THE HIGH COURT FOR THE STATE OF TELANGANA

*** THE HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN**
AND
THE HON'BLE SRI JUSTICE P. KESHAVA RAO

+ WRIT PETITION Nos.4764, 4769, 4892, 5074, 5130, 5329, 6952 and 7583 of 2019

% Date:18.04.2019

Between:

WP No.4764 of 2019:

P.V. Ramana Reddy S/o. P. Shankar Reddy, Aged about 57 years, Occ: Managing Director, Infinity Metals Products India Ltd., Plot No.48, Nagarjuna Hills, Punjagutta, Hyderabad.

… Petitioner

v.

$ Union of India, Ministry of Finance, Dept of Revenue, Represented by Secretary, North Block, New Delhi and others.

... Respondents

WP No.4769 of 2019:

G. Srinivasa Raju S/o.O. Ramakrishna Raju, Aged about 58 years, Occ: Director M/s.Sujana Universal Industries Ltd., Plot No.18, Nagarjuna Hills, Punjagutta, Hyderabad.

… Petitioner

v.

$ Union of India, Ministry of Finance, Dept of Revenue, Represented by Secretary, North Block, New Delhi and others.

... Respondents

WP No.4892 of 2019:

Venkata Satya Dharmavathar Bollina, S/o. Late Bhapiraju, aged about 53 years, Occ: Director, M/s.Hindustan Ispat Pvt. Limited, Flat No.H2, 2nd Floor, Trendset Vantage, Road No.14, Banjara Hills, Hyderabad.

… Petitioner

v.

Union of India, Ministry of Finance, Dept of Revenue, represented by Secretary, North Block, New Delhi and others.

... Respondents

WP No.5074 of 2019:

Balarama Krishna Mandava S/o. M. Kotaiah,
Aged about 69 years, Occ: Director, M/s.EBC Bearings
India Limited, Plot No.10, Bollaram, Hyderabad.

… Petitioner

v.

$ Union of India, Ministry of Finance, Dept of Revenue,
Represented by Secretary, North Block,
New Delhi and others.

... Respondents

WP No.5130 of 2019:

M/s. VS Ferrous Enterprises Private Limited,
A company incorporated under the provisions of
the Companies Act, 2013, Plot No.18, Nagarjuna Hills,
Panjagutta, Hyderabad, Rep. by Authorised Sri Vedula Sairam
and others.

… Petitioners

v.

$ Union of India, Ministry of Finance, Dept of Revenue,
Represented by Secretary, North Block,
New Delhi and others.

... Respondents

WP No.5329 of 2019:

Smt. Jagannagari Ragavi Reddy W/o. J. Satya Sridhar Reddy,
Aged about 40 years, Occ: Partner of M/s.Hyderabad Steels,
Flat No.202, Celestial Grand, Road No.1, Banjara Hills,
Hyderabad.

… Petitioner

v.

$ Union of India, Ministry of Finance, Dept of Revenue,
Represented by Secretary, North Block,
New Delhi and others.

... Respondents

WP No.6952 of 2019:

Challa Durga Adi Deva Vara Prasad, S/o.Challa Rama Somayaji,
Aged about 46 years, Occ: Chief Financial Officer, M/s.MSR
India Ltd., R/o.Sy. No.42/A, Chetlapotharam, IDA Jinnaram,
Gaggillapur, Medak District.

… Petitioner

v.

$ Union of India, Ministry of Finance, Dept of Revenue,
Represented by Secretary, North Block,
New Delhi and others.

... Respondents

WP No.7583 of 2019:

Telapolu Ram Prasad S/o. Balakoteshwara Gupta,
Aged 49 years, R/o.271/2E, Part I, Chityal Village,
Parigi Mandal, Ranga Reddy District

… Petitioner

v.

$ Union of India, Ministry of Finance, Dept of Revenue,
Represented by Secretary, North Block,
New Delhi and others.

... Respondents

! For Petitioners : Sri R. Raghunandan Rao for
Sri Kailash Nath PSS
Sri T. Niranjan Reddy
Sri Laxmi Kanth Reddy Desai

^ For Respondents : Sri K. M. Nataraj
Sri B. Narasimha Sarma
Sri K. Lakshman, Asst. Solicitor General

< Gist :

> Head Note :

? Cases Referred :

1. AIR 1966 SC 1746
2. AIR 1970 SC 940
3. AIR 1970 SC 1065
4. 1970 (1) SCC 847
5. 1976 (2) SCC 302
6. 1992 (3) SCC 259
7. 2014 (4) SCC 453
8. 1994 (3) SCC 569

HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN

AND

HON'BLE SRI JUSTICE P. KESHAVA RAO

WRIT PETITION Nos.4764, 4769, 4892, 5074, 5130 and 5329 of 2019

COMMON ORDER: ***(Per Hon'ble Sri Justice V. Ramasubramanian)***

Challenging the summons issued by the Superintendent (Anti Evasion) of the Hyderabad GST Commissionerate, under Section 70 of the Central Goods and Services Tax Act, 2017 (for short 'CGST Act') and the invocation of the penal provisions under Section 69 of the Act, the Directors (Past and/or present) of a few Private Limited Companies, a Chief Financial Officer of a company and the Partner of a Partnership Firm have come up with the above writ petitions.

2. We have heard Mr. R. Raghunandan Rao and Mr. T. Niranjan Reddy, learned Senior Counsel appearing for the petitioners and Mr. K.M.Nataraj, learned Additional Solicitor General appearing on behalf of the Union of India.

Facts in brief

3. Since the facts out of which these writ petitions arise, differ marginally from each other, we shall bring out the facts of each case separately:

(i) Brief facts in WP No.4764 of 2019:

The petitioner in this writ petition is the Managing Director of a Company, by name, Infinity Metals Products India Limited, engaged in the manufacture of iron and steel products. The Company is a listed

company. A search was conducted in the premises of the Company by the officials of the GST Commissionerate on 27.02.2019 and a summon dated 27.02.2019 was issued to the petitioner under Section 70 of the CGST Act calling upon the petitioner to appear on 28.02.2019, to give evidence truthfully on the matters concerning the enquiry. According to the petitioner, he was traveling on an urgent work on 27.02.2019 and hence, he made a request to grant time for appearing and cooperating with the investigation. But a second summon dated 01.03.2019 was issued directing the petitioner to appear on 05.03.2019. The petitioner admittedly did not appear on 05.03.2019, but gave a letter seeking two weeks time. Therefore, a third summon dated 05.03.2019 was issued calling upon the petitioner to appear for an enquiry on 07.03.2019 with a threat that prosecution would be launched if he failed to do so. Challenging the said summon, which was the third summon (dated 05.03.2019), WP No.4764 of 2019 is filed.

(ii) Brief Facts in WP No.4769 of 2019:

The petitioner in this writ petition is the Managing Director of another Public Limited Company known as Sujana Universal Industries Limited, which is engaged in the business of manufacturing Iron and Steel products. A search was conducted in the premises of the said company on 27.02.2019 and a summon under Section 70 of the Act was issued on 27.02.2019 calling upon the petitioner to appear on 27.02.2019 at 5.00 p.m. According to the petitioner, he appeared in the office of the Superintendent (Anti Evasion) at 5.00 p.m. on

27.02.2019 and he was questioned till about 8.00 p.m. Thereafter, he was asked to come back at 9.00 p.m. and it is the case of the petitioner that the enquiry which started at 9.00 p.m., on 27.02.2019 continued till 4.00 a.m. on 28.02.2019. Though he was directed to appear again in the afternoon of 28.02.2019, he could not appear as his health suffered a setback. Therefore, the petitioner claims to have given a letter dated 28.02.2019 seeking time till 04.03.2019. Even according to the petitioner he did not appear on 04.03.2019, but came up with the above writ petition challenging the summon issued on 27.02.2019.

(iii) Brief Facts in WP No.4892 of 2019:

The petitioner in this writ petition is a Director of a Private Limited Company, by name, Hindustan Ispat Private Limited, engaged in the manufacture of iron and steel products. A search of the premises of the company was conducted on 27.02.2019 and a summon dated 27.02.2019 was served, calling upon the petitioner to appear for an enquiry. According to the petitioner, the staff of the company appeared for the enquiry and cooperated with the authorities. However, the petitioner claims to have found, after returning to Hyderabad on 07.03.2019, the summon dated 27.02.2019 pasted on the door of his residence. Therefore, the petitioner has come up with the above writ petition.

(iv) Brief Facts in WP No.5074 of 2019:

The petitioner is one of the Directors of a Public Limited Company, which is also a listed Company, by name, EBC Bearings India Limited, engaged in the manufacture of iron and steel products.

A search was conducted in the premises of the said company by the officials of the GST Commissionerate on 27.02.2019 and a summon dated 27.02.2019 was issued to him under Section 70 of the Act. According to the petitioner, he appeared before the concerned authority in response to the summons on 27.02.2019, but was made to wait till 1.30 p.m. Thereafter, he was questioned from 6.00 p.m. onwards on 27.02.2019 till 3.00 a.m. on 28.02.2019. The petitioner claims that he was harassed without food or water and was coerced to sign a statement at 3.00 a.m. on 28.02.2019, though the date was recorded in the statement as 27.02.2019. This led to the petitioner suffering a setback in his health. According to the petitioner he was admitted in the hospital on 28.02.2019, but he was again served with a summon calling upon him to appear for an enquiry on 01.03.2019. The petitioner claims to have sent a reply seeking time on the ground of ill health. According to the petitioner, the officials of the GST Commissionerate stormed the hospital on 06.03.2019 and threatened him with arrest and prosecution if he did not appear for investigation. Therefore, after discharge from the hospital on 07.03.2019 the petitioner approached this Court with a writ petition in W.P. No.4893 of 2019. When the writ petition came up for hearing on 08.03.2019, an authorization for arrest issued by the Principal Commissioner of Central Tax on 07.03.2019 under Section 69 of the Act was produced. Therefore, challenging the arrest authorization issued on 07.03.2019, the petitioner came up with the above writ petition in WP No.5074 of 2019. (It may be recorded at this juncture that after an interim order of

protection was granted in this writ petition, the first writ petition WP No.4893 of 2019 was withdrawn).

(v) Brief Facts in WP No.5130 of 2019:

A Private Limited Company, by name, V.S. Ferros Enterprises Private Limited, carrying on the business of trading in iron and steel products and three Directors of the said Company (one of whom claims to have resigned on 11.02.2019) have come up with this writ petition. According to the petitioners, a search was conducted on 27.02.2019. The petitioners claim that thereafter a summon dated 07.03.2019 addressed to the second petitioner herein (who claims to be a former Director) was served on one of the clerical staff of the 1st petitioner Company at about 7.00 p.m., calling upon the second petitioner to appear for an enquiry at 4.00 p.m. According to the petitioners, the summon was bereft of any details and the petitioners could not make out the nature and details of the investigation initiated against them. However, the petitioners claim that through a remand application filed by the concerned authorities, in the case of one J. Satya Sridhar Reddy, Proprietor of M/s. Bharani Commodities, they came to know that certain allegations were leveled against the 1st petitioner Company as though they passed on credit to the tune of Rs.26.95 crores by issuing GST invoices, for the period from July 2017 to December 2018, without either paying GST or without any transfer of goods. Therefore, challenging both the search conducted on 27.02.2019 and the summon issued on 07.03.2019 to the 2nd

petitioner, the Company as well as two other Directors, together with the second petitioner, have come up with the above writ petition

(vi) Brief Facts in WP No.5329 of 2019:

This writ petition is filed by a lady, who claims to be a sleeping partner (her husband is the only other partner) in a Partnership Firm, by name, M/s.Hyderabad Steels. According to the petitioner, her husband J. Satya Sridhar Reddy is the Managing Partner of the Firm. On 27.02.2019 a search of the residential premises of the petitioner was conducted by the officials of the GST Commissionerate, on the basis of a search warrant. After the search, an undated summon under Section 70 of the Act was served calling upon the petitioner to appear on 27.02.2019 at 17.00 hours. According to the petitioner, she appeared for the enquiry and was detained under the guise of investigation till 1.30 a.m. on 28.02.2019 without providing food or water. The petitioner claims that a statement was forcibly extracted from her at 1.00 a.m. on 28.02.2019, with the date 27.02.2019. Thereafter, she was allowed to go at 2.00 a.m. on 28.02.2019. According to the petitioner, a second summon was issued on 28.02.2019 asking her to appear at 3.30 p.m. The petitioner duly complied with the same and was again detained till 2.00 a.m. on the next day. During this period, the petitioner's husband was out of station and as soon as he returned to Hyderabad and appeared before the authorities, he was arrested and remanded to judicial custody. Therefore, apprehending that the same fate would fall on her, the petitioner has come up with the above writ petition, when a third

summon dated 06.03.2019 was issued calling upon her to appear for the enquiry at 6.00 p.m. on 06.03.2019.

(vii) Brief Facts in WP No.6952 of 2019:

The Chief Financial Officer of a company, by name, MSR India Limited, has come up with the above writ petition claiming *inter alia* that the Director General of GST Intelligence registered a case against another company, by name, Flora Corporation Limited, for alleged creation of fake GST invoices without actual movement of goods and for allegedly passing on wrongful ITC to certain companies; that on the basis of a statement allegedly recorded from an authorized signatory of Flora Corporation Limited, the respondents issued summons for the appearance of the petitioner on 28.02.2019; that when he appeared at 2.00 p.m., on 28.02.2019, he was detained till 6.30 a.m. on 01.03.2019; that during this period he was made to sign a statement under coercion; that on 05.03.2019, the petitioner sent a letter retracting from the statement; that on 11.03.2019 he received summons for appearance on 12.03.2019; that fearing ill-treatment, he absconded himself; that again he received summons on 15.03.2019 for appearance on 18.03.2019; that the officers of the respondents are harassing all the employees of the company; that through one of the Directors of the Company, the petitioner was again summoned to appear on 01.04.2019 and that repeated summoning and the extraction of statements under threat of arrest are contrary to law.

(viii) Brief Facts in WP No.7583 of 2019:

The Managing Director of a company, by name, Suyati Impex Private Limited, has come up with the above writ petition contending that a search was conducted in the godown of the company on 02.04.2019; that he was served with a summon on the spot on 02.04.2019 and was whisked away in the vehicle brought by the 3rd respondent, to his office; that in the office a statement was recorded and he was released at 6.00 p.m. on 03.04.2019, after 26 hours; that a statement was extracted under coercion to the effect as though the petitioner created fake invoices in the names of five proprietary concerns run by him and through such fake invoices, without actual movement of goods, ITC claims were passed on; that the petitioner was again summoned to appear on 05.04.2019; and that since he apprehended arrest, he was compelled to file the writ petition.

4. Since the petitioners in these writ petitions were apprehending arrest, at the time when they came up before this Court, we granted interim protective orders, not to arrest the petitioners, but on condition that they appeared before the concerned authorities, whenever summoned and also cooperated in the investigation. Thereafter, the Superintendent (Anti Evasion), who is the 3rd respondent in most of the writ petitions, has come up with a counter affidavit.

Contents of the Counter – affidavit:

5. Since an investigation is now pending, which if results in the prosecution of the petitioners, may lead to the petitioners being tried

for certain offences punishable under the Act, we will only record the gist of the averments contained in the counter affidavit for the purpose of completion of narration. We shall not dwell deep into the facts pleaded in the counter affidavits, since we do not want either the prosecution or the defence to get prejudiced by any finding however remotely we make on the facts. With this note of caution, we shall record the averments contained in the counter affidavits, for the purpose of completion of narration.

6. The counter affidavits proceed briefly on the following lines:

i) that a group persons including the petitioners herein and the person who is already detained and sent to judicial custody floated//incorporated several Proprietary concerns/ Partnership Firms/ Limited Companies;

ii) that such Proprietary concerns/Partnership Firms/Limited Companies claimed input tax credit on the basis of certain invoices, without there being any actual physical receipt of goods;

iii) that these entities also issued many such invoices from July 2017 onwards charging GST without supply of goods against the invoices;

iv) that these bogus/fake invoices were used to avail and utilise fraudulent ITC of GST by the recipients of such invoices;

v) that one of these entities availed fraudulent input tax credit to the tune of Rs.17.60 crores without actual receipt of any goods and they also passed on the above credit by issuing fake GST invoices without supplying goods;

vi) that the very same premises of some of these entities were used by all others to do circular trading/bill trading;

vii) that the entity which availed ITC to the tune of Rs.17.60 crores, paid only a sum of Rs.5,676/-;

viii) that another entity availed fraudulent ITC to the tune of Rs.11.92 crores without actual receipt of goods;

ix) that a third entity availed fraudulent ITC to the tune of Rs.35.45 crores without actual receipt of goods, though they paid only a sum of Rs.20,645/- towards GST;

x) that yet another entity availed fraudulent ITC to the tune of 20.70 crores without actual receipt of goods;

xi) that one of these entities availed fraudulent ITC to the tune of Rs.47.28 crores, without receipt of any goods;

xii) that yet another entity availed fraudulent ITC to the tune of Rs.26.95 crores;

xiii) that one of these entities availed fraudulent ITC to the tune of Rs.39.29 crores without actual receipt of goods;

xiv) that one company availed ITC to the tune of Rs.24.85 crores without actual receipt of goods, but paid a GST amount of Rs.27,853/- only;

xv) that many GST invoices and E-way bills of these entities showed that these entitles have shown transportation of goods weighing more than double the capacity of the lorries/trucks in which they were allegedly sent showing thereby that all these documents are fabricated documents;

xvi) that the creation of fake E-way bills is an offence punishable under the Act;

xvii) that one of these entities generated 10 invoices on a single day as though there was sale of a huge quantity of TMT Bars to another company, which created documents to show that all of them were resold by that company to a third company on the very same day;

xviii) that these documents clearly showed circular trading without there being any actual trading;

xix) that one of these entities availed huge credit facilities to the tune of Rs.15 crores from a

nationalized bank, by showing such huge turnover without there being none

xx) that apart from indulging in circular trading among themselves, these companies also created fake GST invoices to enable their friendly business entities to take input tax credit;

xxi) that in this process, they defrauded the revenue to the tune of several crores of rupees and by availing credit facilities from Banks by showing these turnover, they also defrauded the banks;

xxii) that in response to the summons issued under Section 70 of the CGST Act, 2017, the concerned persons or their employees appeared and made voluntary statements on 27.02.2019 giving graphic details as to how huge ITC claims were generated on paper;

xxiii) that the statements made by some of the writ petitioners showed that these business entitles did not have any godown/warehouse and that they never bought and sold any goods;

xxiv) that the fraudulent input tax credit claimed by all these entities put together totals to a whooping sum of Rs.224.05 crores;

xxv) that the volume of turnover indicated in the GST invoices is about Rs.1289 crores;

xxvi) that the petitioners were thus guilty of defrauding the revenue to the tune of Rs.225 crores;

xxvii) that the petitioners have thus committed offences under clauses (b), (c) and (f) of sub-section (1) of Section 132 of CGST Act, 2017, all of which may be punishable with imprisonment which may extend to 5 years apart from a fine;

xxviii) that the offences committed by the petitioners are cognizable and non-bailable in terms of Section 132(5) of the CGST Act;

xxix) that some of the petitioners, who obtained interim protective orders, failed to comply with the directions contained in the order to appear at the given time on the appointed date; and

xxx) that the present writ petitions are nothing but applications for anticipatory bail filed under Article 226 of the Constitution of India and hence, the writ petitions are liable to be dismissed.

Contentions on the side of the petitioners:

7. The main contentions of Mr. R. Raghunandan Rao and Mr. T.Niranjan Reddy, learned Senior counsel appearing for the petitioners are:

(i) that the maximum punishment that could be imposed under Section 132 of the CGST Act, 2017 is only an imprisonment for 5 years, apart from fine and that therefore, under sections 41 and 41-A of the Code

of Criminal Procedure, after its amendment, a person cannot be arrested so long as such person complies and continues to comply with the notice for his appearance;

(ii) that though Section 41A (3) of the Code confers discretion upon the police officer to arrest a person despite such person complying with the notice, the same has to be done only for reasons to be recorded;

(iii) that since it is always open to the respondents to scrutinise the books of accounts and pass orders of assessment reversing the input tax credits availed by the dealers under the Act, there is no necessity to arrest the petitioners, especially when no adjudication has taken place under the Act;

(iv) that since the officers under the CGST Act, 2017 are not police officers and they are not entitled to seek custody of the persons arrested under the Act, the arrested person will only be remanded to judicial custody and hence there is no chance for the officers to conduct any enquiry with him after arrest.

(v) that the power to order arrest, conferred upon the Commissioner under Section 69 (1) of the Act is available only in cases where he has reason to believe;

(vi) that since the power under section 69(1) is made, under sub-Section (3), subject to the provisions of the Cr.P.C., the phrase "reason to believe" is to be understood in the context of how the said phrase is defined in Section 26 of the Indian Penal Code; and

(vii) that in any case, all the offences under the Act are compoundable under section 138 of the CGST Act and hence arrest is wholly unnecessary.

8. The learned senior counsel for the petitioners relied upon a few decisions where the Supreme Court condemned pre trial arrest in cases where it was not necessary. They also relied upon a judgment of the Delhi High Court which opined that the Commissioner can have reason to believe in terms of Section 69(1), only after an adjudication is made.

Contentions of the Learned Additional Solicitor General:

9. In response to the above contentions, it was argued by Mr. K. N. Nataraj, learned Additional Solicitor General

(1) that Sections 41 and 41-A of Cr.P.C. will have no application to the cases on hand, since the stage at which the provisions of the Cr.P.C. 1973 would apply, is only after arrest, in view of Section 69(3),

(2) that the summons for appearance issued under Section 70 and the authorization for arrest issued under Section 69 (1) of the CGST Act 2017 do not come within the purview of the expression “Criminal Proceedings”, since it is only after the launch of prosecution that criminal proceedings would commence,

(3) that persons like the petitioners herein are not described as accused anywhere in the CGST Act, 2017 so as to enable them to invoke the protection under Article 20 (3) of the Constitution of India,

(4) that the Commissioner exercising power under Section 69(1) is not a police officer,

(5) that Section 132 (1) lists out about 12 different types of offences under Clauses (a) to (l),

(6) that 5 out of these 12 offences are cognizable and non-bailable in view of Section 132(5) of CGST Act,

(7) that the remaining 7 offences are non-cognizable and bailable in view of Section 132(4) of the CGST Act,

(8) that under Section 136 of the CGST Act, a statement made and signed by a person on appearance in response to any summons issued under Section 70 of the Act shall be relevant, to the extent indicated therein, and

(9) that the petitioners are not entitled to convert the writ Court into a Court of anticipatory bail.

10. The learned Additional Solicitor General placed reliance upon several judgments of the Supreme Court to drive home the point that the proceedings under the Act till the stage of launching of the prosecution are not criminal proceedings and that the Commissioner or the appropriate officer under the Revenue Laws are not police officers and that at the stage of issue of notices under Section 70 of the Act, the Court cannot interfere.

11. We have carefully considered the above rival contention.

Discussion and Analysis:

12. We do not think that it is necessary for us to deal with some of the contentions raised by the learned Additional Solicitor General,

as the learned Senior Counsel appearing for the petitioners do not dispute the correctness of the same. The fact (1) that until a prosecution is launched, by way of a private complaint with the previous sanction of the Commissioner, no criminal proceedings can be taken to commence, (2) that persons who are summoned under Section 70(1) of the Act and persons whose arrest is authorised under Section 69(1) of the Act are not to be treated as persons accused of any offence until a prosecution is launched and (3) that an officer of the Central Tax authorised under Section 69(1) of the Act to arrest a person is not a police officer, are all not disputed by the learned Senior Counsel for the petitioners. Therefore, it is not necessary to consider in great detail, the decisions of the Supreme Court in **Badaku Joti Savant v. State of Mysore**[1], **Ramesh Chandra Metha v. State of West Bengal**[2], **Illias v. Collector of Customs**[3], **Percy Rustomji Basta v. State of Maharashtra**[4], **Veera Ibrahim v. State of Maharashtra**[5] and **Poolpandi v. Superintendent, Central Excise**[6].

Broad propositions of law emerging out of the above decisions

13. However, the propositions of law that could be culled out from the aforesaid decisions, can be summed up in brief as follows:

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[1] **AIR 1966 SC 1746**
[2] **AIR 1970 SC 940**
[3] **AIR 1970 SC 1065**
[4] **1970 (1) SCC 847**
[5] **1976 (2) SCC 302**
[6] **1992 (3) SCC 259**

i) that officers under various tax laws such as the Central Excise Act etc., are not police officers to whom Section 25 of the Indian Evidence Act 1872 would apply,

ii) that the power conferred upon the officers appointed under various tax enactments for search and arrest are actually intended to aid and support their main function of levy and collection of taxes and duties,

iii) that a person against whom an enquiry is undertaken under the relevant provisions of the tax laws, does not automatically become a person accused of an offence, until prosecution is launched,

iv) that the statements made by persons in the course of enquiries under the tax laws, cannot be equated to statements made by persons accused of an offence, and

v) that as a consequence, there is no protection for such persons under Article 20(3) of the Constitution of India, as the persons summoned for enquiry are not persons accused of any offence within the meaning of Article 20(3) of the Constitution of India.

14. The learned Senior Counsel appearing for the petitioners have no quarrel about the above propositions. In fact, the petitioners have not come up with these writ petitions contending (i) that the enquiry before the respondents partake the character of criminal proceedings and (ii) that the officers of Central Tax are police officers and that therefore the statements made to them are inadmissible. The petitioners are not even seeking the protection of Article 20(3) of the Constitution of India. On the other hand, the petitioners agree and undertake to appear before the officers and cooperate in the

investigation. Their main grievance is about the possibility of their arrest and detention to custody. But the objection of the respondents is that writ proceedings are not to be converted into proceedings for anticipatory bail.

Whether Article 226 can be used as a substitute to section 438, Cr.P.C

15. What the petitioners seek in these cases is a direction to the respondents not to arrest them in exercise of the power conferred by Section 69(1) of the CGST Act, 2017. This in essence, is akin to a prayer for anticipatory bail. **Since no first information report gets registered before the power of arrest under Section 69(1) of the CGST Act, 2017 is invoked, the petitioners cannot invoke Section 438 of the Code of Criminal Procedure for anticipatory bail. Therefore, the only way they can seek protection against pre-trial arrest (actually pre-prosecution arrest) is to invoke the jurisdiction of this Court under Article 226 of the Constitution of India.**

16. The contention of Mr.K.M.Nataraj, learned Additional Solicitor General contended that writ proceedings cannot be converted into proceedings for anticipatory bail, is unacceptable. If the enquiry initiated by the Commissioner of GST is actually a criminal proceeding, then the petitioners can perhaps invoke the jurisdiction of this Court or of the Court of Sessions under Section 438 Cr.P.C. But, if the enquiry by the respondents is not a criminal proceeding and yet the respondents are empowered to arrest a person on the basis of a

reason to believe that such a person is guilty of commission of an offence under the Act, then the only recourse available to such persons, to protect their personal liberties, is to invoke Article 226 of the Constitution of India.

17. It must be pointed out that despite the fact that **the enquiry by the officers of the GST Commissionerate is not a criminal proceeding, it is nevertheless a judicial proceeding**. This can be seen from sub-Section (2) of Section 70 of the CGST Act 2017. Section 70 of the CGST Act, 2017 reads as follows:

> "**70.** (1) The proper officer under this Act shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry in the same manner, as provided in the case of a civil court under the provisions of the Code of Civil Procedure, 1908.
>
> (2) Every such inquiry referred to in sub-section (1) shall be deemed to be a "judicial proceedings" within the meaning of section 193 and section 228 of the Indian Penal Code."

18. Under sub-Section (1) of Section 70 of the CGST Act, 2017 the proper officer under the CGST Act 2017 has the power to summon a person either to give evidence or to produce a document. The power has to be exercised in the manner as provided in the case of a civil Court under the CPC. In other words, the Proper Officer under the Act can be taken to have been conferred with the powers conferred upon the civil Court under Order XVI CPC.

19. The interesting part of Section 70 is sub-Section (2) of Section 70. This sub-Section declares every enquiry to which Section 70(1) relates, to be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code. As a consequence, a person who is summoned under Section 70(1) of the

CGST Act, 2017, to give evidence or to produce document becomes liable for punishment, if he intentionally gives false evidence or fabricates false evidence or intentionally offers any insult or causes any interruption to any public servant.

20. Therefore, even if the enquiry before the Proper Officer under CGST Act, 2017 is not by its nature, a criminal proceeding, it is nevertheless a judicial proceeding and hence, the person summoned is obliged not to give false evidence nor to fabricate evidence. He is also obliged not to insult and not to cause any interruption to the Proper Officer in the course of such proceedings.

21. A person who faces the threat of arrest in a criminal proceeding, may be entitled to invoke Section 438 Cr.P.C., subject to 2 conditions. They are (i) that section 438, Cr.P.C., applies to the State in which the prosecution takes place and (ii) that the application of Section 438 Cr.P.C., is not ousted by the special enactment under which such a person is prosecuted. For instance, Section 438 Cr.P.C., is not applicable in some of the States such as the State of Uttar Pradesh. Similarly, the provision for anticipatory bail stands excluded by Section 18 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

22. Where the applicability of Section 438 Cr.P.C. is specifically excluded, the High Court would be extremely cautious in exercising the same power indirectly by resorting to Article 226 of the Constitution of India. In **Km. Hema Mishra v. State of Uttar**

Pradesh[7], the Supreme Court noted the decision of the Constitution Bench in **Kartar Singh v. State of Punjab**[8]**,** wherein it was held that a claim for pre-arrest protection is neither a statutory right nor a right guaranteed under Articles 14, 19 and 21 of the Constitution of India. Though the Constitution Bench held that there is no bar for the High Court to entertain an application for pre-arrest protection under Article 226 of the Constitution of India, it was held that the power should be exercised sparingly. In a separate but concurring judgment in **Km. Hema Mishra,** A.K. Sikri, J., as he then was, held that the High Court is empowered to entertain a petition under Article 226 of the Constitution of India, where the main relief itself is against arrest. After having said so, the learned Judge made the following observations:-

> "Obviously, when provisions of Section 438 of Cr.P.C., are not available to the accused persons in the State of Uttar Pradesh, under the normal circumstances such an accused person would not be entitled to claim such a relief under Article 226 of the Constitution of India. It cannot be converted into a second window for the relief which is consciously denied statutorily making it a case of casus omissus."

23. But, nevertheless, the learned Judge also held that the High Court is not completely denuded of its powers under Article 226 of the Constitution of India, to grant such a relief in appropriate and deserving cases. The learned Judge pointed out that this power is to be exercised with extreme caution and sparingly in those cases where the arrest of a person would lead to total miscarriage of justice.

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[7] 2014 (4) SCC 453
[8] 1994 (3) SCC 569

24. Therefore, the contention of the learned Additional Solicitor General that the writ petitions are not maintainable, may not be correct in view of the decision of the Constitution Bench in **Kartar Singh** and the decision in **Km. Hema Mishra**. But, nevertheless, this Court has to keep in mind two things, namely, (1) the note of caution issued by the Supreme Court that this power should be exercised sparingly in appropriate cases and (2) that as a fundamental principle, a writ of Mandamus would lie only to compel the performance of a statutory or other duty. There is a fundamental distinction between a petition for anticipatory bail and the writ of mandamus to direct an officer not to effect arrest. A writ of mandamus would lie only to compel the performance of a statutory or other duty. No writ of mandamus would lie to prevent an officer from performing his statutory functions.

25. While this Court may have to look into the facts of these cases for examining whether the cases of the petitioners would fall under the category of exceptional cases as indicated in **Kartar Singh** and **Km. Hema Mishra**, this Court should also see whether by issuing the writ of Mandamus, we would be preventing the Commissioner or Proper Officer from performing any of their statutory functions.

26. Arguments were advanced on both sides on the question as to the stage at which the provisions of Cr.P.C. would come into play under Section 69 (3) of the CGST Act, 2017, especially for the purpose of finding out the applicability of Sections 41 and 41A of the

Cr.P.C. Section 41A was inserted in the Code of Criminal Procedure by way of Criminal Procedure Code Amendment Act, 2008 and was further modified by another Amendment Act, 2010. Section 41A(3) of Cr.P.C., prohibits the arrest of a person who complies and continues to comply with a notice for appearance issued under sub-Section (1) of Section 41A of Cr.P.C. However, Section 41A(3) of Cr.P.C. also gives discretion to the Police Officer, for reasons to be recorded, to arrest the person even though he complied with and continued to comply with the notice under sub-Section (1) of Section 41A of the Code.

27. The argument of the learned Senior Counsel for the petitioners is that since the maximum punishment prescribed under Section 132 of the CGST Act, 2017 is imprisonment for five years and also since the petitioners have complied with the notices for appearance, there is no necessity for the Commissioner to order their arrest under Section 69 (1) of the CGST Act, 2017. This is in view of section 41-A (3) of the Code.

28. But, the reply of Mr. K.M. Nataraj, learned Additional Solicitor General, to the above contention is that the petitioners cannot invoke Section 41A Cr.P.C., since the provisions of Cr.P.C. would become applicable under Section 69(3) of the CGST Act, 2017, only after the arrest of a person and not before.

29. Section 69 of the CGST Act, 2017 reads as follows:

> **"69.** (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,—

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

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

Some incongruities in section 69 and 132, CGST Act

30. It can be seen from the language employed in sub-Sections (1), (2) and (3) of Section 69, that there are some incongruities. **Under sub-Section (1) of Section 69, the power to order arrest is available only in cases where the Commissioner has reasons to believe that a person has committed any offence specified in clauses (a) to (d) of sub-Section (1) of Section 132 CGST Act, 2017. The offences specified in clauses (a) to (d) of sub-Section (1) of Section 132 CGST Act, 2017 are made cognizable and non-bailable under Section 132(5) of the CGST Act, 2017**.

31. Therefore, it is clear from sub-Section (1) of Section 69 of the CGST Act that **the power of the Commissioner to order the arrest of a person, can be exercised only in cases where such a person is believed to have committed a cognizable and non-bailable offence.** As we have pointed out elsewhere, Section 132(1) of CGST Act, 2017 lists out 12 different types of offences from clauses (a) to (l). The offences specified in clauses (a) to (d) of sub-Section (1) of Section 132 are declared cognizable and non-bailable

under sub-Section (5) of Section 132 CGST Act, 2017. All the other offences specified in clauses (f) to (l) of sub-Section (1) of Section 132 of the CGST, 2017 Act are declared as non-cognizable and bailable under sub-Section (4) of Section 132 of CGST Act, 2017.

32. But the incongruity between Section 69(1) and sub-Sections (4) and (5) of Section 132 of CGST Act, 2017 is that **when the very power to order arrest under Section 69(1) is confined only to congnizable and non-bailable offences, we do not know how an order for arrest can be passed under Section 69(1) in respect of offences which are declared non-cognizable and bailable under sub-Section (4) of Section 132 of CGST Act.**

33. Section 132 of the CGST Act, 2017 reads as follows:

> **132.** (1) Whoever commits any of the following offences, namely:—
>
> (a) supplies any goods or services or both without issue of any invoice, in violation of the provisions of this Act or the rules made thereunder, with the intention to evade tax;
>
> (b) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act, or the rules made thereunder leading to wrongful availment or utilisation of input tax credit or refund of tax;
>
> (c) avails input tax credit using such invoice or bill referred to in clause (b);
>
> (d) collects any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;
>
> (e) evades tax, fraudulently avails input tax credit or fraudulently obtains refund and where such offence is not covered under clauses (a) to (d);
>
> (f) falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information with an intention to evade payment of tax due under this Act;
>
> (g) obstructs or prevents any officer in the discharge of his duties under this Act;
>
> (h) acquires possession of, or in any way concerns himself in transporting, removing, depositing, keeping, concealing, supplying, or purchasing or in any other manner deals with, any goods which he knows or has reasons to believe are liable to confiscation under this Act or the rules made thereunder;
>
> (i) receives or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reasons to believe are in contravention of any provisions of this Act or the rules made thereunder;

(j) tampers with or destroys any material evidence or documents;

(k) fails to supply any information which he is required to supply under this Act or the rules made thereunder or (unless with a reasonable belief, the burden of proving which shall be upon him, that the information supplied by him is true) supplies false information; or

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

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

(ii) in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds two hundred lakh rupees but does not exceed five hundred lakh rupees, with imprisonment for a term which may extend to three years and with fine;

(iii) in the case of any other offence where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds one hundred lakh rupees but does not exceed two hundred lakh rupees, with imprisonment for a term which may extend to one year and with fine;

(iv) in cases where he commits or abets the commission of an offence specified in clause (f) or clause (g) or clause (j), he shall be punishable with imprisonment for a term which may extend to six months or with fine or with both.

(2) Where any person convicted of an offence under this section is again convicted of an offence under this section, then, he shall be punishable for the second and for every subsequent offence with imprisonment for a term which may extend to five years and with fine.

(3) The imprisonment referred to in clauses (i), (ii) and (iii) of sub-section (1) and sub-section (2) shall, in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the Court, be for a term not less than six months.

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

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

(6) A person shall not be prosecuted for any offence under this section except with the previous sanction of the Commissioner.

Explanation.— For the purposes of this section, the term “tax” shall include the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or refund wrongly taken under the provisions of this Act, the State Goods and Services Tax Act, the Integrated Goods and Services Tax Act or the Union Territory Goods and Services Tax Act and cess levied under the Goods and Services Tax (Compensation to States) Act.

34. **If CGST Act, 2017 is a complete code in itself in respect of (1) the acts that constitute offences, (2) the procedure for**

prosecution and (3) the punishment upon conviction, then the power of Commissioner, who is not a Police Officer, to order the arrest of a person should also emanate from prescription contained in the Act itself. Section 69(1) of CGST Act, 2017 very clearly delineates the power of the Commissioner to order the arrest of a person whom he has reasons to believe, to have committed an offence which is cognizable and non-bailable. Therefore, we do not know how a person whom the Commissioner believes to have committed an offence specified in clauses (f) to (l) of sub-Section (1) of Section 132 of CGST Act, which are non-cognizable and bailable, could be arrested at all, since Section 69(1) of the CGST Act, 2017 does not confer power of arrest in such cases.

35. The fact that the power of arrest under Section 69(1) of the CGST Act, 2017 is confined only to cognizable and non-bailable offences, is also fortified by sub-Section (2) of Section 69 which obliges the Officer, who carries out the arrest to inform the arrested person of the grounds of arrest and to produce him before a Magistrate within 24 hours. The duty enjoined upon the Officer carrying out the arrest, to inform the arrested person of the grounds of arrest and to produce him before a Magistrate within 24 hours, is co-relatable under sub-Section (2) of Section 69 of the CGST Act, 2017 to Section 132(5) of the CGST Act, 2017 that deals only with cognizable and non-bailable offences.

36. But, interestingly, clauses (a) and (b) of sub-Section (3) of Section 69 of the CGST Act, 2017 deal in entirety only with cases of

persons arrested for the offences which are indicated as non-cognizable and bailable. The phrase "subject to the provisions of the Code of Criminal Procedure" is used only in sub-Section (3), which deals in entirety only with the procedure to be followed after the arrest of a person who is believed to have committed a non-cognizable and bailable offence. While clause (a) of sub-Section (3) gives two options to the Officer carrying out the arrest, namely, to grant bail by himself or to forward the arrested person to the custody of the Magistrate, clause (b) confers the powers of an Officer incharge of a police station, upon the Deputy Commissioner or the Assistant Commissioner (GST), for the purpose of releasing an arrested person on bail, in the case of non-cognizable and bailable offences.

37. In other words, **even though Section 69(1) of the CGST Act, 2017 does not confer any power upon the Commissioner to order the arrest of a person, who has committed an offence which is non-cognizable and bailable, sub-Section (3) of Section 69 of the CGST Act, 2017 deals with the grant of bail, remand to custody and the procedure for grant of bail to a person accused of the commission of non-cognizable and bailable offences.** Thus, there is some incongruity between sub-Sections (1) and (3) of Section 69 read with section 132 of the CGST Act, 2017.

38. Another difficulty with Section 69 of the CGST Act, 2017 is that sub-Sections (1) and (2) of Section 69 which deal with the power of arrest and production before the Magistrate in the case of cognizable and non-bailable offences, do not use the phrase "subject

to the provisions of Cr.P.C." This phrase is used only in sub-Section (3) of Section 69 in relation to the arrest and grant of bail for offences which are non-cognizable and bailable, though no power of arrest is expressly conferred in relation to non-cognizable and bailable offences.

39. It is important to note that under sub-Section (4) of Section 132 of the CGST Act, 2017, all offences under the Act except those under clauses (a) to (d) of Section 132 (1), are made non-cognizable and bailable, notwithstanding anything contained in Cr.P.C. In addition, Section 67(10) of the CGST Act, 2017 makes the provisions of Cr.P.C. relating to search and seizure, apply to searches and seizures under this Act, subject to the modification that the word "Commissioner" shall substitute the word "Magistrate" appearing in Section 165 (5) of Cr.P.C., in its application to CGST Act, 2017.

40. Therefore, (1) 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 Sections41 and 41A of Cr.P.C. may not be correct.

41. Though for the purpose of summoning of witnesses and for summoning the production of documents, the Proper Officer holding the enquiry under the CGST Act, 2017 is treated like a Civil Court, there are four other places in the Act, where a reference is made, directly or indirectly, to the Cr.P.C. They are (1) the reference to Cr.P.C. in relation to search and seizure under Section 67(10) of CGST Act, 2017, (2) the reference to Cr.P.C. under sub-Section (3) of Section 69 in relation to the grant of bail for a person arrested in connection to a non-cognizable and bailable offence, (3) the reference to Cr.P.C. in Section 132 (4) while making all offences under the CGST Act, 2017 except those specified in clauses (a) to (d) of Section 132 (1) of CGST Act, 2017 as non-cognizable and bailable and (4) the reference to Sections 193 and 228 of IPC in Section 70(2) of the CGST Act, 2017. Therefore, the contention of learned Additional Solicitor General that in view of Section 69(3) of the CGST Act, 2017, the petitioners cannot fall back upon the limited protection against arrest, found in Sections 41 and 41A of Cr.P.C., may not be correct. As pointed out earlier, Section 41-A was inserted in Cr.P.C. by Section 6 of the Code of Criminal Procedure (Amendment) Act, 2008. Under sub-Section (3) of Section 41A Cr.P.C., a person who complies with a notice for appearance and who continues to comply with the notice for appearance before the Summoning Officer, shall not be arrested. **In fact, the duty imposed upon a Police Officer**

under Section 41A(1) Cr.P.C., to summon a person for enquiry in relation to a cognizable offence, is what is substantially ingrained in Section 70(1) of the CGST Act. Though Section 69(1) which confers powers upon the Commissioner to order the arrest of a person does not contain the safeguards that are incorporated in Section 41 and 41A of Cr.P.C., we think Section 70(1) of the CGST Act takes care of the contingency.

42. In any case, the moment the Commissioner has reasons to believe that a person has committed a cognizable and non-bailable offence warranting his arrest, then we think that the safeguards before arresting a person, as provided in Sections 41 and 41A of Cr.P.C., may have to be kept in mind.

43. But, it may be remembered that Section 41A(3) of Cr.P.C., 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) Cr.P.C., for reasons to be recorded, arrest a person. **At this stage, we may notice the difference in language between Section 41A(3) of Cr.P.C. and 69(1) of CGST Act, 2017. Under Section 41A(3) of Cr.P.C., "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.**"

44. It was contended by Mr. Niranjan Reddy, learned Senior Counsel for the petitioners that under Section 26 IPC, a person is said to have "reason to believe", if he has sufficient cause to believe. Therefore, he contended that an authorization for arrest issued under Section 69(1) of the CGST Act, 2017 should contain reasons in writing. But in one of the cases on hand, the authorization for arrest does not contain reasons. Therefore, it was contended that the authorization was bad.

45. But, as we have pointed, the requirement under Section 41A(3) of Cr.P.C. is the "recording of a reason", while the requirement under Section 69(1) of CGST Act, 2017 is the "reason to believe". In fact, on the question as to whether or not, reasons to believe should be recorded in the authorization for arrest, the learned Additional Solicitor General submitted that reasons are recorded in files. The learned Additional Solicitor General also produced the files.

46. **If reasons to believe are recorded in the files, we do not think it is necessary to record those reasons in the authorization for arrest under Section 69(1) of the CGST Act.** Since Section 69(1) of the CGST Act, 2017 specifically uses the words "reasons to believe", in contrast to the words "reasons to be recorded" appearing in Section 41A(3) of Cr.P.C., we think that it is enough if the reasons are found in the file, though not disclosed in the order authorizing the arrest.

47. Once it is found that Article 226 of the Constitution of India can be invoked even in cases where Section 438 Cr.P.C. has no

application (in contrast to cases such as those under the SC/ST Act where it stands expressly excluded) and once it is found that the limited protection against arrest available under Sections 41 and 41A Cr.P.C. may be available even to a person sought to be arrested under Section 69(1) of the CGST Act, 2017 (though the necessity to record reasons in the authorization for arrest may not be there), it should follow as a coronary that the writ petitions cannot be said to be not maintainable.

48. That takes us to the next question as to whether the petitioners are entitled to protection against arrest, in the facts and circumstances of the case. We have already indicated on the basis of the ratio laid down by the Constitution Bench in **Kartar Singh** and the ratio laid down in **Km. Hema Mishra** that the jurisdiction under Article 226 of the Constitution of India to grant protection against arrest, should be sparingly used. Therefore, let us see *prima facie,* the nature of the allegations against the petitioners and the circumstances prevailing in the case, for deciding whether the petitioners are entitled to protection against the arrest. We have already extracted in brief, the contents of the counter affidavits. We have summarized the contents of the counter affidavits very cautiously with a view to avoid the colouring of our vision. Therefore, what we will now take into account on the facts, will only be a superficial examination of facts.

49. In essence, the main allegation of the Department against the petitioners is that they are guilty of circular trading by claiming input tax credit on materials never purchased and passing on such

input tax credit to companies to whom they never sold any goods. The Department has estimated that fake GST invoices were issued to the total value of about Rs.1,289 crores and the benefit of wrongful ITC passed on by the petitioners is to the tune of about Rs.225 crores.

50. The contention of the petitioners is that the CGST Act, 2017 prescribes a procedure for assessment even in cases where the information furnished in the returns is found to have discrepancies and that unless a summary assessment or special audit is conducted determining the liability, no offence can be made out under the Act. Therefore, it is their contention that even a prosecution cannot be launched without an assessment and that therefore, there is no question of any arrest.

51. It is true that **CGST Act, 2017 provides for (i) self assessment, under Section 59, (ii) provisional assessment, under Section 60, (iii) scrutiny of returns, under Section 61, (iv) assessment of persons who do not file returns, under Section 62, (v) assessment of unregistered persons, under Section 63, (vi) summary assessment in special cases, under Section 64 and (vii) audit under Sections 65 and 66.**

52. But, to say that a prosecution can be launched only after the completion of the assessment, goes contrary to Section 132 of the CGST Act, 2017. The list of offences included in sub-Section (1) of Section 132 of CGST Act, 2017 have no co-relation to assessment. Issue of invoices or bills without supply of goods and the availing of ITC by using such invoices or bills, are made offences under clauses

(b) and (c) of sub-Section (1) of Section 132 of the CGST Act. The prosecutions for these offences do not depend upon the completion of assessment. Therefore, the argument that there cannot be an arrest even before adjudication or assessment, does not appeal to us.

53. An argument was advanced by Mr. Raghunandan Rao, learned Senior Counsel for the petitioners that all the offences under the Act are compoundable under sub-Section (1) of Section 138 of the CGST Act, 2017, subject to the restrictions contained in the proviso thereto and that therefore, there is no necessity to arrest a person for the alleged commission of an offence which is compoundable.

54. On the surface of it, the said argument of Mr. Raghunandan Rao, learned Senior Counsel for the petitioners is quite appealing. But, on a deeper scrutiny, it can be found that the argument is not sustainable for two reasons:

(1) Any offence under CGST Act, 2017 is compoundable both before and after the institution of prosecution. This is in view of the substantial part of sub-section (1) of Section 138 of the CGST Act, 2017. But, the petitioners have not offered to compound the offence, though **compounding is permissible even before the institution of prosecution**.

(2) Under the third proviso to sub-Section (1) of 138, compounding can be allowed only after making payment of tax, interest and penalty involved in such cases. Today, the wrongful ITC allegedly passed on by the petitioners, according to the Department is to the tune of Rs.225 Crores. Therefore, we do not think that even if we allow the

petitioners to apply for compounding, they may have a meeting point with the Department as the liability arising out of the alleged actions on the part of the petitioners is so huge. Therefore, the argument that there cannot be any arrest as long as the offences are compoundable, is an argument of convenience and cannot be accepted in cases of this nature.

55. Another argument advanced by the learned Senior Counsel for the petitioners is that since the Proper Officer under the CGST Act, 2017, even according to the respondents is not a Police Officer, he cannot and he does not seek custody of the arrested person, for completing the investigation/enquiry. Section 69(2) obliges the Officer authorized to arrest the person, to produce the arrested person before a Magistrate within 24 hours. Immediately, upon production, the Magistrate may either remand him to judicial custody or admit the arrested person to bail, in accordance with the procedure prescribed under the Code of Criminal Procedure. There is no question of police custody or custody to the Proper Officer in cases of this nature. Therefore, it is contended by Mr. Raghunandan Rao, learned Senior Counsel for the petitioners that the arrest under Section 69, does not advance the cause of investigation/enquiry, but only provides a satisfaction to the respondents that they have punished the arrested person even before trial. According to the learned Senior Counsel, the arrest of a person which will not facilitate further investigation, has to be discouraged, since the same has the potential to punish a person before trial.

56. But, the aforesaid contention proceeds on the premise as though the only object of arresting a person pending investigation is just to facilitate further investigation. However, it is not so. The objects of pre-trial arrest and detention to custody pending trial, are manifold as indicated in section 41 of the Code. They are:

(a) to prevent such person from committing any further offence;

(b) proper investigation of the offence;

(c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner;

(d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer;

Therefore, it is not correct to say that the object of arrest is only to proceed with further investigation with the arrested person.

57. It is true that in some cases arising out of similar provisions for arrest under the Customs Act and other fiscal laws, the Supreme Court indicated that the object of arrest is to further the process of enquiry. But, it does not mean that the furthering of enquiry/ investigation is the only object of arrest.

58. Therefore, all the technical objections raised by the petitioners, to the entitlement as well as the necessity for the respondents to arrest them are liable to rejected. Once this is done, we will have to examine whether, in the facts and circumstances of these cases, the petitioners are entitled to protection against arrest. It must

be remembered that the petitioners cannot be placed in a higher pedestal than those seeking anticipatory bail. On the other hand, the jurisdiction under Article 226 has to be sparingly used, as cautioned by the Supreme Court in **Km.Hema Misra (cited supra).**

59. We have very broadly indicated, without going deep, that the petitioners have allegedly involved in circular trading with a turnover on paper to the tune of about Rs.1,289.00 crores and a benefit of ITC to the tune of Rs.225.00 crores. The GST regime is at its nascent stage. The law is yet to reach its second anniversary. There were lot of technical glitches in the matter of furnishing of returns, making ITC claims etc. Any number of circulars had to be issued by the Government of India for removing these technical glitches.

60. If, even before the GST regime is put on tracks, some one can exploit the law, without the actual purchase or sale of goods or hiring or rendering of services, projecting a huge turnover that remained only on paper, giving rise to a claim for input tax credit to the tune of about Rs.225.00 crores, there is nothing wrong in the respondents thinking that persons involved should be arrested. Generally, in all other fiscal laws, the offences that we have traditionally known revolve around evasion of liability. In such cases, the Government is only deprived of what is due to them. But in fraudulent ITC claims, of the nature allegedly made by the petitioners, a huge liability is created for the Government. Therefore, the acts

complained of against the petitioners constitute a threat to the very implementation of a law within a short duration of its inception.

61. In view of the above, despite our finding that the writ petitions are maintainable and despite our finding that the protection under Sections 41 and 41-A of Cr.P.C., may be available to persons said to have committed cognizable and non-bailable offences under this Act and despite our finding that there are incongruities within Section 69 and between Sections 69 and 132 of the CGST Act, 2017, we do not wish to grant relief to the petitioners against arrest, in view of the special circumstances which we have indicated above.

62. Therefore, the Writ Petitions are dismissed. Consequently, miscellaneous petitions, if any pending, shall stand dismissed. No order as to costs.

V. RAMASUBRAMANIAN, J

P. KESHAVA RAO, J

April 18, 2019

Note

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