of input tax credit by using false or forged bill and is therefore, guilty of the offences prescribed under Section 132 (1) (c) and therefore punishable under Clause (I)

of the said section.

13. The records produced before this Court by the learned Standing Counsel of the respondent reveals that pursuant to the summons issued the petitioner had appeared before the investigating authority and his statements have also been recorded. The records also reveal that the authorization as required under provisions of Section 69 has been issued by the Commissioner and the petitioner also does not deny that the grounds of arrest have been supplied to them within the prescribed period under the statute. The investigation still underway and therefore, the respondents have have sought for extension of the remand before the competent court of criminal jurisdiction.

14. The petitioner has challenged the validity of the proceeding initiated against him vide the Case No. DGGI/INT/INTL/1362/2024 under Section 132(1) (c) of the Central Goods and Services Tax, (CGST) Act, 2017 and also a prayer for release of the petitioner from custody.

15. The power of writ court to issue direction to release from custody has been discussed in several judgments of the Apex Court as well as the High Courts of this country. The power although available is to be used sparingly where the facts demand. In *Choodamani Parmeshwaran Iyer (supra)* while dealing with the proceeding where pursuant to summons issued by the Goods and Services Authority, the assessee, apprehending arrest had approached the Gujarat High Court praying for grant of Pre-arrest bail. The Gujarat High court disposed of the writ petition directing the petitioner to appear before the authority and if any apprehension is necessary, the authority will give further opportunity of two weeks. Being aggrieved, Revenue preferred an appeal before the Apex Court. The Apex Court upon examination of several earlier judgments of the Apex Court as well as that of the High Courts held that referring to *Kartar*

Singh Vs. State of Punjab reported in (1994) 3 SCC 569 held that although there is no bar for the High Court to entertain an application of Pre-arrest protection under Article 226 of the Constitution of India yet such powers should be exercised sparingly. The writ of mandamus would lie only to compel the performance of the statutory and other duties and no writ of mandamus would lie to prevent an officer from performing statutory function. In *Daulat Samirnal Mehta (supra)* a Division Bench in Bombay High Court while entertaining a writ petition challenging the constitutional validity of Section 132 (1) (b) of the CGST Act as well as seeking a declaration that the power under Section 69 of the CGST Act can only be exercised upon determination of the liability along with an interim prayer for enlarging the petitioner since he was under judicial custody, after elaborate examination of the matter and various judgments of the several High Courts as well as Apex Court held that the requirement under Section Sub-section 1 of Section 69 of the GST Act is to have "reasons to believe" that the person has committed an offence under Section 132.

16. The requirement under Sub-section (1) of Section 69 is to have "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 the reference to the requirements of Section 41 of the CrPC, no concrete incident has been mentioned therein recording any act or attempts of tampering of evidence by the petitioner or threatening/inducing any witness besides not co-operating with the 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.

17. The Division Bench of the Bombay High Court extensively referred to the judgment of the Apex Court rendered in *Arnab Manoranjan Goswami Vs. State of Maharashtra* reported in *AIR 2021 SC 1* come to a conclusion that the petitioner therein ought to be enlarged on bail on the conditions mentioned therein. The petitioner therein aggrieved by the constitutional bail approached the Supreme Court of India by filing this special leave No. 3879/2021 praying for interfering with the condition mentioned in the bail granted by the Bombay High Court.

18. The Apex Court upon consideration of the matter in its entirety held that the bail order granted by the Division Bench of the Bombay High Court stood confirmed however the conditions Nos. 5 and 6 in the said order shall not be pre conditions for release on bail. The other conditions were left undisturbed and to be complied with by the petitioner therein.

19. Following the judgment in *Daulat Samirmal Mehta Vs. Union of India & Others*, reported in *2021 SCC OnLine Bom 200* Division Bench of the Bombay High Court in another matter decided in *Sunil Kumar Jha Vs. Union of India & Ors. [W.P.(ST) No. 5484/2021]* & ors along with other connected matter again held with the question of the exercise of the power under Section 69 will arise only upon determination of the liability and consequently enlarging the petitioner therein on bail.

20. Having noticed the above judgments cited at the bar what is clear is that while the power to arrest is conferred under Section 69 of the CGST Act the same shall only be imposed only upon reasons to believe to be arrived at by the Commissioner that the person has committed any of the offences specified under Section 132 and punishable under Clause I, II of Sub-section 1 or Sub-section 2.

21. Perusal of the records reveals that the authorization required under the statute has been given by the Commissioner on the ground that he has reasons to believe on the materials placed before the authority. However, what is not seen from the materials placed before the court at this stage is the determination of the liability as is required for recovery of taxes from any assessee. No material has been shown that such determination of the liability had been arrived at by the respondent authorities on whom the Commissioner had concluded that he had "reasons to believe" that the person has committed any offence specified under the various Clauses under Section 132.

22. That apart it is seen from the records stated that the petitioner was summoned and he had been extensively questioned and his statements are also recorded by the investigating authority. There is no prima facie finding seen from the records produced at this stage that the detention of the petitioner is necessary to prevent tampering of the evidence or that he is likely to cause any interference with the investigations carried on. The only ground seen is that the petitioner is a partner of *M/s Yash Associates* and since the investigation is still at the preliminary stage there is a need to recover other persons namely brokers, suppliers, recipients involved in the purported forged claim of ITC. The authorization also reflects that it is stated that the quantum of tax evasion may also increase later. From the statements recorded before the investigating authority it is seen that there are other partners in the partnership besides the petitioner and at this stage of investigation there are no materials to suggest that the petitioner will tamper with the evidence or have evaded the summons or did not respond to summons when served. The question of whether the directions of the Apex Court in *Arnesh Kumar and others Vs. State of Bihar Reported in (2014) 8 SCC 273* were followed by the respondent is also an issue

which would required determination by this court.

23. While there is no quarrel with the proposition that Section 69 does confer power on the Commissioner to order arrest in case any of the specified offences under Section 132 of the CGST Act, the question remains is whether arrest or detention is called for merely because is power is available on the authority to do so.

24. In *Arnab Manoranjan Goswami (surpa)* it was held as under :

"57. While considering an application for the grant of bail under article 226 in a suitable case, the High Court must consider the settled factors which emerge from the precedents of this court. These factors can be summarized as follows :

- (i) The nature of the alleged offence, the nature of the accusation and the severity of the punishment in the case of a conviction;
- (ii) Whether there exists a reasonable apprehension of the accused tampering with the witnesses or being a threat to the complaint or the witnesses;
- (iii) The possibility of securing the presence of the accused at the trial or the likelihood of the accused fleeing from justice;
- (iv) The antecedents of and circumstances which are peculiar to the accused;
- (v) Whether prima facie the ingredients of the offence are made out, on the basis of the allegations as they stand, in the FIR; and

(vi) The significant interests of the public or the State and other similar considerations.”

25. The Apex Court held that the above principles have involved over a period of time and had emanated from the series of decisions and such principles are equally applicable while exercising jurisdiction under 226 of the Constitution of India when the court is call upon to secure the liberty of the accuse/petitioner.

26. Again in Criminal Appeal No. 838 of 2021 (*Siddharth Vs. The State of Uttar Pradesh & Anr.*) the Apex Court while examining the question of taking into custody any person by the police at the time of submission of the charge-sheet held that Section 170 of the CrPC does not impose an obligation on the officer in charge to arrest each and every accused at the time of the filing of the charge sheet. The Court held that where the investigating officer does not believe that the accused will abscond or disobey summons, he is not required to be produced in custody. The Apex Court held that the term of “custody” within the meaning of Section 170 of the CrPC does not contemplate either police or judicial custody but it merely connotes the presentation of the accused by the investigating officer before the court while filing the charge sheet.

27. The Apex Court went on to hold that personal liberty is an important aspect of our constitutional mandate. The occasion to arrest an accused during investigation arises when custodial investigation becomes necessary or it is a heinous crime or where there is a possibility of influencing the witnesses or where the accused may abscond. Merely because an arrest can be made because it is lawful does not mandate that arrest must be made. A distinction must be made between the existence of the power to arrest and the justification for exercise of it. If arrest is made routine, it can cause incalculable harm to the

reputation and self-esteem of a person. If the Investigating Officer has no reason to believe that the accused will abscond or disobey summons and has, in fact, throughout cooperated with the investigation there is no reason as to why there should be a compulsion on the officer to arrest the accused.

28. Coming to the present proceedings as discussed above from the records produced it is seen that the petitioner has cooperated with the investigating authority and his statement has been recorded there is no material to suggest that he will abscond or not respond to summons issued. There is also no material which prima facie suggests that the determination of the liability has been arrived at by the Commissioner or the investigating officer. Under such circumstances this court is of the view that continued detention of the petitioner at the stage of investigation is not required. This therefore court considers that the petitioner can be released on interim bail until further orders.

29. Let notice be issued returnable 4 (four) weeks. Respondents may complete their instructions has filed necessary affidavit if so advised. Since respondents are represented by Mr. S. C. Keyal, learned Standing Counsel, GST notices waived however, extra copies be furnished within the period of 2 (two) weeks from today.

30. Accordingly, the petitioner is directed to be released on interim bail subject to furnishing personal bond of Rs. 1 Lakh as well as execute a bail bond of Rs. 1 Lakh with two local sureties of the like amount to the satisfaction of the learned Chief Judicial Magistrate, Kamrup (M) and the subject to following conditions :

- (1) That the accused-petitioner shall appear before the Investigating Officer as and when required and co-operate

with the investigation, till investigation is complete.

- (2) He shall not change or move out of his known address without written permission of the I.O.
- (3) That the accused-petitioner shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to Court or to any police office or tamper with the evidence. He shall not, in any manner, try to influence or intimidate the prosecution witnesses.
- (4) That the accused-petitioner shall not obstruct the progress of the investigation/trial. And
- (5) That the accused-petitioner shall not misuse his liberty in any manner.

31. If any of the conditions are found to be violated then the Investigating Officer shall be at liberty to seek cancellation of the bail granted to the accused-petitioner.

32. The records which were produced before the court have been handed over back to the learned Standing Counsel, GST.

33. Let the matter be listed on 12.02.2025.

JUDGE

Comparing Assistant