

(2024) 01 BOM CK 0091

In the Bombay High Court

Case No : Criminal Application (Bail Application) No.19 Of 2024

Rahul S/O Kamalkumar Jain

APPELLANT

Vs

Director General Of Goods And Service Tax Intelligence,
Nagpur Zonal Unit, Thr. Sr. Intelligence Officer, Nagpur

RESPONDENT

Date of Decision : 25-01-2024

Acts Referred:

Central Goods And Services Act, 2017 — Section 69, 69(1), 69(2), 69(3), 67(10), 70, 132, 132(1), 132(1)(a), 132(1)(b), 132(1)(c), 132(1)(d), 132(1)(i), 132(2), 132(5), 136

Code Of Criminal Procedure, 1973 — Section 4(2), 41, 41A, 41A(3), 41(1)(b)(i), 41(1)(b)(ii), 41(3), 165

Dowry Prohibition Act, 1961 — Section 4

Citation : (2024) 01 BOM CK 0091

Hon'ble Judges : Urmila Joshi Phalke, J

Bench : Single Bench

Advocate : Sahil Dewani, S.N.Bhattad

Final Decision : Allowed

Judgement

Urmila Joshi-Phalke, J

1. Heard.

2. The applicant has filed the application seeking bail in connection with Case No.DGGI/INTL/1082/2023 registered for offences punishable under Sections 132(1)(b), 132(1)(c), 132(1) (i) read with Section 132(5) of the Central Goods and Services Act, 2017 (the CGST Act, 2017).

3. The applicant is arrested on 28.11.2023.

4. The allegations against the applicant are, that he is proprietor of M/s.Arihant Traders and apart from the said firm, he is responsible for management and affairs of firms namely Mehal Construction and suppliers and Mehal Associates registered on one single PAN. He has also committed tax fraud of Rs.144.65

crores by availing admissible ITC of Rs.20.14 crores and has also passed on admissible ITC of Rs.17.73 crores. It is further alleged that the applicant also used to operate and look after few other trade firms namely Aditya Trading Company, Prashant Traders in the same premises. Thus, allegation in a nut shell is that the applicant has obtained GST Registration on fictitious documents and has never conducted any business activity from the registered premises and illegally claimed refund of accumulated ITC on account of trade/supply of goods and contravened provisions of the CGST Act, 2017.

5. The Directorate General of GST Intelligence (DGGI) Nagpur, Zonal Unit, Nagpur has conducted a search on 22.11.2023 at the resident of the applicant in respect of the aforementioned trade firms pertaining to its transactions of sales and supply etc. During the course of the said search, three mobile phones of the applicant are seized. Based upon this search, it was found that trade firm viz. Arihant Traders belonging to the applicant is not in existence and no document of any kind of business activity of the said trade firm was found. It further alleged that another trade firms viz. Mehal Construction and Supplier had not declared any supplies in GST Returns. Thus, the applicant failed to give any documents regarding huge trade amongst firms alleged to be managed by the applicant. Thus, the applicant through the said fake and bogus business firms has shown fake transactions and has claimed ITC (Input Tax Credit) over the said sale/transaction and thereby committed the offence.

6. Learned counsel Shri Sahil Dewani for the applicant, submitted that with false allegations, summons was issued to the applicant under Section 70 of the CGST Act, 2017 dated 28.11.2023 and the applicant was called to remain present with allegation of evasion of GST. Despite the said summons dated 28.11.2023, he was called to appear at 5:30 in the evening. Though the summons was showing the timing of the evening, he was called at 1:30 pm under the garb of unlocking his phone which was seized. Accordingly, the applicant has attended the office and he was shown to be arrested. There was non compliance in view of Section 41A of the Code of Criminal Procedure. It is further submitted that during the search, the prosecution did not find any incriminating document with regard to sale and purchase on the portal of GST Department. The prosecution in its search and seizure seized as many as 161 pages as documents pertaining to Ali Trading Company which is not operated by the applicant. The investigating agency did not ascertain the allegation whether the applicant was operating and managing affairs of the alleged trade firms. The allegation of contravention of provisions and availing excess of ITC is also baseless. He further submitted that the powers of arrest are to be exercised with care and circumspection only after adjudication is completed which is not complied. He further submitted that all offences punishable are below seven years. Reasons are not mentioned in the arrest memo mentioning grounds for which the arrest is required. The investigating agency has not followed guidelines issued by the the Honourable Apex Court in the case of Satender Kumar Antil vs. CBI, reported in 2022 SCC OnLine SC 825.

7. In support of his contentions, learned counsel for the applicant placed reliance on following decisions:

1. State of Gujarat etc. vs. Choodamani Parmeshwaran Iyer and anr, reported in 2023 SCC OnLine SC 1043;
2. Narendra Amrutlal Patel and anr vs. Assistant Commissioner of State Tax and anr (Anticipatory Bail Application No.2099/2022 decided on 17.10.2022);
3. Daulat Samirmal Mehta vs. Union of India, thr.the Secretary and ors, reported in 2021 SCC OnLine Bom 200;
4. Rini Johar and anr vs. State of Madhya Pradesh and ors, reported in (2016)11 SCC 703;
5. Md.Asfak Alam vs. State of Jharkhand, reported in 2023 SCC OnLine 892;
6. Satender Kumar Antil vs. CBI, reported in (2022)10 SCC 51, and
7. Chanda Kochar vs. CBI 2023 SCC OnLine Bom 72.

8. Per contra, learned counsel Shri S.N.Bhattad for the the non-applicant submitted that Section 69 of the CGST Act, 2017 empowers the Commissioner to arrest a person when he has reasons to believe that a person has committed any offence specified in clauses (a) or (b) or (c) or (d) of sub-section (1) of Section 132, which is punishable under clauses (i) and (ii) of sub-section (1) or sub-section (2) of the said Section. He may by order authorizes any officer of the Central Tax to arrest such person. In view of sub-section (2) of Section 69, where a person is arrested under sub-section (1) of an offence specified under sub-section (5) of Section 132, the officer authorized to arrest the person shall inform such person of the grounds of arrest and produce him before a Magistrate within twenty-four hours.

He further submitted that in view of Section 4(2) of the Code of Criminal Procedure, if there is separate provision in respect of any subject in a special statute, the same will prevail over general provisions of the Code of Criminal Procedure. Under Section 69 of the CGST Act, 2017, the condition as to "when" a person can be arrested has been given and, therefore, by virtue of Section 4(2) of the Code of Criminal Procedure, the application of Section 41 is restricted in respect of arrest made under the CGST Act, 2017. Therefore, the provision that is Section 41A of the Code will not apply and the applicant cannot take the aid of section 41A.

He further submitted that as far as the merit of the matter is concerned, the accused during his statement dated 22.11.2023 has accepted that he has obtained GST Registrations of Mehal Construction and Suppliers, M/s., Mehal Association, and M/s. Arihant Traders on same PAN. He has further accepted that he has issued invoices without actual supply of goods and availed fraudulent ITC without actual receipts of goods and he has issued only bogus invoices. He has also accepted that he manages and operates sales and purchases transactions of

9 firms. He submitted that thus prima facie material is there against the applicant to connect him with the alleged offence and prayed for rejection of the application.

9. The show cause notice was issued to the applicant indicating that he failed to give any relevant documents regarding huge trade amongst firms alleged to be managed by him. It is further mentioned that the applicant through fake and bogus business firms has shown fake transaction and claimed the ITC. There is no dispute as to the fact that the search was conducted of the residence of the applicant and three mobile phones were seized. It is alleged that by using one PAN, the applicant has run various firms and supplied the goods and there is evasion of tax by committing fraud of Rs.144.65 crores.

10. It is submitted by learned counsel for the applicant that in view of Section 41A, the arrest of the applicant was not at all required. First, the officer of the non-applicant in view of the guidelines of the Honourable Apex Court was under obligation to record his reasons for arrest. The offences punishable are less than seven years as punishment provides for the offence under Section 132(1) and (2) imprisonment of 5 years. Thus, punishment provided is less than seven years. But, without complying the guidelines issued by the Honourable Apex Court, the applicant is arrested which amounts to illegal custody.

Whereas, as per submission of learned counsel for the non-applicant, Section 69 of the CGST Act, 2017 empowers the Commissioner to arrest a person and by virtue of Section 4(2) of the Code of Criminal Procedure, the application of Section 41 is restricted in respect of arrest made under the CGST Act, 2017. As per Section 4(2) of the Code of Criminal Procedure, if there is separate provision in respect of any subject in a special statute, the same will prevail over general provisions of the Code of Criminal Procedure.

11. In the light of the above submissions, if Scheme contemplated under Section 132 of the CGST Act, 2017 is considered, it provides punishment for certain offences and it is urged that it is only when a person supplies any goods or services or both without issue of any invoice, in violation of the provisions of the Act and with an intention to evade taxes or issues any invoice or bill without supply of goods or services or both in violation of the provisions of the Act, leading wrongful availment of the utilization of ITC or refund of the tax or avails ITC using such invoice or bill or collects any amount as tax but fails to pay same to the Government beyond a period of three months, he can be said to have committed offences under clauses (a) or (b) or (d) of the Act which is cognizable and non bailable and the imprisonment imposed by way of punishment, on being convicted for the said offences, may extend to five years or fine, if the amount of ITC is wrongly availed or the amount of refund wrongly taken exceeds Rs.500 lacs. In all other cases, punishment prescribed is imprisonment which may extend to three years and with fine.

12. In the light of the above provisions prescribing the punishment, learned

counsel for the applicant would invoke the law laid down by the Honourable Apex Court in the cases of *Satender Kumar Antil vs. CBI supra* and *State of Gujarat etc. vs. Choodamani Parmeshwaran Iyer and anr supra* and submitted that considering penalty to be imposed on conviction for the offence alleged to have been committed, the arrest of the applicant was unwarranted but the investigating agency has not considered the same. Admittedly, principles of paramount importance is, 'bail is rule and jail is exception'. Now, investigation is completed and further incarceration of the applicant in jail is not required.

13. Insofar as the submission of learned counsel for the non-applicant is concerned, as regards applicability of Section 41A of the Code of Criminal Procedure, the same has been dealt with by the Honourable Apex Court in the case of *State of Gujarat etc. vs. Choodamani Parmeshwaran Iyer and anr supra* wherein it is observed that it is well settled position of law that power to arrest a person by an empowered authority under the GST Act and could be termed as statutory in character and ordinarily the writ court should not interfere with exercise of such power. We say so because such power of arrest can be exercised only in those cases where the Commissioner or his delegatee has reasons to believe that the 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) or sub-section (1) or sub-section (2) of the said Section.

It is further held by the Honourable Apex Court that in the light of the fact that Section 69(1) of the CGST Act, 2017 authorizes the arrest only of persons who are believed to have committed cognizable and non-bailable offences, but Section 69(3) of the CGST Act, 2017 deals with the grant of bail and the procedure for grant of bail even to persons who are arrested in connection with non-cognizable and bailable offences and (2) in the light of the fact that the Commissioner of GST is conferred with the powers of search and seizure under Section 67(10) of the CGST Act, 2017, in the same manner as provided in Section 165 of the Cr.P.C., 1973, the contention of the Additional Solicitor General that the petitioners cannot take umbrage under Section 41 and 41A of Cr.P.C. may not be correct.

It is further held by the Honourable Apex Court that it may be remembered that Section 41(3) of Code of Criminal Procedure, does not provide an absolute irrevocable guarantee against arrest. Despite the compliance with the notices of appearance, a Police Officer himself is entitled under Section 41A(3) Code of Criminal Procedure, for reasons to be recorded, arrest a person. At this stage, we may notice the difference in language between Section 41A(3) of the Code of Criminal Procedure and 69(1) of the CGST Act, 2017. Under Section 41A(3) of the Code of Criminal Procedure, "reasons are to be recorded", once the Police Officer is of the opinion that the persons concerned ought to be arrested. In contrast, Section 69(1) uses the phrase "reasons to believe". There is a vast difference between "reasons to be recorded" and "reasons to believe."

14. This Court at Principal Seat in the case of Daulat Samirmal Mehta vs. Union of India, thr.the Secretary and ors supra dealt with the issue and held that power to arrest is provided in Section 69. As per sub-section (1), where the Commissioner has reasons to believe that the 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 authorize any officer of central tax to arrest such person. Chapter XIX deals with offences and penalties. Section 132 is part of Chapter XIX. It provides for punishment for committing certain offences. As per sub-section (1), whoever commits any of the twelve offences mentioned therein shall be punished in the manner provided in clauses (i) to (iv) of sub-section (1).

15. In this case, we are concerned about Section 132(1) (b) and 132(1)(c) of the CGST Act, 2017.

As per clause (c) of sub-section (1) of Section 132, the offences are availing ITC using invoice or bill without the supply of goods or services or both in violation of the CGST Act.

As per clause (b), a person who issues any invoice or bill without supply of goods or services or both in violation of the provisions of the CGST Act or the rules made thereunder leading to wrongful availment or utilization of ITC or refund of tax.

If a person commits the above two offences as per clauses (b) and (c), he shall be punishable under clause (i) if the amount of tax is evaded or the amount or ITC wrongly availed of or utilized or the amount of refund wrongly taken exceeds Rs.500 lacs with imprisonment for a term which may extend to five years. All other penalties are below five years. Therefore, maximum penalty that can be imposed for committing offence under clauses (b) and (c) of sub-section (1) of Section 132 is imprisonment which may extend to five years and with fine.

As per sub-section 5, the offences specified in clause (a) or (b) or (c) or (d) of sub-section (1) and punishable under clause (i) of that sub-section are cognizable and non-bailable.

16. Reverting back to the facts of the present case, it is alleged that the applicant by using a single PAN and without conducting any business and supplying any goods from the registered premises illegally claimed refund of the accumulated ITC on account of trade/supply of goods and contravened the provisions of the GST. The officer of the non-applicant has recorded the statement of the applicant wherein the applicant during his statement accepted that he has obtained GST Registration of Mehal Construction and Suppliers, M/s.Mehal Associates, M/s.Arihant Traders on the same PAN. It further reveals from his statement that he has accepted that he has issued invoices without actual supply of goods and availed fraudulent ITC without actual receipts of goods and issued the bogus invoices. The non-applicant has relied upon the statement of

the applicant and contended that there is a clear admission on the part of the applicant towards his act of wrong doing and thus committed offence under Section 132(1)(b) and (c) of the CGST Act, 2017 and his arrest has been justified. Section 136 of the CGST Act, 2017 deals with relevancy of statements under certain circumstances. As per the said Section, a statement made and signed by a person on appearance in response to any summons issued under section 70 during the course of any inquiry or proceedings under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, (a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or (b) when the person who made the statement is examined as a witness in the case before the court and the court is of the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice.

Thus, Section 136 will only come into play at the time where the trial commences and the said provision is important to highlight the fact that an admission made by person before the officials under the CGST Act, 2012 would be per se admissible in evidence unless it receives imprimatur of the Court.

17. As noticed above, in view of Section 69 of the CGST Act, 2017, the Commissioner may authorize arrest of a person only if he has reasons to believe that such a person has committed any offence under the clauses mentioned therein. Reasons to believe does not mean a purely subjective satisfaction. It contemplates existence of reasons on which the belief is founded and not merely a belief in the existence of reasons inducing the belief. The belief must not be based on mere suspicion; it must be founded upon information. Such reasons to believe can be formed on the basis of direct or circumstantial evidence. A rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the officer and the formation of his belief.

18. From the material collected on record, the reasons recorded are that during search some documents were found showing that the applicant is also running several firms on one PAN and without supplying any goods and though the said firms are not in existence and claimed ITC on account of trade/supply of goods.

19. In the case of *Arnesh Kumar vs. State of Bihar*, reported in (2014)8 SCC 273, the Honourable Apex Court while laying down some guidelines clarified that directions issued would not only be applicable to cases under 498-A of the Indian Penal Code or Section 4 of the Dowry Prohibition Act but also would cover cases where offence is punishable with imprisonment for a terms which may be less than seven years or which may extend to seven years whether with or without fine.

20. The Honourable Apex Court in the case of *Satender Kumar Antil vs. CBI*

supra has reiterated the above principle in paragraph Nos.26 & 27 which is reproduced as under:

"26. We only reiterate that the directions aforesaid ought to be complied with in letter and spirit by the investigating and prosecuting agencies, while the view expressed by us on the non-compliance of Section 41 and the consequences that flow from it has to be kept in mind by the Court, which is expected to be reflected in the orders.

27. Despite the dictum of this Court in Arnesh Kumar (supra), no concrete step has been taken to comply with the mandate of Section 41A of the Code. This Court has clearly interpreted Section 41(1)(b)(i) and (ii) inter alia holding that notwithstanding the existence of a reason to believe qua a police officer, the satisfaction for the need to arrest shall also be present. Thus, sub-clause (1)(b)

(i) of Section 41 has to be read along with sub-clause (ii) and therefore both the elements of 'reason to believe' and 'satisfaction qua an arrest' are mandated and accordingly are to be recorded by the police officer."

21. The submission made by learned counsel for the non-applicant that the observations are restricting only if the police officer may not apply to the officer of GST Department, exercising powers of arrest under the CGST Act, 2017, may not hold any water as whatever may be statute under which particular to an offence, arrest undisputedly would result in the same consequences. The guidelines issued by the Honourable Apex Court thus are to be followed in the backdrop of severe congestion in the jail and denial of the bail is an exception, where the custody for the purpose of investigation is not warranted. There is no reason why the aforesaid guidelines shall not be made applicable to the statute like in the present matter, where the power is conferred upon an officer to effect an arrest in case of offences where the penalty prescribed is less than 7 years imprisonment. The power to arrest which is under Section 69 of the CGST Act, 2017 contemplates a rider in the form of the Commissioner having reasons to believe that the person has committed an offence specified in clauses (a) to (d) of sub-section (1) of section 132 or he may authorize any officer of the State Tax to arrest such person.

22. Upon considering the Scheme contained in Section 132 of Chap (XIX) of the CGST Act, 2017 and after taking into account the punishment provided, the decision in the case of Arnesh Kumar vs. State of Bihar supra was extensively reproduced in the case of Daulat Samirmal Mehta vs. Union of India, thr.the Secretary and ors supra which is reproduced as under:

"The requirement under sub-section (1) of Section 69 is reasons to believe that not only a person has committed any offence as specified but also as to why such person needs to be arrested. From a perusal of the reasons recorded by the Principal Additional Director General, we find that other than paraphrasing the requirement of Section 41 Cr.P.C., no concrete incident has been mentioned therein recording any act of tampering of evidence by the petitioner or

threatening / inducing any witness besides not co-operating with the investigation, not to speak of fleeing from investigation. In such circumstances, we are of the view that the Principal Additional Director General could not have formed a reason to believe that the petitioner should be arrested.”

23. In the light of the above said observations, when facts of the present case are taken into consideration, it reveals that the applicant was arrested. Necessary investigation is carried out and the statement of the applicant is recorded. The maximum punishment provided is imprisonment upto five years. The facts of the case show that the dispute is regarding the tax evasion and the applicant has already paid Rs.81.00 lacs towards the said tax amount. The offence is under the CGST Act, 2017 except with the limited exceptions are compoundable.

24. In the light of the above facts, detention of the applicant in jail is not required. The applicant is not involved in a heinous crime like murder or terrorism. The basic rule is, 'bail is rule and jail is exception'. The allegations of serious financial impropriety are levelled against the applicant.

25. In this view of the matter, further incarceration of the applicant is not required. Accordingly, I proceed to pass following order:

ORDER

(1) The criminal application is allowed.

(2) The applicant shall be released on bail, in connection with Case No.DGGI/INTL/1082/2023 registered for offences punishable under Sections 132(1)(b), 132(1)(c), 132(1)(i) read with Section 132(5) of the Central Goods and Services Act, 2017, on his executing a P.R.Bond in the sum of Rs.2.00 lacs with one solvent surety of the like amount.

(3) The applicant shall attend the office of the non-applicant as and when required for the investigation purpose.

(4) The applicant shall surrender his passport before learned Judicial Magistrate First Class, Nagpur within a week from the date of his release from the jail.

(5) The applicant shall not leave the jurisdiction of the Nagpur district without prior permission of the Court.

The application stands disposed of.