

HIGH COURT OF MADHYA PRADESH : JABALPUR
(Division Bench)

M.Cr.C. No.24219/2020

Jagdish Arora and another

-Versus-

*Union of India, through Senior Intelligence Officer, GST
Intelligence, Bhopal*

Shri Mukul Rohatgi, Senior Advocate with Shri Ajay Gupta, Shri
Rahul Diwaker, Shri Kapil Wadhwa and Shri Ravi Kant Patidar,
Advocates for the applicants.

Shri Vikram Jeet Banerjee, Additional Solicitor General and Shri
Siddharth Seth, Advocates for the respondent/Union of India.

CORAM :

Hon'ble Shri Justice Ajay Kumar Mittal, Chief Justice.
Hon'ble Shri Justice Vijay Kumar Shukla, Judge.

ORDER
(Jabalpur, dtd. 18.08.2020)

Per : Vijay Kumar Shukla, J.-

Hearing convened through video conferencing.

2. This is the first bail application filed under Section 439 of the Code of Criminal Procedure [for short “the CrPC”] on behalf of the applicants, namely, Jagdish Arora and Ajay Kumar Arora, who have been taken into judicial custody in connection with Crime No.DGGI/BhZU/1204/03/2020-21/SDPL, registered at the Central Goods and Service Tax, Bhopal, in respect of the offence punishable under Section 132(1)(a) read with section 132(1)(i) of the Central

Goods and Service Tax Act, 2017 [hereinafter referred to as “the CGST Act”].

3. The bail application preferred by the applicants under Section 437 of the CrPC before the learned Judicial Magistrate First Class, Bhopal, was rejected on 14-7-2020. Thereafter, they moved an application before the Court of Sessions under Section 439 of the CrPC, which also faced dismissal *vide* impugned order dated 16-7-2020.

4. Shorn of unnecessary details : the factual expose’ adumbrated in a nutshell, are that the applicants were taken into custody by the Central Goods and Service Tax Department (CGST Department) on 7-7-2020, while their formal arrest was shown on 8-7-2020 under Section 69 of the CGST Act, and they have been in jail since 9-7-2020. The instant case arises out of proceedings initiated by the CGST Department in relation to purported evasion of Goods and Service Tax (GST) by the Company – Som Distilleries Pvt. Ltd. [hereinafter referred to as “SDPL”] purportedly leviable and evaded on account of production and sale of sanitizers.

5. At the outset, the petitioners claimed that neither Jagdish Arora nor Ajay Kumar Arora, the applicants herein, are Directors/Managers/Officers/employees or authorized representatives of the

SDPL and as such, they are not responsible for the day-to-day business affairs of the Company. In fact, both the applicants had resigned their Directorship from the SDPL on 01-4-2009, i.e. nearly 11 years ago. A certified copy of Form-32 having the details of resignation from the Directorships is appended to the application as Annexure-P/3. It is asserted that the CGST Department, however, has not collected or placed on record even an iota of documentary evidence in order to substantiate their version. It is strenuously urged that the applicants are entitled to bail on this ground alone.

6. It is putforth that initially the GST authorities had communicated that the demand of GST liability was made to the extent of ₹ 7,96,00,000/-. Thus, in order to demonstrate its *bona fide* the SDPL immediately deposited ₹ 8 crores under protest. According to the petitioners the CGST Department has now increased the purported liability to ₹ 33 crores as an afterthought.

7. It is argued that the instant arrest proceedings are completely premature, as till date the assessment proceedings have not commenced and, therefore, there is no concretized liability that the GST Department can fasten on the SDPL. To bolster the submission, reliance is placed on the decisions of the High Court of Madras in the case of **M. Jayachandran Alloys Pvt. Ltd. vs. Superintendent of GST and Central Excise – W.P. No.5501/2019**

and the Delhi High Court in **Make My Trip (MMT) vs. Union of India, 2016 (44) STR 481 (Delhi)**, confirmed by the Supreme Court in the judgment rendered in the case of **Akhil Krishan Maggu and another vs. Deputy Director, DGGI and Ors – C.W.P. No.24195/2019 (OM)**.

8. It is stated on behalf of the applicants that the SDPL is a private limited company which was incorporated in the year 1986 under the provisions of the Companies Act, 1956. The SDPL is engaged in the business of manufacture and sale of alcohol based products and has made its mark across the country, primarily on account of consistently and uniformly manufacturing high quality products. It is a significant and honest contributor towards the Government exchequer and contributes about ₹ 38 crores annually on account of various taxes. The company also provides employment to about 800-1000 persons across India.

9. It is pleaded that prior to March, 2020 the SDPL was not manufacturing sanitizers. On 19-3-2020 vide order No.1(2)/2020-SP-1 the Government of India directed the Chief Secretaries of all States to initiate steps to enhance production of hand sanitizers and further accord necessary permission to sanitizer manufacturers and distilleries, which on account of having existing infrastructure and ability to manufacture alcohol based products, could easily

manufacture sanitizers. This was done to meet the increased demand in order to curb the spread of the COVID-19 pandemic.

10. Accordingly the State of Madhya Pradesh issued a licence to the SDPL to manufacture hand rub sanitizer for the period 24-03-2020 to 30-6-2020. Subsequently, the licence was extended by the State of Madhya Pradesh, till 30-6-2025.

11. On 4-4-2020, the SDPL was granted a certificate of approval by the Government Analyst, who confirmed the fact that the sanitizers produced by the Company were in conformity with the prescribed standards. The SDPL commenced production of hand sanitizers on 25-03-2020. As hand sanitizers are also an alcohol based product, manufacturing of the same is heavily regulated and monitored by the State Excise Department. Furthermore, even the raw material for the production of the hand sanitizer which is Rectified Spirit (RS) or ENA, also known as Neutral Spirit, is a controlled substance and the usage and manufacturing of which is monitored by the Excise Department.

12. It is next pleaded that as per Distillery, Bottling and Warehouse Rules, made under the Madhya Pradesh Excise Act, 1915, the manufacturing premises are under the direct control of an Excise Officer, who oversees the factory for 24 hrs. The said officer

is responsible for monitoring the production carried out at such controlled premises and the dispatches/supply of all alcohol based products from the premises. The Excise Officer has issued a certificate dated 30-6-2020 certifying that the total production of hand sanitizer by the SDPL till 30-6-2020 has been 2090245 litres and that the company has supplied a total of 917721.46 litres of sanitizer. A copy of the said certificate is appended as Annexure-P/8.

13. It is asseverated that the SDPL has filed its GST returns for March and April, 2020, wherein the GST Tax has been paid at ₹1,72,03,623/-. The due date for GSTR 3B return for the month of May, 2020 was 27th June 2020 and GSTRI due date is 28th July 2020, which are yet to be filed. The Central Board of Indirect Taxes has extended the limitation for filing of GST returns, vide Notifications dated 03-4-2020 and 24-6-2020, therefore, the Company is not in breach of any statutory or regulatory deadlines and it has fully complied with the GST regime.

14. The GST Department carried out search and seizure proceedings at the premises of the SDPL on 26-6-2020 which continued till 28-6-2020 and thereafter, on 30-6-2020. It is the case of the applicants that the search proceedings were carried out in complete derogation of the procedure envisaged in law and in

violation of COVID-19 Guidelines. The search warrants have not been provided/served/shown to responsible persons; documents have been seized without proper inventory and without providing copies thereof, stock is being taken randomly without the aid of SDPL's Store Manager; and proper *panchnamas* are not being prepared and served by the respondent. It is canvassed that because of above-mentioned irregularities, several employees of the Company were abused, humiliated and even assaulted. They are being interrogated rigorously till late hours and are not being spared and allowed to go home, nor they have been allowed to meet their lawyers. It is averred that a false declaration about permitting the applicants to meet their lawyers has been made in the memo of arrest. Further, the employees of the Company have been physically tortured and beaten up inhumanly.

15. It is further argued on behalf of the applicants that being aggrieved by the action of the GST Department, the SDPL has preferred a writ petition before this Court forming the subject-matter of **W.P. No.9650/2020 [Som Distilleries vs. Directorate of GST & Others]**, wherein notice has been issued to the respondents vide order dated 14-7-2020.

16. It is also contended that the levy of GST in the present case is illegal as the GST is to be paid on the actual amount of sale

consideration. A dispute is raised about the GST to be paid by the Company as both, the quantity and the valuation are based on hypothetical reasonings.

17. The action of the CGST authorities has also been challenged as they have committed deliberate and egregious errors in valuation of the purported GST liability of the SDPL, in order to bring the alleged acts within the purview of Section 132(5) of the CGST Act. The GST authorities have committed mischief in valuation of the hand rub sanitizer manufactured by the SDPL with the sole motive of taking the alleged tax evasion above ₹500 lacs. The case of the GST Department is completely contrary to the figures certified by the Excise Department. A comparative chart of CGST and actual figures of the Excise Department has been reproduced in the application. On the basis of the figures enumerated in the chart it is submitted that the figure for total production, supply and closing stock of sanitizer, as estimated by the CGST, is not correct and the same is based on hypothetical reasoning. The basis of calculation made by the GST Department is completely erroneous and contrary to law.

18. It is also asseverated that for the sake of argument, even if the allegations of GST authorities are taken at the face value, the

GST assessable upon the sale of sanitizer viz. ‘Genius’ at most, ought to be valued as follows :

Sr.No.	Particulars as alleged by the GST Authorities	GST Payable
1.	“Clandestine” production and supply of alleged 5,35,000 litres Genius Sanitizer. (Communicated orally on 11-7-2020)	₹80 lacs
2.	Qty. of Genius sanitizer to the tune of 3,47,000 litres seized at Biscuit and Basket Warehouse of Som Distilleries Pvt. Ltd. (which in fact, have not been sold and were stored for buffer purposes).	₹52 lacs
3.	Genius Sanitizer seized at job work site of Som Distilleries and Breweries Ltd. (unsold stock).	₹23.50 lacs
4.	Genius sanitizer seized at various warehouses in various cities of around 38,000 litres (unsold stock).	₹04.45 lacs
5.	Stock Transfer of Genius Sanitizer	₹09.80 lacs
	TOTAL	₹169.75 lacs

19. It is also submitted on behalf of the applicants that although the Company is disputing any demand of the GST authorities, but in order to demonstrate its *bonafide* the Company has already deposited ₹8 crores towards GST, under protest. To substantiate the submission a reference is made to the order of the Apex Court passed in the case of **C. Pradeep vs. Commissioner of GST**, dated 6-8-2019, wherein it is held that even if 10% or some

portion of the disputed liability is paid, while filing an appeal, no coercive action ought to be taken and no arrest made.

20. Further, reliance is placed upon the judgments of the Gujarat High Court in **Akshay Dinesh Patel vs. Commissioner of Central Goods and Services Tax** (*R/Crl Misc. Application No.1442 of 2020*) and the Calcutta High Court rendered in the case of **Sanjay Kumar Bhuwalka vs. Union of India** (*CRM No.3327 of 2018*), wherein benefit of bail was granted to the accused persons on deposit of certain portion of disputed liabilities/dues.

21. That apart, reference is made to Sub-section (7) of Section 107 of the CGST Act, which postulates that where the appellant has paid the amount under sub-section (6), the recovery proceedings for the balance sum, shall be deemed to be stayed. It is putforth that the statutory provision under the CGST Act permits the applicants to prefer an appeal against the amount of tax in dispute upon depositing of such amount and further stays the recovery proceedings during the pendency of such appeal. It is strenuously urged that the applicants could have conveniently preferred such an appeal by depositing 10% of the amount in dispute. However, it is pertinent to note that to show their *bonafide*, the Company has already deposited the entire disputed amount of ₹8 crores, under protest.

22. The next plank of submission on behalf of the applicants is that their arrest is bad in law, because the final assessment and adjudication has yet not been initiated. To buttress the submission, reliance is placed on the judgment passed by the Madras High Court in **M. Jayachandran Alloys Pvt. Ltd. vs. Superintendent of GST and Central Excise – W.P. No. 5501 of 2019**, wherein it is clarified that power of arrest can be exercised only after the liability is quantified upon due assessment. In paras 27 and 36 of the judgement it is specifically observed :

“27. The Act provides for an assessment to be made after notice to be issued to the assessee...

xx xx xx

36. Though the discussions and conclusions therein have been rendered in the context of Chapter V of the finance Act, 1994, levying service tax, I am of the view that they are equally applicable to the provisions of the CGST as well. Section 132 of the Act as extracted earlier, imposes a punishment upon the assessee that commits an offence. There is no dispute whatsoever that the offences set out under (a) to (l) of the provision refer to those items that constitute matters of assessment and would form part of an order of assessment to be passed after the process of adjudication is complete and taking into account the submissions of the assessee and careful weighing of evidence found and explanations offered by the assessee in regard to the same.”

Thus, it is submitted that the procedure adopted in the instant case, where arrest has been made without completion of assessment proceedings, runs counter to the established provisions

of law. It is trite law that the power of arrest is to be used with great circumspection and not casually.

23. Support was drawn from the pronouncement in **Make My Trip (MMT) (supra)**, wherein it is ruled that the provisions of the CGST Act is *para materia* with the provisions of the Finance Act, 1994. Based on the said observation, the Delhi High Court had observed that the power of arrest cannot be resorted to, whilst bypassing the procedures laid down in the Act.

24. The submission was reiterated that the applicants cannot be made vicariously responsible for the default of the Company, as they do not hold a Managerial/Directorial or any Executive position in the company. The fastening of criminal liability on the applicants of the purported defaulted Company under Section 132 of the CGST Act and consequently arresting them, is squarely contrary to the established criminal jurisprudence concerning vicarious liability of penal provisions of India.

25. A reference is made to clause (1) of Section 137 of the CGST Act, which stipulates that a person who at the time of the alleged offence was in charge of, and was responsible to, the Company for the conduct of business of the Company, as well as the Company, shall be deemed to be guilty of the offence and shall be

liable to be proceeded against and punished accordingly. In the present case the applicants, who are neither Directors nor they occupy any Managerial post or position in the Company, cannot, by any stretch of imagination, be observed to be persons – in charge of and responsible to the Company for the conduct of business of the Company and hence, be deemed guilty of the alleged offence. It is, therefore, submitted that the applicants have been wrongly arraigned as accused in the instant case. The applicants are not Directors of the SDPL, therefore, they could not be held responsible for the GST tax evasion, if any, by the Company.

26. The petitioners urges that the alleged offences are punishable with imprisonment of only upto a maximum period of five years, therefore, their arrest was not necessary and they are entitled for grant of bail, keeping in mind the principles enunciated by the Apex Court in the case of **Arnesh Kumar vs. State of Bihar, (2014) 8 SCC 273.**

27. The learned counsel appearing for the applicants referred to the provisions of sections 69 and 137 of the CGST Act.

At this juncture, it is apt to reproduce the said provisions :

“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 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 subsection (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.

... ..

137. Offences by companies. (1) Where an offence committed by a person under this Act is a company, every person who, at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any negligence on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

(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.

(4) Nothing contained in this section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

Explanation.—For the purposes of this section,—

(i) “company” means a body corporate and includes a firm or other association of individuals; and

(ii) “director”, in relation to a firm, means a partner in the firm.”

28. The arrest of the applicants under Section 69(1) of the CGST Act was assailed to be bad in law, as there is failure on the part of the prosecution to provide reasons to believe. It is submitted that the power to arrest is conferred on the Commissioner under Section 69(1) of the CGST Act. As provided under Sub-section (3) of Section 69 of the GST Act, the power under Section 69(1) is subject to the provisions of the CrPC and, therefore, the phrase “reasons to believe” is to be understood in the context of how the said phrase is defined in Section 26 of the Indian Penal Code, 1860 [for short “the IPC”]. As such, ‘reasonable belief’ must be cogent and recorded in writing. In the instant case, the applicants have been kept in the dark and the investigation leading upto their arrest has been bereft of any reason being provided for the same.

29. It is pleaded that in complete disregard to Section 69 of the CGST Act, the GST authorities have failed to provide the “reasons to believe” and “grounds of arrest” in respect of the

alleged offence punishable under Section 132(1)(a) to (d) of the CGST Act.

30. It is strenuously urged that in the present case, there is no rationale and intelligible nexus between the reasons to believe for the applicants committing the alleged offence. The reasons to believe, cannot be equated with the reasons to suspect. To bolster the submissions, reliance is placed on the judgment rendered in the case of **N. Nagendra Rao and Co. vs. State of A.P., AIR 1994 SC 2663**, wherein the Supreme Court has observed that the expression “reason to believe” means that even though formation of opinion may be subjective, but it must be based on material on the record. It cannot be arbitrary, capricious or whimsical. It is, thus, a check on exercise of power to seize the goods.

Further reliance has been placed in the judgment of the Apex Court rendered in the case of **K.K. Ahuja vs. V.K. Vora and another, (2009) 10 SCC 48**, to contend that in the case of vicarious liability, a person of the company has to be legally in charge and also responsible for the conduct of the company. Paras 22 and 23 of the judgement have been referred to, which we think apt to reproduce :

“22. [Section 141](#) uses the words "was in charge of, and was responsible to the company for the conduct of the business of the company" (emphasis supplied). It is evident that a person who can be made vicariously liable

under sub-section (1) of [Section 141](#) is a person who is responsible to the company for the conduct of the business of the company and in addition is also in charge of the business of the company. There may be many directors and secretaries who are not in charge of the business of the company at all. The meaning of the words "person in charge of the business of the company" was considered by this Court in [Girdhari Lal Gupta v. D.N. Mehta](#) [1971 (3) SCC 189] followed in [State of Karnataka v. Pratap Chand](#) [1981 (2) SCC 335] and [Katta Sujatha vs. Fertiliser & Chemicals Travancore Ltd.](#) [2002 (7) SCC 655]. This Court held that the words refer to a person who is in overall control of the day to day business of the company. This Court pointed out that a person may be a director and thus belongs to the group of persons making the policy followed by the company, but yet may not be in charge of the business of the company; that a person may be a Manager who is in charge of the business but may not be in overall charge of the business; and that a person may be an officer who may be in charge of only some part of the business.

23. Therefore, if a person does not meet the first requirement, that is being a person who is responsible to the company for the conduct of the business of the company, neither the question of his meeting the second requirement (being a person in charge of the business of the company), nor the question of such person being liable under sub-section (1) of [section 141](#) does not arise. To put it differently, to be vicariously liable under sub-section (1) of [Section 141](#), a person should fulfil the 'legal requirement' of being a person in law (under the statute governing companies) responsible to the company for the conduct of the business of the company and also fulfil the 'factual requirement' of being a person in charge of the business of the company."

31. In the present case, the GST authorities have not placed on record any material whatsoever, to support such "reason to believe" against the applicants. Such *reason to believe* must be recorded by the Commissioner of CGST himself with application of mind.

32. That all the offences under the CGST Act are compoundable under Section 138 of the CGST Act and hence, the arrest is wholly unnecessary. The object and purpose of the CGST Act is not penal in nature, but it is economic for the purpose of legislation being to recover any amount, that may be due to the Government exchequer. To substantiate the submission, it is urged that the Calcutta High Court in **Sanjay Kumar Bhuwalka (supra)** while deciding a bail application in case of similar nature observed thus :

“.... I do agree with such contention of Mr. Basu that the GST Act of 2017 is essentially a fiscal statute and the statement of object and reason has to be read together, which is aimed at realization of revenue. Revenue is the monetary payment due to the Government and non-payment, whatever be the means applied for such non-payment confers right on the Government, both Central and State, to realise the revenue whereas penal provision of arrest and detention is only when there is violation of the provision under the statute which is not the intention of the Legislature to achieve the fiscal object regardless of the existence of a provision for the arrest of the offender in the Act.”

33. That apart, it is submitted that the Court below has committed a grave error in rejecting the bail application moved on behalf of the applicants. The impugned order has been passed mechanically without giving due consideration to the correct position of law or facts. Further, the court below has failed to appreciate the letter and spirit of the CGST Act, which is to recover

the dues payable under the Act and as such its primary object cannot be meted out by imposing punitive punishment.

34. Prayer for grant of bail has also been made on medical grounds. It is stated that the applicant No.2, Ajay Kumar Arora is an old and infirm person of 61 years of age. He is a heart patient having undergone an open heart bypass surgery in the year 2009. He is also suffering from an extreme form of Asthma and as such, is highly vulnerable to the COVID-19 virus. Despite these ailments, with a view to demonstrate his *bona fide*, he joined the proceedings before the G.S.T. Officers for the first time on 02-7-2020. On that day, he was interrogated from 12 noon till 10 p.m. After fully co-operating with the Department, he gave a written intimation humbly requesting to be excused from personal appearance on account of his health condition and his peculiar vulnerability on account of COVID-19 pandemic. Despite his precarious health he was again called on 3-7-2020, 4-7-2020 and 6-7-2020 and further fully co-operated with the Department. Copies of medical documents have been placed on record.

35. On behalf of applicant No.1 – Jagdish Arora, it is pointed out that he is 64 years old person and is also suffering from various ailments. He had undergone heart surgery in the form of Stent in the year 2010. He has a long history of gastroenterology

diseases which on account of COVID-19 pandemic poses a serious threat to his life. Despite grave risk to his life, in order to show his *bona fide* he attended the proceedings and was interrogated continuously on 7-7-2020 from 05:30 p.m. till 3 p.m. on the next day – 8.7.2020. As there was severe chest pain during course of the interrogation, he was immediately admitted to the I.C.U. of the J.P. Hospital, Bhopal. Medical reports have been appended to the application.

36. The submissions made on behalf of the applicants on the anvil of the aforementioned facts and grounds, can be summarised as follows :

(a) The applicants are not the Directors of the SDPL, therefore, they are not responsible for the affairs of the Company. In this regard a reference has been made to the provisions envisaged in clause (1) of Section 137 of the CGST Act and some pronouncements of the High Courts and the Supreme Court.

(b) The power to arrest has to be exercised only upon completion of assessment. Various High Courts viz. Delhi, Karnataka and Gujarat have taken the view that the power to arrest under Section 132 of the CGST Act can only be invoked once the assessment is complete. The judgment of the Madras High Court rendered in the case of **M/s Jayachandran Alloys (supra)** has been referred, wherein it is held that the power to punish set out in Section 132 of the CGST Act,

2017 would stand triggered only when it is established that an assessee has committed an offence, which has to necessarily be post-determination of the demand due from the assessee after completion of process of assessment. Para 40 of the judgment relied upon being relevant, is extracted hereunder :

“40. In the present case, the Department does not dispute that action was intended or envisaged in the light of Section 132 of the CGST Act, the counter fairly stating that the provisions of Section 132 of the CGST Act were shown to the assessee. There is thus no doubt in my mind that the Department intended to intimidate the petitioner with the possibility of punishment under Section 132 and this action is contrary to the scheme of the Act. While the activities of an assessee contrary to the Scheme of the act are liable to be addressed swiftly and effectively by the Department, (the statute in question being a revenue statute where strict interpretation is the norm), officials cannot be seen to be acting in excess of the authority vested in them under the Statute. I am of the considered view that the power to punish set out in Section 132 of the Act would stand triggered only once it is established that an assessee has committed an offence that has to necessarily be post-determination of the demand due from an assessee, that itself has to necessarily follow the process of an assessment.”

(c) The High Court of Delhi in the case of **Make My Trip (MMT) India Private Ltd. (supra)** while dealing with the power of arrest under the Finance Act, 1994 held that without any determination to straight-way conclude, that the petitioners had collected and not deposited service tax in excess of ₹50 lakhs and thereby had committed a cognizable offence, would be putting the cart before the horse.

(d) The decision in **Make My Trip (MMT) India Private Ltd. (supra)** was affirmed by the Supreme

Court in Civil Appeal No.8080 of 2018, by way of a speaking order stating that the issue is as to whether the power of arrest under Section 91 of the Finance Act, 1994 can be exercised without following the procedure as set out in Section 73-A(3) and (4) of the said Act. The High Court has decided, after a detailed discussion, that it is mandatory to follow the procedure contained in Section 73-A(3) and (4) of the said Act before going ahead with the arrest of a person under sections 90 and 91. The aforesaid conclusion was affirmed as the Supreme Court did not see any reason to deviate from it.

(e) The applicants have been arrested without any 'reason to believe'. No such reasons as required under Section 69(1) have been provided by the respondent. No supporting documents existed at the time of the arrest and even in the proposal to arrest. The power to arrest under Section 69 can only be exercised for offences falling under clauses (a) to (d) of Section 132(1) of the CGST Act.

(f) Sanitizer contains 80% spirit/alcohol, a substance sourced, controlled and heavily regulated by the Excise Department. An Excise Officer is present at the premises of the Company 24 hrs. a day, 365 days a year and maintains the record of production of hand sanitizer.

(g) The Excise Department Certificate issued in favour of the SDPL evidences that it manufactured only 20 lacs litres of sanitizer and supplied only 9 lacs litres till 30-6-2020 from the factory premises. The said

figures were also affirmed by an independent report of the flying squad of the Excise Department.

(h) The respondent has taken the value at MPR of ₹500/- per litre without any basis, and by reverse calculation arrived at the figure of ₹381/- per litre as the value at which the GST is to be assessed.

(i) Section 15(1) of the CGST Act provides that the value of supply of goods shall be the transaction value, i.e. price actually paid or payable for the supply of goods and not the MRP.

(j) The respondent initially communicated the demand of GST liability of ₹7,96,00,000. The SDPL immediately made deposit of ₹8 crores , i.e. 100% of the alleged liability between the period 7-7-2020 to 9-7-2020.

(k) In **C. Pradeep vs. Commissioner of GST (supra)** the Apex Court has observed that until the assessment is concluded, respondents cannot invoke Section 132 of the CGST Act.

(l) The applicants have fully co-operated with the investigation proceedings.

(m) The offence under Section 132 of the CGST Act is punishable with a maximum of 5 years and is compoundable.

(n) Frivolity in prosecution has to be considered and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail. *[See : Ram Govind Upadhyay vs. Sudarshan Singh, AIR 2002 SC 1475]*

(o) The applicant No.1 – Jagdish Arora, aged about 64 years, is a heart patient and had a Stent placement in the year 2010. He has also a long history of gastroenterology diseases. He was admitted to the ICU of J.P. Hospital Bhopal, on 8-7-2020.

(p) The applicant No.2 – Ajay Kumar Arora, aged about 61 years, is also a heart patient and had undergone an open heart bypass surgery in the year 2009. He is also an asthmatic.

37. The respondent submitted that the entire exercise undertaken, is strictly in accordance with the provisions of Sections 67 and 69 of the CGST Act. There is sufficient material to establish direct involvement of the applicants in the three Companies under investigation. There is basis of investigation which is evident from the note-sheets – investigation reports. It is submitted that an intelligence was received from the Director General (DGST), Intelligence Headquarter that several distilleries (including the SDPL) across India engaged in manufacture of Ethanol from grains, are involved in GST evasion. Acting on the said intelligence, a reasonable belief was formed that the SDPL had evaded GST on the taxable product and the documents received for investigation have been searched in the premises. During search, the statements of employees of the Company were recorded. They informed that the actual control of the Company is at the hands of the applicants. The

statement of one Binay Kumar Singh, an employee of the Company was heavily relied upon by the respondent. The framing of assessment is not a *sine-qua-non* for making the arrest as held by the Telangana High Court in **P.V. Ramana Reddy Vs. Union of India {W.P. No. 4764/2019 (para 56)}** which view was affirmed by the Apex Court in **Special Leave to Appeal (Criminal) No. 4430/2019 (P.V. Ramana Reddy Vs. Union of India)**.

38. We have heard the learned counsels appearing for the parties at length and bestowed our anxious consideration on their respective arguments advanced. The record was also produced by the respondent in a sealed cover. We have gone through the record in order to ascertain the existence of “reasons to believe” for the proceedings being initiated against the applicants. We do not perceive any material, except the statement of the employee – Binay Kumar Singh. There is no documentary material produced on record to show that the present applicants were legally in charge and responsible for the day-to-day working of the Company. They had already resigned legally from the Directorship of the Company. Merely on a bald statement of an employee of the Company, it cannot be held that the present applicants were in charge and responsible for the functions of the Company.

39. On a careful consideration of nature and gravity of the allegations made against the applicants and the specific evidence collected in respect of the allegations levelled, elaborate discussion of which would not be apt, as it may adversely affect the interest of either party, the specific facts put forth by the learned senior counsel for the applicants and the reply and other facts and circumstances of the case, in the considered opinion of this Court, the case for granting bail is made out. Therefore, without commenting on the merits of the case, **the application for grant of bail to the applicants stands allowed.** Needless to say that anything observed hereinbefore shall not be taken to be an expression of opinion in any ancillary or incidental proceeding taken in pursuance to search on 26.06.2020 to 28.06.2020.

40. It is directed that the applicants – **Jagdish Arora and Ajay Kumar Arora** be released from custody on their furnishing a personal bond in the sum of **₹5,00,000/- (Rupees five lacs only)** each, with separate sureties of the like sum to the satisfaction of the trial Court, for their appearance before it, as and when required, further subject to the following conditions :

(i) *The applicants shall co-operate with the trial and shall not seek unnecessary adjournments on frivolous grounds to protract the trial;*

(ii) *The applicants shall not directly or indirectly allure or make any inducement, threat or promise to the prosecution witnesses, so as to dissuade them from disclosing truth before the Court.*

(iii) *The applicants shall not commit any offence or involve themselves in any criminal activity.*

(iv) *In case of their involvement in any other criminal activity or breach of any other aforesaid conditions, the bail granted in this case may also be cancelled.*

(v) *The applicants shall submit their passports, if any, before the trial Court and shall not leave India without prior permission of this Court.*

41. Let the original records of the case be returned to the respondent in a sealed cover.

(Ajay Kumar Mittal)
Chief Justice

(Vijay Kumar Shukla)
Judge

ac.