

R.M. AMBERKAR
(Private Secretary)

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION (ST) NO. 5484 OF 2021

Sunil Kumar Jha .. Petitioner
Vs
Union of India & Ors. .. Respondents

WRIT PETITION (ST) NO. 5486 OF 2021

Akshay Chhabra .. Petitioner
Vs
Union of India & Ors. .. Respondents

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- Mr. Sharan Jagtiani, Senior Counsel a/w Mr. Ameet Naik, Ms. Madhu Gadodia, Mr. Deepak Deshmukh and Ms. Jyoti Singh i/by Naik Naik & Co for the Petitioner in WPST 5484/2021
 - Mr. Abad Ponda, Senior Counsel a/w Mr. Ameet Naik, Ms. Madhu Gadodia, Mr. Deepak Deshmukh and Ms. Jyoti Singh i/by Naik Naik & Co for the Petitioner in WPST 5486/2021
 - Mr. Jitendra B. Mishra a/w Mr. R.K. Pathak and Ms. S.D. Vyas, 'B' Panel Counsel for the Respondents
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**CORAM : UJJAL BHUYAN &
MILIND N. JADHAV, JJ.**

DATE : MARCH 11, 2021.

P.C.:

Considering that subject matter of both the writ petitions are identical, those were heard together on 09.03.2021.

2. We have heard Mr. Ponda and Mr. Jagtiani, learned senior counsel for the petitioners as well as Mr. Mishra, learned counsel for the respondents.

3. In both the writ petitions, the following prayers have been made:-

- (i) To declare section 132(1)(b) and (c) of the Central Goods and Services Tax Act, 2017 (briefly, "**the CGST Act**" hereinafter) as unconstitutional;
- (ii) For a declaration that power under section 69 can be exercised only upon determination of liability and consequent upon failure of the taxable person to meet such liability;
- (iii) Restraining the respondents from lodging any criminal complaint against the petitioners; and
- (iv) Enlarging the petitioners on bail on such terms and conditions as may be deemed fit and proper.

4. It may be mentioned that the two petitioners were arrested on 16.02.2021 by the respondents under section 69 of the CGST Act.

5. Facts necessary for adjudication may be set out briefly as under:-

5.1. Mr. Sunil Kumar Jha is the petitioner in writ petition (st) No. 5484 of 2021 whereas Mr. Akshay Chhabra is the petitioner in writ petition (st) No. 5486 of 2021. Mr. Akshay Chhabra is the chairman cum managing director of the company called One Point One Solutions Ltd (briefly "**petitioner company**" hereinafter) having its registered office at International Infotech Park, Vashi. Mr. Sunil Kumar Jha is the Chief Financial Officer of the petitioner company. Petitioner company is engaged in the business of providing business process outsourcing (BPO) services to various clients covering a range of services from customer support to consultancy services, to healthcare and retailing etc.

5.2. It is stated that petitioner company is listed in the National Stock Exchange having a work force of more than 5000 employees.

5.3. On 17.09.2020 respondent No. 2 conducted a search and seizure operation in the office premises of the petitioner company whereafter summons dated 24.09.2020 were issued to Mr. Jha to tender evidence and also to provide purchase invoices of seven companies viz, (i) Siddharh

Education Services Ltd, (ii) HNO Furnishing Ltd, (iii) Creative Business Associates, (iv) Wiggins Coretech Equip P Ltd, (v) Gradiente Infotainment Ltd, (vi) Cannonball Trading Pvt Ltd and, (vii) Mystique Media Pvt Ltd for the financial years 2017-18, 2018-19 and 2019-20. It is stated that petitioner company had entered into various transactions with the above seven companies which had received services from the petitioner company.

5.4. On 30.09.2020 petitioner produced the purchase invoices and agreements relating to Mystique Media Pvt Ltd.

5.5. On 18.11.2020 again a search and seizure operation was conducted by respondent No. 3 at Vashi and Pawne office premises of the petitioner company as well as in the residential premises of Mr. Akshay Chhabra to whom summons were issued. Though petitioner company was working at 50% of the staff strength because of COVID 19 restrictions imposed by the government, nonetheless documents of the petitioner company were seized by respondent No. 2 on 18.11.2020.

5.6. Be that as it may, Mr. Sunil Kumar Jha appeared before the respondents and his statement was recorded on

20.11.2020. It may also be mentioned that bank account of the petitioner company in the Axis Bank was attached by respondent No. 2.

5.7. Mr. Akshay Chhabra attended the office of respondent No. 3 on 28.01.2021 whereafter his statement was recorded. It may also be mentioned that on 01.02.2021, respondent No. 2 recorded the statement of one of the directors of the petitioner company Mr. Akashanand Karnik and also of Mr. Sunil Kumar Jha. Thereafter, statement of Mr. Akshay Chhabra was recorded by respondent No. 2 on 03.02.2021.

5.8. While statements of the above persons were recorded as such, again a search and seizure operation was carried out on 04.02.2021 in the Turbhe office of the petitioner company. An allegation has been made that employees of the petitioner company including female staff were not allowed to go home till 04.00 a.m. on 05.02.2021. Also at 03.50 p.m. on 05.02.2021, statement of Ms. Biji Shivprasad, an employee of the petitioner company, was recorded by respondent No. 2. It is stated that petitioners brought to the notice of respondent No. 2 the harassment meted out to the employees of the petitioner company

notwithstanding full cooperation rendered by the petitioner company and by the petitioners to the respondents. However, respondent No. 2 again carried out a search and seizure operation on 05.02.2021 in the Pawne office of the petitioner company whereafter various documents were seized. Petitioners have stated that in the course of the search and seizure operation, respondent No. 2 wanted to know the location of the modular furniture supplied by M/s. HNO Furnishings Ltd which was shown by Mr. Akash Chhabra by taking respondent No. 2 and other officials to the various work stations where modular furniture were installed. Though apparently respondent No. 2 was satisfied about the modular furniture supplied by M/s. HNO Furnishings Ltd, nevertheless the accompanying officials called upon the petitioner company to submit documentary evidence of the rentals of its premises from the year 2014 onwards. Even such details were furnished by the petitioner company.

5.9. In the meanwhile, recording of statements continued and on 09.02.2021 statement of Mr. Sunil Kumar Jha was recorded. Thereafter, statement of Mr. Akshay Chhabra and Mr. Sunil Kumar Jha were again recorded on 12.02.2021, 15.02.2021 and 16.02.2021.

5.10. While the petitioners went to attend the office of respondent No. 2 on 16.02.2021 after being summoned, they were arrested under section 69 of the CGST Act. On 17.02.2021 they were produced before the Court of Judicial Magistrate First Class, Vashi at Belapur when remand application was filed by respondent No. 2. Learned Judicial Magistrate allowed the remand application by sending the petitioners to judicial custody for 14 days. Though a bail application was made on behalf of the two petitioners, the same was ultimately rejected by the learned Judicial Magistrate by order dated 03.03.2021.

5.11. Petitioners have stated that on 18.02.2021, petitioner company had made a payment of Rs. 1,36,56,638.00 under protest to demonstrate its *bonafides*. Subsequently on 23.02.2021, further payments totalling Rs. 3,44,02,350.00 were made by the petitioners. Thus, petitioners have paid in all Rs. 4,80,58,988.00.

5.12. Petitioner company and some of its officials including directors have filed a writ petition before this Court being writ petition (st) No. 4557/2021 wherein this Court by order dated 25.02.2021 had issued notice and directed that no coercive action shall be taken against the officials who

had moved this Court though they would cooperate with the investigation. In the said order dated 25.02.2021, it was recorded that the allegations against the two petitioners is that they have committed the offence of availing ineligible input tax credit (ITC) to the extent of Rs. 9,04,89,054.00 by using fake invoices i.e without actual supply of goods or services. It was also noted that out of the alleged availing of ineligible input tax credit of slightly more than Rs. 9 crores, petitioner company had deposited more than Rs. 4.80 crores which is more than 50% of the alleged dues.

5.13. It is also stated that for the period under consideration, petitioner company had paid Goods & Services Tax (GST) of Rs. 8 crores to the government and that it would pay whatever amount is quantified subject to adjudication and its right of appeal.

5.14. Aggrieved by the arrest and continued detention of the petitioners, the two writ petitions have been filed seeking the reliefs as indicated above.

6. Respondent No. 4 has filed separate but identical affidavits in both the writ petitions stating that petitioners have committed the offence of availing ineligible input tax

credit of Rs. 9,04,89,054.00 by using fake invoices without supply of goods and / or services, thus committing offence under section 132(1)(b) and (c) of the CGST Act which is punishable under clause (i) of sub-section (1) of section 132 which is a cognizable and non-bailable offence. While contending that petitioners have the regular remedy of moving bail applications, the affidavits have also given details of various transactions entered into by the petitioner company to highlight the seriousness of the allegation against the petitioners.

7. Mr. Ponda and Mr. Jagtiani, learned senior counsel for the petitioners have contended that when the petitioners had cooperated with the investigation and had responded to the summons issued, there was no justification for taking the petitioners into custody. Referring to section 132(1)(i) of the CGST Act, they submit that the maximum penalty for committing an offence under section 132(1)(b) and (c) is five years with fine. Since the maximum sentence is less than seven years, judgment of the Supreme Court in **Arnesh Kumar Vs. State of Bihar**¹ would be applicable. Referring to the recent judgment of this Court in **Daulat Samirmal Mehta Vs. Union of India**², it is submitted that

¹ (2014) 8 SCC 273

² Order dated 15.02.2021 in Civil Writ Petition No. 471 of 2021.

respondents would have to justify and give reasons as to why the petitioners are required to be taken into custody despite appearing before the respondents responding to the summons issued to them. It is submitted that after the petitioners were taken into custody on 16.02.2021, a perfunctory round of interrogation was carried on 06.03.2021 that too after the two writ petitions were moved before this Court on 04.03.2021 only to justify custodial interrogation. Further submission made is that against the allegation that the petitioners had availed ineligible input tax credit to the extent of Rs. 9,04,89,054.00, petitioners have paid till date Rs. 4,80,58,988.00 which is more than 50% of the alleged dues. Referring to the judgment of the Supreme Court in **Arnab Manoranjan Goswami Vs. State of Maharashtra**³ as well as to the decision of this Court in Daulat S. Mehta (supra), learned senior counsel for the petitioners submit that not only the continued detention of the petitioners are illegal, their very arrest itself is illegal. Thus, there cannot be any justification for keeping the petitioners in custody any longer.

8. On the other hand, Mr. Mishra, learned counsel for the respondents has supported the impugned action of the

3 2020 SCC OnLine SC 964

respondents in arresting the petitioners and submits that their further detention is necessary. Detention of the two petitioners is not only for the purpose of custodial interrogation but also to ensure that petitioners do not tamper with the documents and influence the witnesses. Controverting the contention of learned counsel for the petitioners that petitioners had cooperated with the investigation, Mr. Mishra has taken us through the statements recorded and submits that while petitioners had appeared before the respondents and their statements were recorded, the answers to various questions were given in such a manner that the investigating authority could not proceed further. The statements made were evasive and therefore cannot be construed to be cooperative in nature. He has also placed reliance on a decision of the Telangana High Court in **P.V. Ramana Reddy Vs. Union of India**⁴ as well as to an order passed by this Court in the case of **Ashish Jain Vs. Union of India**⁵. He therefore submits that the present is not a fit case for grant of bail to the petitioners.

9. Submissions made by learned counsel for the parties have been duly considered. We have also perused

⁴ 2019(25) G.S.T.L. 185 (Telangana)

⁵ Order dated 31.07.2019 passed Cri. W.P. NO. 3804 of 2019

the materials on record. Judgments cited at the bar have been duly carefully examined.

10. There is no dispute to the fact that petitioners were arrested on 16.02.2021 under section 69 of the CGST Act. A perusal of the arrest memo dated 16.02.2021 issued by the Superintendent (Anti Evasion) would go to show that the allegation against the two petitioners is committing an offence under section 132(1)(b) and (c) of the CGST Act punishable under section 132(1)(i) thereof. As per the remand application, it is alleged that petitioners had played a crucial role in the illegal availment / utilization of ineligible input tax credit to the tune of Rs. 9,04,89,054.00 without supply of goods and / or services and have utilized the same for payment of GST besides issuing fake invoices to fake / fictitious companies like M/s. Germanium Trading Pvt Ltd. Interestingly, in the prayer portion of the remand application, the arresting authority sought judicial custody of the two petitioners for 60 (sixty) days though in the penultimate paragraph, the same was overwritten and made 14 days without any initial.

11. Section 69 of the CGST Act deals with power to arrest. Sub-section (1) says that if the Commissioner has

reasons to believe that a person has committed any offence specified in clause (a) to 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. In *Daulat S. Mehta (supra)*, this Court has analyzed the powers conferred upon the Commissioner under section 69 of the CGST Act holding that recording of reasons to believe by the Commissioner that a person has committed the offence and is required to be arrested is the *sine qua non* for exercise of such power. It has been held that requirement under sub-section (1) of section 69 is recording of 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. It has also been highlighted that CGST Act is primarily an enactment for collection of revenue which is its primary objective; arrest is only incidental to achieve the said objective. Further, arrest under sub-section (1) of section 69 of the CGST Act has been made subject to the provisions of the Code of Criminal Procedure, 1973 including sections 41 and 41A.

12. Proceeding to section 132 of CGST Act, we find that clauses (a) to (l) of sub-section (1) defines various

offences. Allegation against the petitioners is that they have committed the offences described under clauses (b) and (c) i.e. issuing invoices or bills without supply of goods or services or both leading to wrongful availment or utilization of input tax credit or refund of tax and availing input tax credit using such invoices or bills. The punishment prescribed for commission of such offence is laid down in clauses (i) to (iv) of sub-section (1) of section 132. As per clause (i), if the amount of tax evaded or input tax credit wrongly availed of or utilized or the amount of refund wrongly taken exceeds Rs. five crores, then the sentence is imprisonment for a term which may extend to five years and with fine. All the other sentences are below five years. Therefore, the maximum sentence that can be imposed upon conviction for committing an offence under section 132(1)(b) and (c) is five years and with fine. In Arnesh Kumar (supra), Supreme Court had held that in case of an offence where the punishment upon conviction is seven years if a person complies with a notice under section 41-A of the Code of Criminal Procedure, 1973 (briefly "**Cr.P.C.**") particularly sub-section (3) thereof which says that where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the

notice unless for reasons to be recorded the police officer is of the opinion that he ought to be arrested. Relying upon Arnesh Kumar (supra), this Court in Daulat S. Mehta (supra) also held that the reasons to believe contemplated in sub-section (1) of section 69 must not only pertain to commission of any offence as specified but also the need and necessity for arresting such person when that person had complied with the summons.

13. In the instant case, we find that both the petitioners taken together had appeared before the respondents on multiple occasions particularly on 20.11.2020, 01.02.2021, 03.02.2021, 09.02.2021, 12.02.2021, 15.02.2021 and 16.02.2021 when their statements were recorded. Not only that a number of employees and officials of the petitioner company as well as independent directors had appeared before the investigating authorities and their statements were also recorded. As a matter of fact in the statement of Mr. Akashnand Karnik, director of the petitioner company recorded on 01.02.2021, he meticulously answered all the queries pertaining to various transactions of the petitioner company with M/s. Wiggins Coretech Equipments Pvt Ltd, M/s. Siddharth Education Services, M/s. HNO Furnishsings Ltd, M/s. Creative

Business Associates, M/s. Mystique Media Pvt Ltd, M/s. Gradient Infotainment Ltd and M/s. Cannon Ball Trading Pvt Ltd including supply of computers and whatever services were provided by them. On the same day, the statement of Mr. Sunil Kumar Jha was also recorded separately and if we look at the two statements, we do not find any significant discrepancy in the two. If that is the position and following the law laid down in Arnesh Kumar (supra) as reiterated by this Court in Daulat S. Mehta (supra), there could not have been any justification to arrest the two petitioners on 16.02.2021.

14. That apart we do not find any instance of the petitioners tampering with documents or trying to influence any witness being brought on record. Merely saying or apprehending that in future they may tamper with evidence or induce any witness as observed by the learned Magistrate cannot be a justification to deny bail.

15. We have already noticed that the maximum sentence that can be imposed upon conviction for the said offence is imprisonment for five years. This brings us to section 167 of the Cr.P.C.. Section 167(2)(a)(ii) makes it clear that a person cannot be kept in detention beyond a

total period of sixty days where investigation relates to an offence punishable for imprisonment for a term of not less than ten years and is not completed. It also says that a Magistrate may authorize detention of the accused person beyond a period of fifteen days if he is satisfied that adequate grounds exists for doing so but no Magistrate shall authorize detention of the accused person in custody for a total period exceeding 60 days as in the present case. In this backdrop, if we look at the remand application, we find that the prayer made by the arresting authority (page 119 of the paper book in WP (st) No. 5486/2021) is for remand of the petitioners to judicial custody for 60 days though in the penultimate paragraph, this was overwritten to 14 days but without initials. This only indicates the manner in which the respondents have proceeded in the matter whereby the process of detention itself is sought to be converted into a penalty. We say this and no more on this aspect.

16. We have also noticed that as per the remand application, the allegation against the two petitioners is that they had played a crucial role in illegally availing input tax credit of Rs. 9,04,89,054.00. Petitioners have stated that on 18.02.2021, petitioner company made a payment of Rs. 1,36,56,638.00 under protest. Thereafter further payments

were made on 23.02.2021 for a total amount of Rs. 3,44,02,350.00. In all, petitioners have paid Rs. 4,80,58,988.00 till date and they have made a statement that they would be bound to pay whatever amount is found due and payable upon investigation and adjudication subject to their right of appeal.

17. In Daulat S. Mehta (supra), this Court has held that bail jurisprudence which has evolved over the years stands on a different footing altogether. This is more so when admittedly respondents have not lodged any first information report before the police under section 154 of Cr.P.C. Respondents have also not filed any complaint before the competent magistrate under section 200 Cr.P.C. There was no formal accusation against the petitioners prior to their arrest. The first time such accusation was placed on record was after arrest in the form of remand application. A remand application by its very nature cannot be construed to be a first information or a complaint as is understood in law. If the remand application is excluded, then even after 26 days of custody (in the case of Daulat S. Mehta (supra)), there was still no formal accusation against the said petitioner.

18. The same is the situation in the present case as well. Both Mr. Akshay Chhabra and Mr. Sunil Kumar Jha are in detention since 16.02.2021 without any formal accusation. In such circumstances, without expressing any opinion at this stage as to the legality and validity of the initial arrest, we are of the view that continued detention of the petitioners would not at all be justified. Accordingly and in the light of the above, we issue the following directions:-

- (i) Let formal notice be issued to the respondents;
- (ii) Petitioners i.e Mr. Sunil Kumar Jha and Mr. Akshay Chhabra shall execute a personal bond each for an amount of Rs. 50,000/- (Rupees Fifty Thousand) before the Jail Superintendent, Taloja Jail;
- (iii) The concerned Jail Superintendent is directed to ensure that this order is complied with forthwith;
- (iv) Upon release, petitioners shall furnish surety of Rs. 5,00,000.00 (Rs. Five Lacs) each in Remand Application No. F. No. V / AE /Bel /GrA(New)/12-159/OPOS/20-21 before the Judicial Magistrate First Class, Vashi at C.B.D. Belapur tomorrow i.e 12.03.2021;
- (iv) Within six weeks of their release, petitioners

to furnish one solvent surety each of the like amount before the said authority;

- (v) Petitioners shall cooperate in the investigation and shall not make any attempt to interfere with the ongoing investigation;
- (iii) Petitioners shall not tamper with any evidence or try to influence or intimidate any witness;
- (iv) Petitioners shall deposit their passports before the Judicial Magistrate First Class, Vashi at C.B.D. Belapur

19. Stand over to 20th April, 2021.

[MILIND N. JADHAV, J.]

[UJJAL BHUYAN, J.]