

A.F.R.

IN THE HIGH COURT OF ORISSA, CUTTACK

BLAPL No.9999 of 2023

In the matter of an application under Section 439 of the
Cr.P.C.

Nitin Kapoor Petitioner

-Versus-

State of Odisha Opposite Party

For Petitioner : Mr. R.P. Kar, Sr. Advocate
instructed by Mr. S.Tibrewal
& Mr. Rahul Raheja, Advocates

For Opp. Parties : Mr. P. Mohapatra,
Sr. Standing Counsel, DGGST
along with Mr. A. Kedia, Junior
SC, CGST & Customs

P R E S E N T:

THE HONOURABLE SHRI JUSTICE M.S. SAHOO

Date of hearing : 02.11.2023 Judgment : 23.11.2023

M.S.SAHOO, J. The petition under section 439, Cr.P.C. has
been filed by the petitioner challenging the order dated
22.08.2023, rejecting the prayer for bail by the petitioner
passed by learned Special Judge (CBI) Court-I-cum-Addl.

Sessions Judge, Bhubaneswar in BLAPL No. 1443 of 2023 arising out of the order dated 11.07.2023 passed by learned S.D.J.M., Bhubaneswar pertaining to 2(c) CC No. 61 of 2023 (F. No. DGGI/BbZU/07/GST/2023 dated 11.07.2023) for the offences alleged against the petitioner under section 69 of Central Goods and Service Tax Act, 2017 (for short 'the Act'), read with Sections 132(1)(b), 132(1)(c), 132(1)(f) of the Act rejecting the prayer of the petitioner for bail.

2. Heard Mr. R.P. Kar, learned Senior Counsel appearing for the petitioner instructed by Mr. S. Tibrewal & Mr. Rahul Raheja, advocates. The learned senior counsel advanced arguments at length supporting the prayer for bail.

3. On behalf of the investigating agency, Mr. Mohapatra, learned Senior Standing Counsel, Director General, GST was heard in extenso along with Mr. Avinash Kedia, learned Junior Standing Counsel, CGST & Customs, Orissa High Court, Cuttack.

Pleadings :

4. Apart from considering the averments made in the petition filed by the petitioner, this Court has considered the case compilation filed by the petitioner along with memo dated 17.10.2023 and the written note of submission and compilation of the judgment/orders relied upon by the learned counsel for the petitioner filed on 02.11.2023.

The opposite party have filed their response/objection to the petition in the form of an affidavit dated 16.10.2023 sworn to by the Senior Intelligence Officer on behalf of Directorate General of Goods and Services Tax Intelligence, Bhubaneswar Zonal Unit and further additional affidavit dated 01.11.2023 has been filed on behalf of the opposite party along with written notes of submission on behalf of the opposite parties and a compilation of relevant provisions and judgments filed on 2.11.2023.

Prosecution Report :

5. Investigation Report/complaint dated 8.9.2023 registered as 2(c) CC No. 61 of 2023 was filed before the learned Subdivisional Judicial Magistrate, Bhubaneswar in the form of a complaint for an offence punishable under section 132 of the Act read with section 132 of the Orissa GST Act, 2017 and section 20 of the IGST Act, 2017, which indicates the following :

5.1 That certain registered entities having GSTIN (Goods and Services Tax Identification Number) are non-existent at their registered premises. The supply chain and physical verification at the premises of supplier of the firms is also non-existent at their registered premises. Presumably, the entities having GSTIN and their supplier entity, have been created to pass on and avail "Input Tax Credit" under the GST regimen (for short 'ITC') to defraud government exchequer. The details of

vehicle numbers mentioned on the eWay bills generated for purported supply were verified and found to be non-existent. It is alleged that the fictitious entities have shown export of goods in their GST returns, however, they have never actually received any goods from the alleged supplier. There is no movement of any vehicle for transportation of the alleged goods. It is alleged, the exports declared are all bogus and fake. The ITC received from the Government is misuse of benefits extended by the Government to exporters.

5.2 The bank accounts where the ITC has been credited have been verified from the banks and the ITC has been received in the bank accounts.

5.3 It has been stated in the complaint before the learned S.D.J.M. that searches were conducted in the premises as per the office address of the firms and it was found that there were no goods in those premises. The statement of the accused persons i.e. present petitioner along with accused no.2 named in the complaint were recorded under section 70 of the CGST Act, 2017. The chat contained in the mobile phone of the accused persons were verified by the officers of the complainant agency that lists names of thirteen entities for which offices have been arranged. All the entities have GST registrations. The entities have been registered by using

Aadhar and PAN cards of various people who are otherwise not so financially sound and do not have the means to operate the entities. It has been alleged against the present petitioner that he sources documents like Aadhar card, PAN card of different persons. The accused no.2 facilitates finding of place for rent. The rental agreement is signed between the proprietor and the owner of the premises. The proprietor opens a bank account and the details are then furnished. It is indicated in the complaint that the ITC in the goods and service tax (GST) system is a mechanism that allows registered business to claim a credit for the tax, they have paid on inputs used in their business operations. The credit is offset against the GST liability that the business owes to the Government.

5.4 In the context of exports, businesses can claim refunds on the GST paid on the inputs used in the export of goods and services. It is alleged that the refunds have been received by at least two entities and after money has been credited to the bank accounts, the same have been withdrawn. It is alleged that the petitioner has created 111 fake GSTINs to generate bogus transactions and has claimed ITC amount of Rs.267,41,14,087/- thereby a refund to the tune of Rs.16,40,09,812/- has been received.

Submissions on behalf of the petitioner :

6. It is submitted by learned counsel on behalf of the petitioner that there is no material to substantiate the above allegations.

The pleadings of the petitioner and the submissions of learned senior counsel are summarized herein :

6.1 There is no material on record showing that the petitioner has been responsible for affairs of said firms/companies or the petitioner has played any role in any of said firms. The allegations are completely incorrect and have been made without any basis.

6.2 The entities as alleged are exist in Odisha have a ITC to the tune of Rs.1.96 crores, which is less Rs.2 crores. However, the Department in order to make the offence non-bailable, has added ITC of firms that does not lie within their jurisdiction. Though the DGGI, BBSR Zonal Unit has power to investigate, the amount adjudicated in the complaint in the 2(c) CC before competent court, is tentative. The petitioner is neither the proprietor nor the beneficiary in any firm. Therefore, the allegation under section 132 of the GST Act would not be tenable.

6.3 The authorities have relied on the statement of accused no.2 which has been retracted already. No action has been taken against the proprietor of any of the entities those have been named to have received ITC. The amount of ITC which is alleged to have been received

by the recipient entities can be recovered from the entities with interest as per the sections 73 or 74 assuming that there has been contravention of the provisions contained in section 16(2) of the Act.

6.4 By virtue of section 138 of the CGST Act, 2017, the offences are to be tried summarily and also the offences are compoundable by virtue of section 138 of the Act. The final prosecution report has been filed by the authorities, even if further investigation is kept open under section 178(3) of the Cr.P.C., the petitioner shall always cooperate with the agency.

6.5 The maximum punishment prescribed is for five years for the offence alleged against the petitioner and the petitioner is in custody since 11.07.2023 since when he and the co-accused were remanded to judicial custody.

6.6 It is submitted the entire transactions in entire Orissa is below Rs.2 crores. All the evidences are documentary and stored in electronic form with the opp.parties, hence, there is no chance of tampering. All the witnesses are official witness and there is no chance of influencing the witnesses. The petitioner is not a flight risk and is ready and willing to appear before the DGGI Authorities as per the terms and conditions fixed by this Hon'ble Court.

Submissions on behalf of the opposite party :

7. It is submitted by the learned Senior Standing Counsel, DGGI that the learned courts below while considering the factual matrix, circumstances and the gravity of the offences have been pleased to deny bail to the petitioner herein. The petitioner's bail application is premature as the investigation of the case is evolving with the discovery of 111 fabricated GSTINs involved in illegal export benefit claims, fraudulent Input Tax Credits of around Rs.267 crores, and false export transaction representations resulting in a fraudulent refund of approximately Rs.16.40 crores. The ongoing investigation has revealed the intricate supply chains of M/s. Jasem Overseas and M/s. Rompathar General Overseas, involving entities registered in Delhi with a paper-bound existence, intended for the fraudulent availing of ITC pertaining to fake exports. The co-accused Ronald Earnest Ignatio has assisted Nitin Kapoor and has actively participated in the creation of 13 fake GSTINs, which have declared bogus transactions involving fraudulent ITCs of Rs.17,71,10,560/- thereby obtaining illegal refund of Rs.7,79,52,045/-.

7.1 It is submitted the denial of bail is imperative to ensure an unimpeded and exhaustive investigative process. The statements from accused persons, indicate the petitioner as the mastermind behind the entire conspiracy. The far-reaching transactions create a

substantial risk of vital connections being destroyed, disrupting the investigation if the accused is granted bail. It is submitted that the multi-state scope of the investigation indicates a complex network of fraudulent activities, potentially hindering coordination among all India investigative agencies. Incriminating materials like mobile phone has been seized from the petitioner. The petitioner is a flight risk.

Case Law cited :

8. The learned counsel for the petitioner has relied on the following decisions to support his submissions to allow the prayer for bail :

- (i) BLAPL No.9407 of 2021 (**Smruti Ranjan Sahoo v. State of Odisha**) disposed of on 26.11.2021.
- (ii) BLAPL No.8217 of 2021 (**Gurdit Dang v. State of Odisha**) disposed of on 26.11.2021.
- (iii) BLAPL No.3175 of 2021 (**Subash Chandra Swain v. State of Odisha**) disposed of on 07.09.2021.
- (iv) BLAPL No.9642 of 2020 (**Kashmir Kumar Agrawal v. State of Odisha**) disposed of on 15.11.2023.
- (v) BLAPL No.6643 of 2020 (**Amit Beriwal v. State of odisha**) disposed of on 10.11.2020.

- (vi) BLAPL No.4266 of 2020 (**Bikas @ Vikas Sarawgi v. State of Odisha**) disposed of on 23.12.2020.
- (vii) BLAPL No.4125 of 2020 (**Pramod Kumar Sahoo v. State of Odisha**) disposed of on 23.12.2020.
- (viii) S.B CrI. Misc. Bail Application No.5882 of 2021 (**Bhagwan Sahay Gupta v. Union of India**) disposed of on 04.05.2021. (High Court of Rajasthan, Jaipur Bench)
- (ix) CrI. Misc. Bail Application No.742 of 2020 (**Paridhi Jain v. State**) disposed of 20.01.2020 (High Court of Rajasthan, Jodhpur Bench).
- (x) BLAPL No.776 of 2021 (**Smruti Ranjan Mohanty v. State of Odisha**) disposed of on 18.02.2022.
- (xi) BLAPL No.9043 of 2021 (**Amit Kumar Agarwal @ Amit Agarwal v. State of Odisha and another**) disposed of on 11.01.2022. सत्यमेव जयते
- (xii) CrI. Misc. Bail Application No.21848 of 2022 (disposed of on 29.07.2022).
- (xiii) CrI. Misc. Bail Application No.1603 of 2019 arising out of SLP(CrI.) No.9269 of 2019 (**Shri P. Chidambaram v. Central Bureau of Investigation**) disposed of on 22.10.2019.
- (xiv) Writ Petition(s) (Criminal) No(s). 339 of 2023 (**Gagandeep Singh v. Union of India & others**)

- (xv) SLP Appeal (Crl.) No.10319 of 2022 (**Ratnambar Kaushik v. Union of India**) disposed of on 05.12.2022
- (xvi) S.B. Criminal Miscellaneous Bail Application No.17349 of 2022 (**Vikas Bajoria v. Union of India**) disposed of on 01.06.2023.
- (xvii) MCRC No.2729 of 2023 (**Sourabh Agrawal v. Union of India**) disposed of on 19.07.2023.
- (xviii) SB Criminal Miscellaneous Bail Application No.17536 of 2022 (**Gaurav Kakkar v. Directorate General of Gst Intelligence**) disposed of on 11.01.2023.
- (xix) Bail Application No.4019 of 2020 (**Raghav Agrawal v. Commissioner of Central Tax and GST Delhi North of Delhi High Court.**)
- (xx) Bail Appl. No.3257 of 2021 (**Yogesh Kumar Goyal v. DGGI.**)
- (xxi) **AKhil Krishan Maggu v. Deputy Director : 2019 SCC Online P & H 5416.**
- (xxii) **Sitaram Aggarwal v. Customs: 2005 SCC Online Del 61 : (2005)79 DRJ 554.**
- (xxiii) Criminal Petition Nos.979 and 980 of 2019 (**Shravan A. Mehra & Ors, v. Superintendent of Central Tax, Anti-evasion, GST Commissionerate.**)
- (xxiv) **Sunder Singh Bhati v.State: 2022 SCC Online Del 134.**

(xxv) ***Union of India v. Kisan Ratan Singh : 2020 SCC Online Bom 39.***

(xxvi) ***Arnesh Kumar v. State of Bihar : (2014) 5 SCC 469.***

9. Learned Senior Standing Counsel for the opposite party has relied on the following decisions in support of his contentions opposing the prayer for bail :

- (i) ***Y.S. Jagan Mohan Reddy v. Central Bureau of Investigation (2013) 7 SCC 439***, to contend that economic offences are of a distinct nature and must be treated differently concerning bail. Factors considered while granting bail include the nature of accusations, evidence, potential punishment, the accused's character, unique circumstances, and reasonable possibilities.
- (ii) ***State of Gujarat v. Mohanlal Jitmaliji Porwal and another : (1987) 2 SCC 364*** wherein considering the appeal against acquittal it was held economic offences are marked by calculated, deliberate designs for personal profit, disregarding the community's interest and causing damage to the national economy and interest.
- (iii) ***Mohit Jain v. Union of India (Misc. Criminal Case No. 26215 of 2023, disposed of on 04.07.2023)*** to contend that the instances involving substantial GST refunds through fraudulent entities, anticipatory bail should not be granted.
- (iv) ***Nimmagadda Prasad v. C.B.I., Hyderabad (2013) 7 SCC 466*** to contend that when granting bail in such cases, the court should consider various factors, including the nature of the accusations, the evidence

supporting them, potential punishment upon conviction, the accused's character, unique circumstances, witness tampering concerns, and the broader interests of the public and the state.

Further the learned Sr. Standing Counsel Mr. Mohapatra has relied on the following decisions :

- (v) ***Soni Vallabhdas Liladhar and another v. Assistant Collector of Customs, Jamnagar: AIR 1965 SC 481.***
- (vi) ***Badaku Joti Savant v. State of Mysore :AIR 1966 SC 1746.***
- (vii) ***Ramesh Chandra Mehta v. State of West Bengal: AIR 1970 SC 940.***
- (viii) ***Illias v. Collector of Customs, Madras : AIR 1970 SC 1065.***
- (ix) ***BLAPL No.748 of 2021 (Thabir Sagar v. State of Odisha)*** disposed of on 18.06.2021.

Analysis & conclusion सत्यमेव जयते

10. Since the matter is before the learned trial court for consideration any observation on merits herein is likely to prejudice the cases of the petitioner as well as that of the prosecution, therein. For the limited purpose of answering the prayer for grant of bail by this Court, during pendency of trial, the above contentions have been taken note of.

11. Apart from adverting to the aforesaid rival contentions, this Court takes note of the principles laid

down by the Hon'ble Supreme Court in **Satender Kumar Antil v. CBI, (2022) 10 SCC 51 : 2022 SCC Online SC 825 (paragraphs 12 to 16, 19 & 90 to 94 of SCC)**

Bail is the rule

12. The principle that bail is the rule and jail is the exception has been well recognised through the repetitive pronouncements of this Court. This again is on the touchstone of Article 21 of the Constitution of India. This Court in Nikesh Tarachand Shah v. Union of India [Nikesh Tarachand Shah v. Union of India, (2018) 11 SCC 1 : (2018) 2 SCC (Cri) 302] , held that : (SCC pp. 22-23 & 27, paras 19 & 24)

"19. In Gurbaksh Singh Sibbia v. State of Punjab [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] , the purpose of granting bail is set out with great felicity as follows : (SCC pp. 586-88, paras 27-30)

'27. It is not necessary to refer to decisions which deal with the right to ordinary bail because that right does not furnish an exact parallel to the right to anticipatory bail. It is, however, interesting that as long back as in 1924 it was held by the High Court of Calcutta in Nagendra Nath Chakravarti, In re [Nagendra Nath Chakravarti, In re, 1923 SCC OnLine Cal 318 : AIR 1924 Cal 476] , AIR pp. 479-80 that the object of bail is to secure the attendance of the accused at the trial, that the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial and that it is indisputable that bail is not to be withheld as a punishment. In two other cases which, significantly, are the "Meerut Conspiracy cases"

observations are to be found regarding the right to bail which deserve a special mention. In *K.N. Joglekar v. Emperor* [*K.N. Joglekar v. Emperor*, 1931 SCC OnLine All 60 : AIR 1931 All 504] it was observed, while dealing with Section 498 which corresponds to the present Section 439 of the Code, that it conferred upon the Sessions Judge or the High Court wide powers to grant bail which were not handicapped by the restrictions in the preceding Section 497 which corresponds to the present Section 437. It was observed by the court that there was no hard-and-fast rule and no inflexible principle governing the exercise of the discretion conferred by Section 498 and that the only principle which was established was that the discretion should be exercised judiciously. In *Emperor v. H.L. Hutchinson* [*Emperor v. H.L. Hutchinson*, 1931 SCC OnLine All 14 : AIR 1931 All 356] , AIR p. 358 it was said that it was very unwise to make an attempt to lay down any particular rules which will bind the High Court, having regard to the fact that the legislature itself left the discretion of the court unfettered. According to the High Court, the variety of cases that may arise from time to time cannot be safely classified and it is dangerous to make an attempt to classify the cases and to say that in particular classes a bail may be granted but not in other classes. It was observed that the principle to be deduced from the various sections in the Criminal Procedure Code was that grant of bail is the rule and refusal is the exception. An accused person who enjoys freedom is in a much better position to look after his case and to properly defend himself than if he were in custody. As a presumably innocent person he is therefore entitled to freedom and every opportunity to look after his own case. A presumably innocent person must have his freedom to enable him to establish his innocence.

28. Coming nearer home, it was observed by Krishna Iyer, J., in *Gudikanti Narasimhulu v. Public Prosecutor* [*Gudikanti Narasimhulu v. Public Prosecutor*, (1978) 1 SCC 240 : 1978 SCC (Cri) 115] that : (SCC p. 242, para 1)

“1. ... the issue [of bail] is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitised judicial process. ... After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of “procedure established by law”. The last four words of Article 21 are the life of that human right.”

29. In *Gurcharan Singh v. State* (Delhi Admn.) [*Gurcharan Singh v. State* (Delhi Admn.), (1978) 1 SCC 118 : 1978 SCC (Cri) 41] it was observed by Goswami, J., who spoke for the Court, that : (SCC p. 129, para 29)

“29. ... There cannot be an inexorable formula in the matter of granting bail. The facts and circumstances of each case will govern the exercise of judicial discretion in granting or cancelling bail.”

30. In *American Jurisprudence* (2nd Edn., Vol. 8, p. 806, para 39), it is stated:

“Where the granting of bail lies within the discretion of the court, the granting or denial is regulated, to a large extent, by the facts and circumstances of each particular case. Since the object of the detention or imprisonment of the accused is to secure his appearance and submission to the jurisdiction and the judgment of the court, the primary

inquiry is whether a recognizance or bond would effect that end.”

It is thus clear that the question whether to grant bail or not depends for its answer upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail.’

24. Article 21 is the Ark of the Covenant so far as the Fundamental Rights Chapter of the Constitution is concerned. It deals with nothing less sacrosanct than the rights of life and personal liberty of the citizens of India and other persons. It is the only article in the Fundamental Rights Chapter (along with Article 20) that cannot be suspended even in an emergency [see Article 359(1) of the Constitution]. At present, Article 21 is the repository of a vast number of substantive and procedural rights post Maneka Gandhi v. Union of India [Maneka Gandhi v. Union of India, (1978) 1 SCC 248].”

[Underlined to supply Emphasis]

13. Further this Court in *Sanjay Chandra v. CBI* [*Sanjay Chandra v. CBI*, (2012) 1 SCC 40 : (2012) 1 SCC (Cri) 26 : (2012) 2 SCC (L&S) 397] , has observed that : (SCC p. 52, paras 21-23)

“21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called

upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

22. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.

23. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson."

[Underlined to supply Emphasis]

Presumption of innocence

14. Innocence of a person accused of an offence is presumed through a legal fiction, placing the onus on the prosecution to prove the guilt before the court. Thus, it is for that agency to satisfy the court that the arrest made was warranted and enlargement on bail is to be denied.

15. Presumption of innocence has been acknowledged throughout the world. Article 14(2) of the International Covenant on Civil and Political Rights, 1966 and Article 11 of the Universal Declaration of Human Rights, 1948 acknowledge the presumption of innocence, as a cardinal principle of law, until the individual is proven guilty.

[Emphasis Supplied]

16. Both in Australia and Canada, a prima facie right to a reasonable bail is recognised based on the gravity of offence. In the United States, it is a common practice for bail to be a cash deposit. In the United Kingdom, bail is more likely to consist of a set of restrictions.

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19. The position in India is no different. It has been the consistent stand of the courts, including this Court, that presumption of innocence, being a facet of Article 21, shall inure to the benefit of the accused. Resultantly burden is placed on the prosecution to prove the charges to the court of law. The weightage of the evidence has to be assessed on the principle of beyond reasonable doubt.

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Economic offences (Category D)

90. What is left for us now to discuss are the economic offences. The question for consideration is whether it should be treated as a class of its own or otherwise. This issue has already been dealt with by this Court in P. Chidambaram v. Directorate of Enforcement [P. Chidambaram v. Directorate of Enforcement, (2020) 13 SCC 791 : (2020) 4 SCC (Cri) 646] , after taking note of the earlier decisions governing the field. The gravity of the offence, the object of the Special Act, and the attending circumstances are a few of the factors to be taken

note of, along with the period of sentence. After all, an economic offence cannot be classified as such, as it may involve various activities and may differ from one case to another. Therefore, it is not advisable on the part of the court to categorise all the offences into one group and deny bail on that basis. Suffice it to state that law, as laid down in the following judgments, will govern the field:

[Emphasis Supplied]

Precedents

91.P. *Chidambaram v. Directorate of Enforcement* [P. Chidambaram v. Directorate of Enforcement, (2020) 13 SCC 791 : (2020) 4 SCC (Cri) 646] : (SCC pp. 804-805, para 23)

“23. Thus, from cumulative perusal of the judgments cited on either side including the one rendered by the Constitution Bench [*Gurbaksh Singh Sibbia v. State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] of this Court, it could be deduced that the basic jurisprudence relating to bail remains the same inasmuch as the grant of bail is the rule and refusal is the exception so as to ensure that the accused has the opportunity of securing fair trial. However, while considering the same the gravity of the offence is an aspect which is required to be kept in view by the Court. The gravity for the said purpose will have to be gathered from the facts and circumstances arising in each case. Keeping in view the consequences that would befall on the society in cases of financial irregularities, it has been held that even economic offences would fall under the category of “grave offence” and in such circumstance while considering the application for bail in such matters, the Court will have to deal with the same, being sensitive to the nature of allegation made against the accused. One of the circumstances to consider the gravity of the

offence is also the term of sentence that is prescribed for the offence the accused is alleged to have committed. Such consideration with regard to the gravity of offence is a factor which is in addition to the triple test or the tripod test that would be normally applied. In that regard what is also to be kept in perspective is that even if the allegation is one of grave economic offence, it is not a rule that bail should be denied in every case since there is no such bar created in the relevant enactment passed by the legislature nor does the bail jurisprudence provide so. Therefore, the underlining conclusion is that irrespective of the nature and gravity of charge, the precedent of another case alone will not be the basis for either grant or refusal of bail though it may have a bearing on principle. But ultimately the consideration will have to be on case-to-case basis on the facts involved therein and securing the presence of the accused to stand trial.”

[Underlined to supply Emphasis]

92.Sanjay Chandra v. CBI [Sanjay Chandra v. CBI, (2012) 1 SCC 40 : (2012) 1 SCC (Cri) 26 : (2012) 2 SCC (L&S) 397] : (SCC pp. 62-64, paras 39-40 & 46)

“39. Coming back to the facts of the present case, both the courts have refused the request for grant of bail on two grounds : the primary ground is that the offence alleged against the accused persons is very serious involving deep-rooted planning in which, huge financial loss is caused to the State exchequer; the secondary ground is that of the possibility of the accused persons tampering with the witnesses. In the present case, the charge is that of cheating and dishonestly inducing delivery of property and forgery for the purpose of cheating using as genuine a forged document. The punishment for the offence is imprisonment for a term which may extend to seven years. It is, no doubt, true that the nature of the

charge may be relevant, but at the same time, the punishment to which the party may be liable, if convicted, also bears upon the issue. Therefore, in determining whether to grant bail, both the seriousness of the charge and the severity of the punishment should be taken into consideration.

40. The grant or refusal to grant bail lies within the discretion of the court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case. But at the same time, right to bail is not to be denied merely because of the sentiments of the community against the accused. The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the court, whether before or after conviction, to assure that he will submit to the jurisdiction of the court and be in attendance thereon whenever his presence is required.




93. The rate of conviction in criminal cases in India is abysmally low. It appears to us that this factor weighs on the mind of the Court while deciding the bail applications in a negative sense. Courts tend to think that the possibility of a conviction being nearer to rarity, bail applications will have to be decided strictly, contrary to legal principles. We cannot mix up consideration of a bail application, which is not punitive in nature with that of a possible adjudication by way of trial. On the contrary, an

[Emphasis Supplied]

ultimate acquittal with continued custody would be a case of grave injustice.

94. *Criminal courts in general with the trial court in particular are the guardian angels of liberty. Liberty, as embedded in the Code, has to be preserved, protected, and enforced by the criminal courts. Any conscious failure by the criminal courts would constitute an affront to liberty. It is the pious duty of the criminal court to zealously guard and keep a consistent vision in safeguarding the constitutional values and ethos. A criminal court must uphold the constitutional thrust with responsibility mandated on them by acting akin to a high priest.”*

12. In ***Ratnambar Kaushik v. Union of India, (2023) 2 SCC 621 : 2022 SCC OnLine SC 1678 (at page 622 of SCC)***, the Hon’ble Supreme Court granted bail to the petitioner therein, the facts of the case being somewhat similar to the present case. The relevant paragraphs are quoted herein : (paragraphs 3 to 8 of SCC)

**3.** *The gist of the allegations against the petitioner in the prosecution initiated against him is that the petitioner had clandestinely transported raw unmanufactured tobacco brought from Gujarat by 7 trucks weighing 90,520 kg. It is alleged that raw tobacco was cleared in the name of M/s Maa Ambey Enterprises, Bakoli from M/s Arihant Traders, Kheda, Gujarat but the said trucks went to Patparganj area to M/s Galaxy Tobacco in Delhi. It is further alleged that the said quantity of unmanufactured tobacco has been apparently used in the clandestine manufacture and supply of chewing tobacco without payment of leviable duties and tax.*

4. *The petitioner contends that even if the tax is levied at 28%, the value would be around Rs 10,30,824. However, as per the case of the respondent, the total tax/duty and cess involved would be Rs 15,57,28,345. The said contention has been raised on the basis of the projected manufacture of zarda pouches from the said quantity of unmanufactured tobacco. Thus on the projected number of pouches, the tax amount if taken into consideration, would be to that extent.*

5. *It is further contended on behalf of the respondent that in the course of the investigation it has also come to light, apart from the 7 trucks, 287 more trucks loaded with raw unmanufactured tobacco has been transported as per the details obtained from the toll/RFID data of NHAI, which shows the movement of the trucks.*

6. *Insofar as the allegations made against the petitioner are concerned, the learned Senior Counsel for the petitioner while rebutting the same would contend that at this juncture, such allegations made by the respondent against the petitioner are far-fetched. Even if one accepts as correct, the allegation on which the proceedings is predicated, wherein 90,520 kg of raw/unmanufactured tobacco in 7 trucks is taken note of, the GST, if reckoned, comes to only Rs 1,93,26,020. It is contended that the sum of Rs 11,04,34,400 shown as cess by the respondent is even without the proof of manufacture of zarda and it has been done only to indicate the projected value of more than Rs 15 crores. The learned Senior Counsel for the petitioner therefore disputed the allegations and contended that such allegations have been made only to allege cognizable and non-bailable offence against the petitioner so as to deny bail and take him into custody.*

7. Though allegations and counter-allegations are made, at this stage, it would not be necessary for us to advert to the details of the rival contentions, since the matter in any event is at large before the trial court and any observations on merits herein would prejudice the case of the parties, therein. However, for the limited purpose of answering the prayer for the grant of bail, the contentions are taken note of. It is no doubt true, that an allegation is made with regard to the transportation of unmanufactured tobacco and it is alleged that such procurement of unmanufactured tobacco is for clandestine manufacture and supply of zarda without payment of leviable duties and taxes. Though it is further contended that in the process of the investigation, the transportation of a larger quantity of unmanufactured tobacco weighing about 35,57,450 kg is detected, these are all matters to be established based on the evidence, in the trial.

8. In considering the application for bail, it is noted that the petitioner was arrested on 21-7-2022 and while in custody, the investigation has been completed and the charge-sheet has been filed. Even if it is taken note that the alleged evasion of tax by the petitioner is to the extent as provided under Section 132(1)(l)(i), the punishment provided is, imprisonment which may extend to 5 years and fine. The petitioner has already undergone incarceration for more than four months and completion of trial, in any event, would take some time. Needless to mention that the petitioner if released on bail, is required to adhere to the conditions to be imposed and diligently participate in the trial. Further, in a case of the present nature, the evidence to be tendered by the respondent would essentially be documentary and electronic. The ocular evidence

will be through official witnesses, due to which there can be no apprehension of tampering, intimidating or influencing. Therefore, keeping all these aspects in perspective, in the facts and circumstances of the present case, we find it proper to grant the prayer made by the petitioner.”

[Emphasis Supplied]

13. It is noticed that in some of the decisions cited by learned Senior Standing Counsel for the DGGST, the observations of the Hon'ble Supreme were in the context that the Supreme Court was dealing with appeal against conviction or acquittal and the considerations therein are not similar to the considerations by a Court while taking up a petition under Section 439 of Cr.P.C. , the petitioner praying for grant of bail when the trial is still pending.

It has to be further observed that regarding the statement made before the investigating officer its admissibility and relevancy is not a matter of consideration before this Court in the present proceeding.

14. It is true that the allegation made against the petitioner is that he received the benefit of the amount that was granted to different entities to the tune of Rs.7,79,52,045/-, obtaining refund of Rs.7,79,52,045/- and it is contended by the prosecution/complainant that there is likelihood of the discovery of more such

transaction, but it is also not disputed that the final prosecution report has been filed in the case. The petitioner was arrested on 11.07.2023, incarcerated for more than four months and the punishment provided is imprisonment which may extend to five years and fine and completion of trial in any event would take some time. Since the alleged offence constitutes the act of crediting amount of ITC through the departmental Online system, to the account of the certain entities which have been alleged to be non-existent and the money has been subsequently received by the petitioner, the evidence tendered by the opposite party/complainant would essentially be documentary and electronic. The ocular evidence will be through official witnesses of the department due to which there can be no apprehension of tampering, intimidating or influencing.

15. Therefore, keeping all the above aspects in the perspective, in the facts and circumstances of the present case, by applying the principles enunciated by the Hon'ble Supreme Court in **Satender** (*supra*) and **Ratnambar** (*supra*), this Court is inclined to grant the prayer for bail made by the petitioner subject to such stringent terms and conditions that would be imposed by the learned court in seisin of the matter, for which the court shall hear the learned counsel for the complainant as well as the learned counsel for the petitioner and

further conditions as would be deemed appropriate can be imposed along with the following conditions :

Two sureties for an amount to the satisfaction of the learned court in seisin of the matter, out of the two sureties one shall be a family member of the petitioner and the other shall be a local person; the court in seisin of the matter shall ensure and verify the credential of the sureties, the court shall direct and record its satisfaction;

the petitioner shall not in any manner make any inducement, threat or promise to the prosecution witnesses so as to dissuade them from disclosing truth before the court and shall not tamper with the evidence;

the petitioner shall not indulge himself in similar activity;

the petitioner shall surrender his passport if any, before the learned court in seisin of the matter and will not leave India without prior permission of the Court and in the event the petitioner has not been issued with any passport, he would submit an affidavit stating the said fact;

the petitioner shall appear before the concerned authority as would be so required for the purpose;

he shall appear before the police having jurisdiction of his area of residence, if directed by the learned court in seisin of the matter in the manner to be decided by the learned court;

the petitioner shall fully cooperate with the ongoing further investigation and make himself available anywhere as and when required for such purpose;

the petitioner shall be available to be contacted over mobile phone and such phone should remain active and normally not be changed, and in case of any change of mobile number of the petitioner for any bona fide reason, the same shall be communicated to the Investigating Agency;

the petitioner shall co-operate with the trial and shall not seek unnecessary adjournments on frivolous grounds to protract the trial;

the petitioner shall not indulge in any criminal activity or commission of any crime after being released on bail; In case of his involvement in any other criminal activities or breach of any condition imposed for grant of bail, the investigating agency shall file petition for cancellation of bail;

16. The BLAPL is disposed of accordingly.

It is clarified that any observations made in this judgment shall not be construed to be the opinion of this Court regarding the merits of the contentions that would be raised in the pending trial before the learned court in seisin by either of the parties to the present petition.

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M.S.Sahoo, J.

Orissa High Court, Cuttack
The 23rd November, 2023/dutta/Gs



Signature Not Verified

Digitally Signed
Signed by: AJIT KUMAR DUTTA
Designation: Secretary
Reason: Authentication
Location: ohc
Date: 23-Nov-2023 18:11:22

