HIGH COURT OF JUDICATURE AT BOMBAY

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.93 OF 2021

Yogesh Jagdish Kanodia,]
Age : 46, Occupation : Businessman,]
Residing at D/106, Vasant Pride,]
Near Cambridge School,]
Thakur Complex, Kandivali,]
Mumbai – 400 101] .. Petitioner
]

VERSUS

1. The State of Maharashtra]
]

2. Assistant Commissioner of State Tax]
(D-024) (Investigation-B),]
Mumbai.] .. Respondents

Mr.Abad Ponda, Senior Advocate a/w Ms.Anveshika Singh i/b Mr.Karan Jain for the Petitioner.

Mr.Jitendra B. Mishra, Special Public Prosecutor, for Respondent No.2.

Mrs.S.D.Shinde, APP for Respondent No.1/State.

CORAM : S.S.SHINDE &
MANISH PITALE, JJ.

RESERVED ON : 03rd FEBRUARY, 2021
PRONOUNCED ON : 08th FEBRUARY, 2021

JUDGMENT (PER MANISH PITALE, J.)

1. Rule. Rule made returnable forthwith. With the consent of learned counsel appearing for the parties, heard finally.

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2. The petitioner has approached this Court claiming that his arrest under the provisions of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as **"the CGST Act"**), is illegal as he has been kept in custody in a bailable offence. On this basis, the petitioner seeks a direction for his release forthwith.

3. The petitioner was arrested on 30.12.2020 and he was produced before the Additional Chief Metropolitan Magistrate, Mumbai, who remanded the petitioner to magisterial custody. Respondent No. 2 proceeded against the petitioner on the basis that he had committed offence under section 132 (1) (b) (c) of the CGST Act and that since the input tax credit wrongly availed by the petitioner exceeded Rs.500 lakh (Rs.5 crores) and the offence was punishable with imprisonment for a term, which could extend to five years and with fine under section 132 (1) (i) of the CGST Act, it was a cognizable and non-bailable offence under sub-section (5) thereof. The power to arrest the petitioner was exercised by respondent No.2 under Section 69 of the CGST Act.

4. According to respondent No.2, the petitioner was effectively operating four business establishments which had indulged in fake purchase invoices and sale invoices whereby bogus input tax credit was claimed to the tune of at least Rs.11.54 crores and the amount of wrongful input tax credit passed on through fake sale invoices was not less than Rs.9.29 crores. On the basis of such figures arrived at during the investigation initiated against the petitioner, he was put under arrest on 30.12.2020.

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5. In the writ petition, it was contended that the entire action of arresting the petitioner and then his remand to judicial custody was illegal as four specific distinct legal entities were wrongly treated as one and thereupon it was wrongly treated as if the input tax credit illegally availed exceeded the figure of Rs.5 crores. It was submitted that on a proper application of the provisions of the CGST Act to the claims of respondent No. 2, it would be clear that in the case of each of the four individual legal entities, the input tax credit allegedly wrongly availed did not exceed Rs.5 crores and therefore, even if it was to be treated that offences under section 132 of the CGST Act had been committed, these were non-cognizable and bailable offences. On this basis, it was claimed in the Writ Petition that the arrest and continued custody of the petitioner was wholly illegal and, therefore, unsustainable.

6. Mr.Ponda, learned senior counsel appearing on behalf of the petitioner, reiterated the grounds of challenge raised in the writ petition by inviting attention of this court to the provisions of the CGST Act. Attention of this court was invited to the definition of the expression “person” as stated in section 2 (84) of the CGST Act. It was submitted that under the said provision an individual, a Hindu undivided family, a company, a firm and so on were treated as distinct persons, which was significant for the present case. It was submitted that respondent No.2 had proceeded on the basis that the four business establishments being investigated were controlled by the petitioner. But, a perusal of the documents, on the basis of which respondent No.2 proceeded, would show that the petitioner was a proprietor of ‘M/s. Shree Ganesh Textiles’, he was the Karta of

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Hindu Undivided Family engaged in the business of fabrics by the name 'M/s. Yash Fabrics', the father the petitioner was proprietor of 'M/s. J.K. Fabrics' and he was the Karta of Hindu Undivided Family engaged in the business by name 'M/s. Krishnansh Enterprises'. On this basis, it was submitted that even as per the record of respondent No.2, each of the said firms or business establishments were distinct persons as defined under section 2 (84) of the CGST Act and, therefore, the alleged input tax credit wrongly availed by each of the said establishments had to be treated distinctly and separately. This would be in terms of the scheme of the CGST Act, thereby showing that even if each of the said establishments could be alleged to have committed offences under section 132 (1) (b) (c) of the CGST Act, the amount of such input tax credit allegedly wrongly availed would not exceed Rs.5 crores. Thus, the offences, if at all, were non-cognizable and bailable.

7. The learned senior counsel appearing for the petitioner, invited attention of this court to section 69 of the CGST Act to contend that the power to arrest in the present case was exercised in a wholly illegal manner because when the offence could, at best, be a non-cognizable and bailable offence, as per section 69 (3) of the CGST Act, the petitioner ought to have been admitted to bail immediately. There was no propriety in arresting the petitioner and then seeking his remand before the Magistrate. It was submitted that even the Magistrate failed to appreciate the provisions of the CGST Act while passing the impugned order dated 30.12.2020, thereby remanding the petitioner to magisterial custody. According to the learned counsel appearing for the petitioner, respondent No.2 in the

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present case had violated the right of the petitioner under Article 21 of the Constitution of India, as his arrest and continued custody was wholly illegal and it violated the provisions of the CGST Act. It was submitted that since the incarceration of the petitioner was not in terms of procedure established by law, this court in exercise of its jurisdiction under Article 226 of the Constitution of India ought to interfere with the impugned order by directing release of the petitioner from custody forthwith.

8. The learned counsel appearing for the petitioner further contended that, there was no provision under the CGST Act for clubbing the amount of alleged tax violation of separate and distinct legal entities, unlike Section 64 of the Income Tax Act which provides for clubbing of income of person with that of another in specified situations. It was further submitted that in absence of any such provision, the alleged input tax credit wrongly availed by the aforesaid four distinct business establishments could not have been clubbed together to cross the threshold of Rs.5 crores as stated in section 132 (1) (i) of the CGST Act, to claim that the petitioner had committed cognizable and non-bailable offences under section 132 (5) of the CGST Act. Reliance was placed on judgment of the Hon'ble Supreme Court in the case of ***Arnab Manoranjan Goswami Vs. The State of Maharashtra & Others*** **(Judgment and Order dated 27.11.2020 passed in Criminal Appeal No. 742 of 2020)**, particularly paragraph 61 thereof. Reliance was also placed on judgments of High Courts, reference to which shall be made while dealing with the contentions raised on behalf of the petitioner.

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9. Mr.Mishra, learned Special Public Prosecutor appearing for respondent No.2, vehemently opposed the contentions raised on behalf of the petitioner. By referring to the affidavit filed on behalf of respondent No.2, it was submitted that although four firms or business establishments were the subject matter of investigation and proceedings in the present case, there was ample material on record to show that all of them were effectively operated and controlled only by the petitioner. It was submitted that the petitioner himself was the proprietor and Karta of two such firms and although his father was the proprietor and Karta of the other two firms, each and every aspect of the activity pertaining to all the four firms or establishments was controlled by the petitioner himself. It was brought to the notice of this court that the KYC details of bank accounts of all the four firms were that of the petitioner. It was his email ID and mobile number that were linked to all the accounts of the firms and the e-Way Bill Registration data also demonstrated that the it was the email of the petitioner that was used for registration in respect of all the four firms. Reference was made to the statement of the petitioner recorded under section 70 of the CGST Act, as also the statement of his father and that of the Tax Consultant.

10. On this basis, it was submitted that it was the petitioner alone, who had committed the offences under Section 132 (1) (b) (c) of the CGST Act and he could not claim that the offences were non-cognizable and bailable because the input tax credit wrongly availed by the four firms could not be clubbed together. It was also brought to the notice of this court that the material available through investigation clearly demonstrated that the addresses against which

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the four firms were shown to be carrying out business were stated to be leased premises, but the owners of such premises had stated on affidavits that they had never met the petitioner or his father and that their signatures on the documents pertaining to the lease deeds were forged. On this basis, it was emphasized that the entire alleged business activity was fraudulent and that input tax credit was wrongly availed by the petitioner on the basis of such fake sale and purchase activities. On this basis, it was submitted that the action of arresting the petitioner could not be said to be illegal because he had clearly committed offences that were cognizable and non-bailable under section 132 (5) of the CGST Act. The learned Special Public Prosecutor relied upon the judgment of Telangana High Court in the case of ***P.V.Ramana Reddy Vs. Union of India***[1] as also judgments of this Court in the case of ***Tejas Pravin Dugad Vs. Union of India & Ors.*** **(Judgment and Order dated 15.01.2021 passed Criminal Writ Petition No.1715 of 2020)** and ***Ashish Jain Vs. Union of India & Ors.*** **(Judgment and Order dated 31st July, 2019 passed in Writ Petition No.3804 of 2019).**

11. Having heard the learned counsel appearing for the rival parties, in the context of the specific contention raised on behalf of the petitioner, it would be appropriate to reproduce relevant portions of some of the above referred provisions of the CGST Act.

12. Section 2(84) reads thus :

"**2. Definitions**.

In this Act, unless the context otherwise requires,-

1 2019(25) G.S.T.L. 185 (Telangana)

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(1)------

(84) "person" includes-

(a) an individual;

(b) a Hindu Undivided Family

(c) ……

13. Section 69 reads thus :

"**69. Power to arrest**

(1) Where the Commissioner has reasons to believe that a person has committed any offence specified in clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) of section 132 which is punishable under clause (i) or (ii) of sub-section (1), or sub-section (2) of the said section, he may, by order, authorise any officer of central tax to arrest such person.

(2) Where a person is arrested under sub-section (1) for an offence specified under sub-section (5) of section 132, the officer authorised to arrest the person shall inform such person of the grounds of arrest and produce him before a Magistrate within twenty-four hours.

(3) Subject to the provisions of the Code of Criminal Procedure, 1973 (2 of 1974),-

(a) where a person is arrested under sub-section (1) for any offence specified under sub-section (4) of section 132, he shall be admitted to bail or in default of bail, forwarded to the custody of the Magistrate;

(b) in the case of a non-cognizable and bailable offence, the Deputy Commissioner or the Assistant Commissioner shall, for the purpose of releasing an arrested person on bail or otherwise, have the same powers and be subject to the same provisions as an officer-in-charge of a police station."

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14. Section 132 reads as under :

"**132. Punishment for certain offences**

(1) Whoever commits, or causes to commit and retain the benefits arising out of, any of the following offences, namely :-

(a) -------

(b) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act, or the rules made thereunder leading to wrongful availment or utilisation of input tax credit or refund of tax;

(c) avails input tax credit using the invoice or bill referred to in clause (b) or fraudulently avails input tax credit without any invoice or bill;

(d) ------

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

shall be punishable-

(i) in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds five hundred lakh rupees, with imprisonment for a term which may extend to five years and with fine;

(ii) -----

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), all offences under this Act, except the offences referred to in sub-section (5) shall be non-cognizable and bailable.

(5) The offences specified in clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) and punishable under

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clause (i) of that sub-section shall be cognizable and non-bailable."

15. Section 137 reads as under :

"**137. Offences by companies**

(1) ----

(3) Where an offence under this Act has been committed by a taxable person being a partnership firm or a Limited Liability Partnership or a Hindu Undivided Family or a trust, the partner or karta or managing trustee shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly and the provisions of sub-section (2) shall, *mutatis mutandis*, apply to such persons".

16. The specific contention raised on behalf of the petitioner is that in the present case, this Court needs to exercise its extraordinary writ jurisdiction under Article 226 of the Constitution of India since the right of the petitioner under Article 21 of the Constitution of India has been allegedly violated. According to the petitioner, his arrest and continued custody is not according to the procedure established by law and, therefore, this Court needs to interfere in the present matter by setting aside the impugned order dated 30.12.2020 passed by the Court of Magistrate, remanding the petitioner to magisterial custody and giving a direction for release of the petitioner forthwith.

17. In order to examine the said contention, it is necessary to appreciate the circumstances in which a person can be arrested for a cognizable and non-bailable offence under the provisions of the CGST Act. Section 132 pertains to punishment for certain offences and sub-section (5) thereof provides that offences specified in clause

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

18. Section 132 (1) (i) of the CGST Act specifies that in cases where the input tax credit wrongly availed exceeds Rs.5 crores, such an offence would be punishable with imprisonment which may extend to five years and with fine, the offence being cognizable and non-bailable. Thus, the central requirement for application of the said provision is that the input tax credit wrongly availed must exceed Rs.5 crores. The whole endeavour of the petitioner in the present petition is to demonstrate that the figure of Rs.5 crores is not exceeded, even if the facts as claimed to have been discovered by respondent No.2 during investigation are to be accepted. It is for this reason that much emphasis has been placed on the definition of "person" under Section 2 (84) of the CGST Act and it is emphasized that since each of the said firms or business establishments has a different registration number, the alleged wrongdoing of these four firms cannot be clubbed together to exceed the figure of Rs.5 crores. The material available on record, including the figures stated in the affidavit filed on behalf of respondent No.2, would show that the figure of Rs. 5 crores stands exceeded, if the amount of input tax credit allegedly wrongly availed by at least two or more of the aforesaid firms, is put together. Therefore, it becomes crucial as to whether such an exercise could be carried out, in the face of the said four firms having separate registration numbers for the purposes of the CGST Act.

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19. A perusal of the material on record shows that according to the facts that have emerged at this stage on the basis of investigation carried out by respondent No. 2, it is only the petitioner, who is effectively running and controlling all the four aforesaid firms or business establishments. Although the petitioner has retracted his statement given under section 70 of the CGST Act, the other statements on record show that the aforesaid four firms and their activities are carried out and controlled by the petitioner himself. In fact, even as per the statements made in the writ petition itself, the petitioner is sole proprietor of the entity 'M/s Shree Ganesh Textiles' and he is the Karta of the Hindu Undivided Family that does business in the name of 'M/s Yash Fabrics'. Section 137 (3) of the CGST Act, quoted above, clearly states that where an offence under the said Act is committed by a Hindu Undivided Family, the Karta shall be deemed to be guilty of that offence and he shall be liable to be proceeded against and punished.

20. Thus, even if, at this stage, it is to be concluded that the petitioner may not be held liable for the other two firms of which his father is the proprietor and Karta, insofar as 'M/s Shree Ganesh Textiles' and 'M/s Yash Fabrics' are concerned, it is only the petitioner who is the proprietor and Karta. Therefore, he is the only person responsible for the alleged offences committed by the said two firms on the basis of the material presently available on record. This is quite apart from the fact that the statement of the Tax Consultant as also that of the father of the petitioner clearly point towards the fact that even with regard to the other two firms, it is the petitioner, who is effectively running and controlling all the

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activities that have led to allegation of offences being committed for wrongly availing input tax credit.

21. The question, therefore, that arises for consideration is, as to whether in the peculiar facts of the present case it could be said that under Section 69 of the CGST Act, the Commissioner had reasons to believe that a person had committed the offences specified in section 132 thereof, thereby justifying authorization of an officer to arrest such a person. The material presently available on record *prima facie* indicates that not only was the petitioner alone responsible for the activities of the aforesaid four firms and that the entire KYC details and other information for registration of the said four firms pertained only to the petitioner, but the petitioner had indulged in *prima facie* fake claims regarding addresses of the said four firms. This is evident from the fact that respondent No. 2 has affidavits in its possession during the course of investigation from landlords and owners of premises from where the said four firms were purportedly conducting business, stating that no lease deeds were ever signed by such landlords and owners, thereby indicating that such wrongful and illegal activities of claiming input tax credit were undertaken by creating fake entities stated to be carrying out business activities from fake addresses. At the present moment, the material on record *prima facie* indicates that the petitioner alone indulged in all such activities. In tax frauds the *modus operandi* of creating fictitious entities to get around the rigours of law is not unknown.

22. The affidavit filed on behalf of respondent No. 2 also refers to material indicating that even the vehicles used for transport of goods as claimed by the petitioner never actually transported such goods

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and surprisingly the material indicates that such volumes of goods were transported on two wheelers. Such material available on record with respondent No. 2, certainly *prima facie,* indicates that there were sufficient reasons to believe that the petitioner was the person who committed the aforesaid offences thereby justifying the action of authorizing an officer to arrest the petitioner.

23. When the material available on record is viewed from this angle it becomes clear that the contention raised on behalf of the petitioner regarding non-availability of provision in the CGST Act for clubbing the wrongful activities of distinct legal persons, by relying upon certain provisions of the Income Tax Act and other legislations, cannot hold water and it cannot be said that respondent No. 2 wrongly exercised the power to arrest under Section 69 of the CGST Act, in the face of the material available on record at this stage with the said respondent. It cannot be said that the petitioner has been able to make out such a strong *prima facie* case that his arrest under the provisions of the CGST Act can be said to be in violation of procedure established by law, thereby violating his right under Article 21 of the Constitution of India. In this regard the emphasis placed on behalf of the petitioner on the judgment of the Hon'ble Supreme Court in the case of ***Arnab Manoranjan Goswami*** (supra) is misplaced because the said judgment of the Hon'ble Supreme Court laid down that the High Court ought to exercise its power under Article 226 of the Constitution of India in situations where a citizen is able to *prima facie* show that the instrumentality of the state is being weaponized for using the force of criminal law. We are of the opinion that applying the parameters indicated by the Hon'ble

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Supreme Court in the aforesaid judgment, it cannot be said that the petitioner has been able to make out a case for issuing a direction for his release from custody on the basis that his arrest is wholly illegal and unauthorized.

24. Taking any other view at this stage would amount to accepting the claim of the petitioner and preventing the Commissioner from exercising power under Section 69 (1) of the CGST Act, despite sufficient material and reasons to believe that offences had been committed warranting arrest, only because multiple entities are created and run by a single individual for carrying out activities, which *prima facie* indicate wrong availing of input tax credit exceeding Rs. 5 crores. It is in this context that the learned Special Public Prosecutor is justified in relying upon judgment of the Telangana High Court in ***P.V.Ramana Reddy*** (supra), as also judgments of this court in the case of ***Ashish Jain*** (supra) and ***Tejas Pravin Dugad*** (supra).

25. Insofar as judgments of the High Courts relied upon by the learned counsel for the petitioner are concerned, in the case of ***Makemytrip (India) Pvt. Ltd. Vs. Union of India***[2], the Delhi Court found on facts that even, *prima facie,* the petitioners therein could not be held to have violated the provisions of the Finance Act,1994 and Customs Act, 1962 or the Central Excise Act, 1944, thereby showing that power to arrest could not be exercised. The order of this Court passed in ***Champsi M. Shah Vs. Union of India***[3] can also be of no assistance to the petitioner because it is passed in the facts

2 233(2016)DLT484
3 2019 SCC Online Bom 9840

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of that case without any discussion on the question of alleged illegality in exercise of power to arrest. The judgment of the Madhya Pradesh High Court in the case of ***Jagdish Arora & Anr. Vs. Union of India***[4], held in favour of the petitioners on the basis that the material on record did not show existence of "reasons to believe" as contemplated under Section 69 of the CGST Act to proceed for the arrest of the petitioners. It was specifically found in paragraph 38 of the judgment that the petitioners therein could not be said to be responsible for the concerned company. But, as noted above, such is not the situation in the present case and therefore, the said judgment is clearly distinguishable.

26. In view of the above, we are of the opinion that the petitioner has not been able to make out a case for exercising jurisdiction of this court under Article 226 of the Constitution of India. Therefore, the prayers made in the present writ petition cannot be granted. Accordingly, the writ petition is dismissed.

27. The observations made herein before are only for the purpose of adjudication of the present writ petition. We make it clear that dismissal of this writ petition shall not be construed as an impediment to apply for grant of bail before the competent court. Rule is discharged.

(MANISH PITALE, J.) **(S.S.SHINDE, J.)**

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