

**GST : Bail was to be granted to persons arrested for GST evasion using fake invoices in name of shell companies, thereby facilitating irregular availment and utilization of input tax credit by such entities to whom such fake invoices were issued. Grant of bail is a rule and rejection of bail is an exception. Thus, bearing in mind evidence having been collected by Investigating Agency as per which it was found that more than 40 such fake/shell companies were being operated by accused persons against whom investigation is under process and in consideration of compounding nature of offence, persons were asked to furnish a bond of sum of Rs. 50 lakhs each on condition to deposit of Rs. 39 crore to the Government Exchequer pursuant to grant of bail**

• While granting a conditional bail to accused persons, Court observed that the economic offence having deep rooted conspiracy and involving huge loss of public funds needs to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing a serious threat to the financial health of the country. While granting bail, the Court has to keep in mind the nature of the accusations, the nature of evidence in support thereof the severity of the punishment which conviction will entail, the character of the accused, reasonable apprehension of the witnesses being tampered with, the larger interest of the public/ State and others similar consideration are required to be taken into consideration.

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**[2018] 95 taxmann.com 198 (Calcutta)**

**HIGH COURT OF CALCUTTA**

**Sanjay Kumar Bhuwalka**

**v.**

**Union of India**

SHIVAKANT PRASAD, J.

CRM NOS. 3327 AND 3328 OF 2018

JULY 9, 2018

**Sekhar Basu, Debasish Roy, Rajdeep Majumder, Danish Haque, Arindam Dey, Mayukh Mukherjee, K.L. Mukherjee, Mrs. Aroshi Rathore and Mrs. Kriti Mehorotra for the Petitioner. K.K. Maity for the Respondent.**

## **JUDGMENT**

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1. The above two cases under provision of Section 439 Cr.P.C. have been filed by two separate petitioners under the same Memo of Arrest by the opposite party, Union of India whereunder petitioners have prayed for enlarging them on bail, inter alia, on the grounds stated in the petitions. Both the cases were heard analogously as the legal issue and the factual aspects of the case are common. So they can be disposed of by a common judgment.

2. To speak precisely, the applications are directed against the order dated 28.05.2018 passed by the Additional Chief Judicial Magistrate, Sealdah in connection with Case No. C 216 of 2018 arising out of DGCEI F. No. 29/KZU/KOL/GR.D/2018 dated 12.5.2018 under Section 132(1)(a), (b) and (c) of the Central Goods and Services Tax Act, 2017 whereby prayer of the petitioners to enlarge them on bail was

turned down.

3. Mr. K.K. Maity learned Advocate for Union of India opposite party herein submitted that the petitioner in CRM 3327 of 2018 Shri Sanjay Kumar Bhuwalka and in CRM 3328 of 2018 Neeraj Jain were arrested on 12.05.2018 due to their involvement in the business of generating and selling of fake tax invoices to various entities without supplying the underlying goods or services, thereby facilitating irregular availment and utilization of input tax credit by such entities to whom such fake invoices were issued.

4. It is submitted that during investigation, it was revealed that M/s. Mecon Engineering Works, M/s. Amazonite Steel Pvt. Ltd., M/s. Corandum Impex Pvt. Ltd., M/s. Cuprite Marketing Pvt. Ltd. and M/s. Binky Exim Pvt. Ltd. were all part of a well thought out conspiracy aimed at duping the exchequer by way of creation of a complex web of inter-connected companies engaged in fraudulent issuance of tax invoices without supply of goods or services to enable the recipient companies to avail and utilize fake input tax credit leading to loss of Government revenue.

5. It is contended that the investigation revealed that all the above fake companies were being controlled and run by a group of persons including Shri Sanjay Kumar Bhuwalka and Shri Neeraj Jain being the petitioners herein.

6. Summons were issued to the petitioners under Section 70 of the CGST Act, 2017 read with Section 174(2) of the said Act and in their statements, they have admitted that they were looking after and controlling the business activities of the companies.

7. It was further revealed that various companies were controlled by them who have passed on fake input GST credit to the tune of Rs. 27 crore and Rs. 12 crore respectively to the recipient entities.

8. Accordingly, it is submitted by Mr. Maity that in view of such fraudulent activities by the petitioners, the Additional Director General had reasons to believe that the petitioners have committed the offences stipulated under Section 132 sub-section (1)(a), (b) and (c) of the said Act for having evaded payment of tax in excess of rupees five hundred lakh which is an offence punishable with imprisonment for a term which may be extended to five years and with fine under Section 69 of the said Act. Based on such reasonable belief, the Additional Director General directed the officers concerned to arrest the petitioners in terms of the provisions stipulated under Section 69 of the said Act and they were arrested on 12.05.2018.

9. It would be profitable to reproduce the provision of Section 69 of the CGST Act which deals with Power to Arrest as under :

**"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 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 174),—
  - (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) 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."

10. Mr. Sekhar Basu, learned senior counsel for the petitioners stressed on the word **reasons to believe** appearing in section 69(1) of the Act contending that a Statute, be it of any nature, civil, criminal, quasi criminal or quasi civil has a definite destination to reach which in legal parlance is described as "attainment of the object for which the law has been enacted for" and to analyse the character of a statute, it has to be read as a whole and then and then only its true character and application can be understood.

11. 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 realize 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.

12. It has been argued that it is trite law that a provision of law which seeks to apply will lead to deprivation of liberty of a citizen, ought to be construed strictly regard being had to the mandate of Article 21 of the Constitution of India, namely, the observance of "procedure established by law".

13. Under Section 69 of the Act the functionary is the Commissioner as defined in Section 2(24) of the Act, "*Commissioner*" means the Commissioner of central tax and includes the Principal Commissioner of central tax appointed under section 3 and the Commissioner of integrated tax appointed under the *Integrated Goods and Services Tax Act*." My attention is invited to the said provision contending that there has been a delegation of the power of the Commissioner or Additional Director General Goods and Service Tax Intelligence and that delegatee has exercised the power of the delegator under Section 69 of the Act. Common law principles which are in vogue in our country accepts and in law enumerates the concept of "right implies duty". Whoever steps into the shoes of the Commissioner to exercise his authority under the Act must remain alive to and be fully conscious of the duty entrusted on the Commissioner by section 69 of the Act. Duties are two-fold - to form "reasonable belief" and "by order authorize any officer of central tax to arrest such person" as contained in section 69(1) of the Act.

14. Mr. Basu fortifies his argument contending that reasonable believe has not been properly dealt with by the Additional Director rather he has simply endorsed on the Memo of Arrest with the sentence "**proposal at A approved**". It is further submitted that while interpreting penal law protection of liberty has to be accepted as the provision of the statute provides that the authority must have reasonable believe and relied on the expression "reason to believe" means jurisprudentially as observed by the Hon'ble Supreme Court in the case of *Joti Parshad v. State of Haryana* reported in *1993 Supp(2) Supreme Court Cases 497* at paragraph 4 of extract of the observation in the cited judgment which reads thus—

"4. Under the Indian penal law, guilt in respect of almost all the offences is fastened either on the ground of "intention" or "knowledge" or "reason to believe". We are now concerned with the expressions "knowledge" and "reason to believe". "Knowledge" is an awareness on the part of the person concerned indicating his state of mind. "Reason to believe" is another facet of the state of mind. "Reason to believe" is not the same thing as "suspicion" or "doubt" and mere seeing also cannot be equated to believing. "Reason to believe" is a higher level of state of mind. Likewise "knowledge" will be slightly on higher plane than "reason to believe". A person can be supposed to know where there is a direct appeal to his senses and a person is presumed to have a reason to believe if he has sufficient cause to believe the same. Section 26 I.P.C. explains the meaning of the words "reason to

believe" thus:

26. "Reason to believe" - A person is said to have "reason to believe" a thing, if he has sufficient cause to believe that thing but not otherwise.

In substance what it means is that a person must have reason to believe if the circumstances are such that a reasonable man would, by probable reasoning, conclude or infer regarding the nature of the thing concerned. Such circumstances need not necessarily be capable of absolute conviction or inference; but it is sufficient if the circumstances are such creating a cause to believe by chain of probable reasoning leading to the conclusion or inference about the nature of the thing. These two requirements i.e. "knowledge" and "reason to believe" have to be deduced from various circumstances in the case....."

**15.** Bearing in mind the principle laid in the said observation, it is suffice to say such "reasons to believe" has to be formed by the Commissioner after the records of such inspection and search are communicated to him under sub-section 10 of section 67 of the Act or in any other manner the materials are placed before him for the formation of his "reason to believe". When the Commissioner or the delegatee has reason to believe that the person concerned has committed an offence which necessitates arrest, an order has to be passed and such order logically, reasonably and prudentially must be informed by reasons or must contain the reasons which have emanated from "reasons to believe" entertained by the authority concerned.

**16.** Adverting to the Memo of Arrest and the order endorsed thereon it is urged by Mr. Basu that in unmistakable terms the Additional Director General Goods and Service Tax Intelligence has merely exercised his authority and was completely oblivious of and irresponsible in the duty to be discharged by him. The document placed before the Court shows that the officers subordinate to the Additional Director General Goods and Service Tax Intelligence in their own way and as per their understanding, prepared official note and at the bottom of the said note the Additional Director General Goods and Service Tax Intelligence is the last signatory and the same is preceded by a sentence "proposal of (A) above approved". Nothing can be more threatening and detrimental to the execution of law than the ignorance of law or non-observance of law by those who are assigned the job by the statute to observe the law. What appears from the document is, can be aptly described as what the English adage says "putting the cart before the horse". It was for the Additional Director General Goods and Service Tax Intelligence to consider all the materials available with regard to the accusations of commission of the offences mentioned in section 69 of the Act and come to his own conclusion for effecting arrest unhindered, unaffected by interference from any quarter.

**17.** It is further contended that the entire exercise by the officers sub-ordinate to the Additional Director General Goods and Service Tax Intelligence and the ultimate signature on the document by the Additional Director General Goods and Service Tax Intelligence are merely topsy-turvy, deplorable administrative exercise of power and a threat to the Constitutional observance of "procedure established by law". It is further submitted that despite delegation of powers of the Commissioner on officers sub-ordinate to him, the structural edifice of the statute presents the Commissioner to be at the helm of affairs.

**18.** To buttress such contention, the attention of this Court has been drawn to Section 134 of the Act which is couched in a negative language and says that no cognizance of any offence punishable under the Act shall be taken without the previous sanction of the Commissioner. Further Section 138 is a corroboration of the nature and character of the Act, being a fiscal statute and the sections says without any reservation that any offence can be compounded either by the Central government or by the State government, as the case may be and can be compounded on the payment of the "compounding amount" which expression shall mean the revenue due to be paid to the Central or State government as the case may be. This provisions of law highlights and enlivens the character of the statute to be a fiscal statute enacted with the object of realization of dues.

**19.** In reply to contention made by Mr. Basu that petitioners were arrested not by proper authority under the Act, Mr. Maity invited my attention to Notification No. 14/2017 dated 01.07.2017, the Central Board of Excise and Customs appointed the officers in the Directorate General of Goods and Services Tax Intelligence as Central Tax officers and invested them with all the powers under the said Act and the Rules made thereunder. In terms of the said Notification, the post of Additional Director General, Goods and Services Tax Intelligence, is equivalent to the post of Commissioner. Accordingly, the said Additional Director General, Directorate General of Goods and Services Tax Intelligence, has been empowered under section 69 of the Act to exercise all the powers invested in the Commissioner of Central Tax. Therefore, he was well within his jurisdiction while directing the concerned officers to arrest the said persons.

**20.** In response to the interpretation as to reasonable belief Mr. Maity submitted that the office note reveals that the said Additional Director General, based on the facts brought out from the investigation conducted by the DGGI, had reasons to believe that the petitioners have committed the offence specified under clauses (a), (b) and (c) of sub section (1) of section 132 of the said Act. Based on such reasonable belief, the said Additional Director General approved the proposal to arrest by his officers to arrest the said persons. It is inferred on plain reading of section 69 of the Act that no formal procedure or format has been prescribed under the Act requiring the Commissioner to use any particular format while ordering for such arrest and the legislature, in its own wisdom, has refrained from imposing any procedural obligation on the part of the Commissioner while ordering for arrest of persons based on his reasonable belief. Accordingly, the two persons were arrested by the Intelligence Officers through 'Arrest Memo' under the provision of 69 of the Act read with Sections 132(1)(a), 132(1)(b), 132(1)(c) and 132(5) of the Act.

**21.** Mr. Maity relied on a decision in the case of *Tirupati Trading Corporation -v.- Collector of Customs* reported in *1998(104) E.L.T 618 Calcutta* wherein the Hon'ble Division Bench held that whether the seizure under Section 110 of the Customs Act, 1962 was under a reasonable belief or not is a justiciable one, but once it is held that there was material, relevant and germane the sufficiency of the material is not open to judicial review.

**22.** Having regard to rival contentions I am of the considered opinion that 'reasonable belief' or reason to believe as a standard to arrest requires that arresting officer subjectively believe that the suspect has committed the offence and that objectively reasonable person would reach the same conclusion. Reasonable grounds do not require as much evidence as a *prima facie* case but do require that thing believed to be more likely than not.

**23.** Therefore, in the light of the aforesaid contentions, the submission of the petitioners that no reason has been assigned for arrest has no legs to stand upon, particularly in view of the fact that the said office note itself clearly provides the reasons to believe that such arrests were warranted.

**24.** In the given facts of the case as per the Memo of Arrest it is crystal clear that during the investigation, it was found that more than 40 such fake/shell companies were being operated by the accused persons against whom investigation is under process.

**25.** Mr. Maity submitted that in the said case investigation have been conducted by the Delhi Zonal Unit, Mumbai Zonal Unit, Patna Zonal Unit, Ludhiana Zonal Unit of the DGGI and new evidences of irregular availment of input credit by various entities on the strength of fake invoices issued by the shell companies, controlled by the accused persons have been unearthed. The Department has started a pan India investigation with respect to fraudulent passing of GST input credit by issuing fake GST invoices. As a result of the investigation, the Department has unearthed evasion of GST involving huge government revenue in Delhi, Meerut, Jaipur and Mumbai and six persons involved in the fraud have been arrested and further investigation is required to reveal whom the petitioners have supplied all these fake invoices.

**26.** It is also submitted that they are either labourer of jute mill or tea seller or unemployed aged between

20 to 30. In their statement, they stated that through agent of the accused Shri Sanjay Bhuwalka they met the accused and submitted copies of their personal documents like PAN Card, Voter Id Card etc. and signed many other documents. In exchange, the accused promised to pay them Rs. 4,000/- per month. Further, the Department has recorded statement of Bank Manager of Laxmivilas Bank on 11.05.2018, where he categorically mentioned that Bank accounts relating to the fake/shell companies were operated either by the accused themselves or by their employee and in the event petitioners are enlarged on bail, there is every probability of tampering the documents and the recipient who have received the fake tax invoices from them and wrongfully availed the input tax credit will destroy the documents resulting in loss of Government revenue to the Exchequer.

27. It is further submitted that during investigation on 12.05.2018 Shri Sanjay Bhuwalka paid Rs.1 Crore on behalf of the above said companies. But it is ultimately verified and found that the said amount has not been transferred to the credit of the Central Government. Such type of fraudulent activities has been practiced by the said petitioners and therefore, they are not entitled to get any order of bail.

28. To fortify his stand Mr. Maity relied on decision in case of *Amal Mubarak Salim Al Reiyami v. Union of India* reported in *2015 (321) E.L.T. page 590 Raj* wherein it is held that so far as grant of bail to the petitioners on merits is concerned, looking to the gravity of the offence and likelihood of the repetition of the same petitioners are not entitled to bail on merit too. In economic offence as in the present case interest of the National economy is adversely affected and therefore, while considering the question of grant of bail to an accused it should be seen whether it is desirable in National interest or not.

29. In the case of *Rajesh Goyal v. Union of India* reported in *2012 (284) E.L.T. 164 Raj* it has been observed that the accused petitioner has evaded the excise duty causing a great loss to the public exchequer. Hence, the offence being of grave nature, the petitioner should not be allowed bail. The Hon'ble Court also held that the act of the petitioners may be termed as 'Royal Thievery' which is opposed to both democracy and society.

30. In the case of *Subhas Chandra Bal Chandra Badjata v. DGCE (Intelligence) Mumbai* reported in *2015(324) E.L.T 307-Born* the Hon'ble Court has observed that the material collected shows that false record was created for evasion of excise duty. Thus it is case of forgery and fraud.

31. In the case of *Directorate of revenue Intelligence v. Chander Prakash Verma* reported in *2016 (332) E.L.T 693 Del.* the Hon'ble Court has held that custody of accused person in a case like the instant one is not to be measured in days but it has to be seen whether the grant of bail would hamper the investigation and if it is found to be so, then bail is not to be granted in such cases.

32. It is settled position of law that grant of bail is a rule and rejection of bail is an exception. Maximum punishment provided in the Act is for a term of five years. The accused persons were arrested on 12.5.2018 and investigation has to be concluded within 60 days from the date of arrest as per provision of Section 167(2) of Cr.P.C. In view of submission of Mr. Maity investigation is still going on and will take a considerable period of time in conclusion of investigation to submit a final report against the accused petitioners to face the trial in open Court. 60 days period is going to lapse on 10.7.2018 so obviously he would be entitled to statutory bail. That apart, I have considered the submission of Mr. Basu in regard to Section 134 and 138 of the Act the object and reason of this Act is obviously to realise the revenue to the Government Exchequer and bearing in mind the provision of compounding nature of the offence under Section 138 of the Act.

33. I am fully aware of the observation of the Hon'ble Supreme Court that economic offences constitute a class apart and need to be visited with a different approach in the matter of a bail. The economic offence having deep rooted conspiracy and involving huge loss of public funds needs to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing a serious

threat to the financial health of the country. While granting bail, the Court has to keep in mind the nature of the accusations, the nature of evidence in support thereof the severity of the punishment which conviction will entail, the character of the accused, reasonable apprehension of the witnesses being tampered with, the larger interest of the public/State and others similar consideration are required to be taken into consideration. Nevertheless, bearing in mind the evidence having been collected so far by the Investigating Agency and in consideration of the compounding nature of the offence, this Court is pleased to enlarge the petitioners on bail on furnishing bond of the sum of Rs. 50,00,000/- each on condition to deposit of Rs. 39 crore to the Government Exchequer through the competent authority with direction to appear before the I.O./Authority holding investigation to assist the investigating machinery as and when called upon to appear before the authority concerned till final investigation or till the offence is compounded under the provision subject to satisfaction of the learned Additional Chief Judicial Magistrate, Sealdah.

**34.** Thus, the CRM 3327 of 2018 and CRM 3328 of 2018 are hereby allowed and disposed of.

**35.** Urgent certified photocopy of this Judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

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