IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH.

Date of Decision:-15.11.2019

CWP No.24195 of 2019(O&M)

Akhil Krishan Maggu & Anr.

.....Petitioners.

Versus

Deputy Director, Directorate General of GST Intelligence & Ors.

.....Respondents.

CORAM:- HON'BLE MR. JUSTICE JASWANT SINGH
HON'BLE MR. JUSTICE LALIT BATRA

Present:- Mr. Jagmohan Bansal, Advocate for the Petitioners.

Mr. Satya Pal Jain, Additional Solicitor General of India (Senior Advocate) assisted by Sh. Sourabh Goel,Advocate & Mr. Tajender K. Joshi, Advocate for the Respondents.

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JASWANT SINGH, J.

1. Akhil Krishan Maggu (Petitioner No. 1) son of Sanjeev Maggu-Petitioner No. 2 is a practising lawyer in the field of taxation. The Petitioners through instant petition under article 226 of Constitution of India are seeking quashing of summons dated 28.8.2019 (**Annexure P-11**) issued by Senior Intelligence Officer (for short 'SIO'), Directorate General of GST Intelligence (for short 'DGGI').

2. The pleaded case of the Petitioners is that Petitioner No. 1 as an Advocate, on behalf of four exporters who had retracted their statements made at the first instance filed Writ Petitions before Delhi High Court against DGGI. As per Respondent these four exporters had availed huge

amount of refund of IGST and they are dummy owners. The DGGI-Respondent on 15.8.2019 searched Gurugram residence of Ramesh Wadhera-alleged owner of dummy export firms who happens to be neighbour of Petitioners. On the request of Ramesh Wadhera, Petitioners came to his residence and some commotion (शोरगुल, उत्तेजना, हुल्लड़, गड़बड़ी) took place between Petitioners and official of DGGI. At the behest of DGGI, Police registered FIR dated 15.8.2019 under Section 186, 353 IPC at DLF Police Station, Gurugram against both the Petitioners and arrested them on the same day. Both were released on bail on 22.8.2019 after a week incarceration (बंदीकरण, कैद).

The DGGI on 27.8.2019 again recorded statements of said dummy exporters, who allegedly disclosed name of Petitioners apart from earlier names of Ramesh Wadhera and Mukesh Kumar as also being involved. The Respondent-DGGI on 28.8.2019 searched Gurugram residence of Petitioners who at that point of time were not at home. The Respondents after completing search took away younger brother of Petitioner No. 1 to their office and arrested him on 29.8.2019. The DGGI on 2.9.2019 lodged another FIR against Petitioner No. 2 under Section 186, 34 & 353 IPC at DLF Police Station, Gurugram alleging that he called police at the time of search of his residence on 28.8.2019 which amounts to obstruction in performance of official duty. The DGGI-Respondent vide summons dated 28.8.2019 (Annexure P-11) directed Petitioners to appear before SIO to tender their statement in connection with export made by dummy export firms. Apprehending coercive action, the Petitioners approached this Court by way of present writ petition.

3. This court while issuing notice of motion vide order 10.9.2019 directed Petitioners to appear before Senior Intelligence Officer, DGGI.

Both the Petitioners appeared before Respondent on 11 & 12th September' 2019. The DGGI-Respondent on 12.9.2019 handed over Petitioner No. 2 to Directorate of Revenue Intelligence, New Delhi who arrested him on 12.9.2019. On 13.9.2019, the Petitioner No. 2 was sent to judicial custody and till date he is stated to be in judicial custody. The Petitioner No. 1 again appeared before DGGI-Respondent on 28.9.2019 & 1.10.2019 but statement could not be recorded. The Petitioner again appeared before Respondent on 7.10.2019 and tendered his statement. The Petitioner appeared before Respondent on 11.10.2019 & 16.10.2019 but his further statement was not recorded.

4. Counsel for the Petitioners contends that it is case of vendetta and there is no evidence against Petitioners to connect them with fraud if any committed by alleged four dummy exporters or alleged owner Ramesh Wadhera. The Respondents did not record statement of Petitioners while they were in judicial custody for a week in the FIR lodged by them and at present Petitioner No. 2 is again in judicial custody since 13.9.2019, however till date no statement has been recorded. It shows that intention of Respondent is just to arrest Petitioners and tarnish their reputation. The Respondents just due to filing of writ petitions before Delhi High Court on behalf of four exporters and commotion at the residence of Ramesh Wadhera want to implicate Petitioner even though they have already remained in custody for altercation which took place at the Gurugram residence of Ramesh Wadhera. The Respondents during the course of investigation could not gather even a single piece of evidence against Petitioners still they are running after their blood. The Respondents want that Petitioner No. 1 should accept that he is involved in refund scam

though even his father was not found involved and Respondents/DGGI got arrested him from DRI. Intention of Respondent is just to arrest Petitioner which is evident from the fact that Respondent/DGGI remained silent when Petitioner No. 2 was in custody in FIR case and thereafter in DRI matter.

5. Counsel for the Respondent contended that Petitioner No. 1 is neither cooperating nor answering questions asked by SIO. He is involved in the fraud and deserves no sympathy of this court. The exporters are not real owners of exporting firm and it is Petitioners who in connivance with Ramesh Wadhera and one Mukesh Kumar had created bogus/dummy firms and availed refund of IGST. The Petitioner No. 1 who earlier was customs clearing agent is mis-using his professional position and needs to be interrogated without cover of protection of this court.

6. Counsel for the Respondents on 24.10.2019 submitted record of investigation in sealed cover. We have perused a number of documents submitted by counsel in sealed cover but we do not find in record any statement of Petitioners, Dhruv Maggu-brother of Petitioner No. 1, Ramesh Wadhera and Mukesh Kumar to ascertain disclosure made by all of them. Except Petitioner No. 1, all other named persons have been arrested so their statements are necessary to ascertain *prime facie* role of Petitioners. Statements of dummy exporters who had retracted their earlier statements, were again recorded on 27.8.2019 i.e. after incurrence of incident at residence of Ramesh Wadhera on 15.8.2019 and arrest of both Petitioners by Gurugram Police have been produced, however, the earlier Statements recorded on 13.5.2019 of all the exporters are not produced probably because of the fact that these statements do not indict/implicate present Petitioners. Documents relating to Petitioner No. 2 working as Customs

House Agent and Petitioner No. 1 as 'H' card holder are produced, which are not relevant because as per Respondent itself Petitioner No. 1 joined profession in 2017 and present controversy relates to GST which came into force w.e.f. 1.7.2017.

7. Before adverting to present controversy, it would be profitable to look at judicial pronouncements relating to the issue involved. The provisions of CGST Act, 2017 qua arrest and prosecution are *para materia* with provisions of Finance Act, 1994 (Service Tax). While dealing with power of arrest prior to determination of tax liability, Delhi High Court in the case of **Make My Trip Vs. Union of India 2016 (44) STR 481 (Del.)** has thoroughly examined scheme of the Act and concluded in Para 116 as below:

> " **116.** To summarise the conclusions in this judgment :
>
> (**i**) The scheme of the provisions of the Finance Act, 1994 (FA), do not permit the DGCEI or for that matter the Service Tax Department (ST Department) to by-pass the procedure as set out in Sections 73A(3) and (4) of the FA before going ahead with the arrest of a person under Sections 90 and 91 of the FA. The power of arrest is to be used with great circumspection and not casually. It is not to be straightway presumed by the DGCEI, without following the procedure under Sections 73A(3) and (4) of the FA, that a person has collected service tax and retained such amount without depositing it to the credit of the Central Government.
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> (**ii**) Where an assessee has been regularly filing service tax returns which have been accepted by the ST Department or which in any event have been examined by it, as in the case of the two petitioners, without commencement of the process of adjudication of penalty under Section 83A of the FA, another agency like the DGCEI cannot without an SCN or enquiry straightway go ahead to make an arrest merely on the suspicion of evasion of service tax or failure to deposit service tax that has been collected. Section 83A of the FA which provides for adjudication of penalty provision mandates that there must be in the

first place a determination that a person is "liable to a penalty", which cannot happen till there is in the first place a determination in terms of Section 72 or 73 or 73A of the FA.

(**iii**) For a Central Excise officer or an officer of the DGCEI duly empowered and authorised in that behalf to be **satisfied** that a person has **committed an offence** under Section 89(1)(d) of the FA, it **would require an enquiry to be conducted by giving an opportunity to the person sought to be arrested to explain the materials and circumstances gathered against such person**, which according to the officer points to the commission of an offence. Specific to Section 89(1)(d) of the FA, it has to be determined with some degree of certainty that a person has collected service tax but has failed to pay the amount so collected to the Central Government beyond the period of six months from the date on which such payment is due and further that the amount exceeds Rs. 50 lakhs (now enhanced to Rs. 1 crore).

(**iv**) A possible exception could be where a person is shown to be a habitual evader of service tax. Such person would have to be one who has not filed a service tax return for a continuous length of time, who has a history of repeated defaults for which there have been fines, penalties imposed and prosecutions launched, etc. That history can be gleaned only from past records of the ST Department. In such instances, it might be possible to justify resorting to the coercive provisions straightaway, but then the notes on file must offer a convincing justification for resorting to that extreme measure.

(**v**) The decision to arrest a person must not be taken on whimsical grounds; it must be based on 'credible material'. The constitutional safeguards laid out in *D.K. Basu's* case (supra) in the context of the powers of police officers under the Cr PC and of officers of Central Excise, Customs and enforcement directorates, are applicable to the exercise of powers under the FA in equal measure. An officer whether of the Central Excise department or **another agency like the DGCEI**, authorised to exercise powers under the CE Act and/or the FA **will have to be conscious of the constitutional limitations on the exercise of such power**.

(**vi**) In the case of MMT, **without even an SCN being issued and without there being any determination of the amount of service tax arrears, the resort to the extreme coercive measure of arrest followed by the detention of Mr. Pallai was impermissible in law**.

(**vii**) In terms of C.B.E. & C.'s own procedures, for the launch of

prosecution there has to be a determination that a person is a habitual offender. There is no such determination in any of these cases. There cannot be a habitual offender if there is no discussion by the DGCEI with the ST Department regarding the history of such assessee. Assuming that, for whatever reasons, if the DGCEI does not talk to ST Department, certainly it needs to access the service tax record of such assessee. Without even requisitioning that record, it could not have been possible for the DGCEI to arrive at a reasonable conclusion whether there was a deliberate attempt of evading payment of service tax. In the case of MMT, the decision to go in for the extreme step of arrest without issuing an SCN under Section 73 or 73A(3) of the FA, appears to be totally unwarranted.

(**viii**) For the exercise of powers of search under Section 82 of the FA, (i) an opinion has to be formed by the Joint Commissioner or Additional Commissioner or other officers notified by the Board that "any documents or books or things" which are useful for or relevant for any proceedings under this Chapter are secreted in any place, and (ii) the note preceding the search of a premises has to specify the above requirement of the law. The search of the premises of the two petitioners is in clear violation of the mandate of Section 82 of the FA. It is unconstitutional and legally unsustainable.

(**ix**) The Court is unable to accept that payment by the two petitioners of alleged service tax arrears was voluntary. Consequently, the amount that was paid by the petitioners as a result of the search of their premises by the DGCEI, without an adjudication much less an SCN, is required to be returned to them forthwith.

(**x**) It was imperative for the DGCEI to first check whether the entity whose employees are sought to be arrested has regularly been filing service tax returns or is a habitual offender in that regard. It is only after checking the entire records and seeking clarification where necessary, that the investigating agency can possibly come to a conclusion that Section 89(1)(d) is attracted. None of the above safeguards were observed in the present case. The DGCEI acted with undue haste and in a reckless manner.

(**xi**) Liberty is granted to the officials of MMT and IBIBO to institute appropriate proceedings in accordance with law against the officers of the DGCEI in which the supplementary affidavits filed in these proceedings and the replies thereto can be relied on. This holds good for the officials of the DGCEI as well when called upon to defend those

proceedings in accordance with law.

(**xii**) The Court cannot decline to exercise its jurisdiction and clarify the legal position as regards the interpretation of the scope and ambit of the powers under Sections 89, 90 and 91 of the FA. This is clearly within the powers of this Court. That is why this Court has decided to proceed with these petitions notwithstanding that the criminal petitions may be pending in the criminal jurisdiction of this Court.

(**xiii**) The Court is satisfied that in the present case the action of the DGCEI in proceeding to arrest Mr. Pallai, Vice-President of MMT, was contrary to law and that Mr. Pallai's Constitutional and Fundamental Rights under Article 21 of the Constitution have been violated. The Court is conscious that Mr. Pallai has instituted separate proceedings for quashing of the criminal case and, therefore, this Court does not propose to deal with that aspect of the matter.

Delhi High Court in Para 80-82 has carved out exceptions where power of arrest may be resorted. Para 80-82 are extracted below:

" **80.** One caveat, however, may be where a person is shown to be a habitual evader of service tax. Such person would have to be one who has not filed a service tax return for a continuous length of time, who has a history of repeated defaults for which there have been fines, penalties imposed and prosecutions launched, etc. That history can be gleaned only from past records of the ST Department. In such instance, it might be possible to justify resorting to the coercive provisions straightaway. But then the notes on file must offer a convincing justification for resorting to that extreme a measure. What, however, requires reiteration is that the potent power of arrest should not be lightly and casually exercised to induce fear into an assessee and the consequential submission to the unreasonable demands made by officers of the investigating agency during the interrogation and while in custody. To again quote the Bombay High Court in *ICICI Bank Ltd.* v. *Union of India* (supra) :

> "At the cost of repetition we may say that if a tax payer fraudulently or with the intention to deprive Revenue of its legitimate dues evades payment thereof not only that, if the Central Excise Officer is of the opinion that for the purpose of protecting the interest of the Revenue it is necessary provisionally to attach any property belonging to the person on whom the notice is served under Section 73 or Section 73 A of the Act, he is

empowered to do so, however with the previous approval of the Commissioner of Central Excise. However, at the same time, law enforcers cannot be permitted to do something that is not permitted within the four corners of law."

81. In *Technomaint Contractors Ltd.* v. *Union of India* - 2014 (36) S.T.R. 488 (Guj.), the Gujarat High Court held that Section 73C of the FA cannot be activated for making a recovery even before adjudication.

82. In the context of the provisions for arrest under the Central Excise Act, 1944, the DGCEI has published a Manual in 2004 containing guidelines to the CE Officers on when and in what circumstances resort should be had to the coercive step of arrest. In Chapter X Para 7 of the said Manual, it is stated that arrest can be made prior to the issue of an SCN but only "where fraudulent intent is clear (*prima facie* there is evidence of *mens rea*) or where the evidence is enough to secure a conviction or where the person is likely to abscond, tamper with evidence or influence the witnesses if left at large. *Arrest at the investigation stage should be resorted to only when it is unavoidable."*

(***Emphasis supplied***)

Concededly, Hon'ble Supreme Court vide order dated 23.01.2019 has upheld aforesaid decision of Delhi High Court.

7.1 Relying upon decision of Delhi High Court, in the case of **Jayachandran Alloys (P) Ltd. Vs. Superintendent of GST & C. Ex., Salem 2019 (25) G.S.T.L. 321 (Mad.)**, Madras High Court has concluded, in the relevant Paras as below:

" 36. Though the discussions and conclusions therein have been rendered in the context of Chapter V of the Finance Act, 1994, levying service tax, I am of the view that they are equally applicable to the provisions of the CGST Act as well. Section 132 of the Act as extracted earlier, imposes a punishment upon the Assessee that '*commits'* an offence. There is no dispute whatsoever that the offences set out under [clauses] (a) to (l) of the provision refer to those items, that constitute matters of assessment and would form part of an order of assessment, to be passed after the process of adjudication is complete and taking into

account the submissions of the Assessee and careful weighing of evidence found and explanations offered by the Assessee in regard to the same.

37. The use of words 'commits' make it more than amply clear that the act of committal of the offence is to be fixed first before punishment is imposed. The allegation of the revenue in the present case is that the petitioner has contravened the provisions of Section 16(2) of the Act and availed of excess ITC in so far as there has been no movement of the goods in the present case as against the supplier and the Petitioner and the transactions are bogus and fictitious, created only on paper, solely to avail ITC. The manner of recovery of credit in cases of excess distribution of the same is set out in Section 21 of the Act. This section provides that where the Input Service Distributor distributes credit in contravention of the provisions contained in Section 20 resulting in excess distribution of credit to one or more recipients, the excess credit so distributed shall be recovered from such recipients along with interest, and the provisions of Section 73 or Section 74, as the case may be, shall, *mutatis mutandis*, apply for determination of amount to be recovered.

38. Thus, 'determination' of the excess credit by way of the procedure set out in Section 73 or 74, as the case may be is a pre-requisite for the recovery thereof. Sections 73 and 74 deal with assessments and as such it is clear and unambiguous that such recovery can only be initiated once the amount of excess credit has been quantified and determined in an assessment. When recovery is made subject to 'determination' in an assessment, the argument of the department that punishment for the offence alleged can be imposed even prior to such assessment, is clearly incorrect and amounts to putting the cart before the horse.

39. The exceptions to this rule of assessment are only those cases where the assessee is a habitual offender, that/who has been visited consistently and often with penalties and fines for contraventions of statutory provisions. It is only in such cases that the authorities might be justified in

proceedings to pre-empt the assessment and initiate action against the assessee in terms of Section 132, for reasons to be recorded in writing. There is no allegation, either oral or in writing in this case that the petitioner is an offender, let alone a habitual one.

40. In the present case, the Department does not dispute that action was intended or envisaged in the light of Section 132 of the CGST Act, the counter fairly stating that the provisions of Section 132 of the CGST Act were '*shown'* to the Assessee. There is thus no doubt in my mind that the Department intended to intimidate the petitioner with the possibility of punishment under 132 and this action is contrary to the scheme of the Act. While the activities of an assessee contrary to the scheme of the Act are liable to be addressed swiftly and effectively by the Department, (the statute in question being a revenue statute where strict interpretation is the norm), officials cannot be seen to be acting in excess of the authority vested in them under the statute. I am of the considered view that the power to punish set out in Section 132 of the Act would stand triggered only once it is established that an assessee has 'committed' an offence that has to necessarily be post-determination of the demand due from an assessee, that itself has to necessarily follow the process of an assessment.

41. I draw support in this regard from the decision of the Division Bench of the Delhi High Court in the case of *Make My Trip (India)* (supra), as confirmed by the Supreme Court reiterating that such action, as in the present case, would amount to a violation of Constitutional rights of the petitioner that cannot be countenanced.

42. The decision of this Court in Criminal Original Petition No. 30467 of 2018 (batch case), dated 12-2-2019 is relied upon by the respondents. The Learned Single Judge states that '*in the light of the grave position put forth by the prosecution and also the fact that the investigation was at very early stages',* the request for Anticipatory Bail should be rejected and proceeds to do so. This decision does not take into consideration the

decision of the Delhi High Court in the case of *Make My Trip (India) Pvt. Ltd.,* (supra), confirmed by the Supreme Court and also does not take into account the relevant statutory provisions of the Revenue enactment, that in my view are necessary to appreciate the *lis* in proper perspective. The decision is thus distinguishable on facts and in law.

43. As far as the decision rendered by the Rajasthan High Court is concerned, it is distinguishable on facts, as at Paragraph 20 thereof, the Learned Judge records that the petitioner therein did not controvert the claim that the claim of Input Tax Credit is made based on fake invoices. Thus, no defence was put forth by the petitioner to the allegation of Bill Trading in that case, which is not so in the case before me. This decision is also distinguishable on facts.

44. The Learned Single Judge of the Bombay High Court, in Anticipatory Bail Application, in the case of *Meghraj Moolchand Burad* v. *Directorate General of GST (Intelligence), Pune and Another, Anticipatory Bail Application No. 2333 of 2018* [2019 (21) G.S.T.L. 125 (Bom.)] has considered a similar case and has rejected the Anticipatory Bail taking into consideration the conduct of the applicant, gravity of offence and the serious allegations made. This order has travelled to the Supreme Court in Petition for Special Leave to Appeal Crl. Nos. 244/2019, dated 9-1-2019 [2019 (24) G.S.T.L. J82 (S.C.)] by the petitioner therein, wherein the Bench has issued notice and granted interim protection in the following terms :-

> ‘ Issued notice.
>
> In the meantime, the petitioner shall not be arrested, provided he appears before the Directorate General of GST Intelligence and in the event of his arrest, he shall be released on bail on furnishing security to the satisfaction of the competent authority.
>
> Learned Counsel for the petitioner has submitted that the

petitioner shall regularly appear, as and when he is called. ’

45. Moreover, the High Court of Karnataka at Bengaluru in Criminal Petition No. 979 of 2019 c/w Criminal Petition No. 980/2019, dated 19-2-2019 [2019 (23) G.S.T.L. 449 (Kar.)] while considering the grant of Anticipatory Bail, in circumstances very similar to the matter before me, has allowed the petition and granted bail in favour of the Assessee with conditions.

46. Issue (ii) is answered in favour of the petitioner. Issue (iii) is allowed, directing the respondents to conclude the process of adjudication within a period of twelve (12) weeks from today, after issuing show cause notice to the petitioner setting out the proposals for assessment, affording full opportunity to the petitioner to respond to the same and advance submissions in person, and pass a reasoned and speaking order, in accordance with law. ”

(*Emphasis Supplied*)

7.2 Gujarat High Court in the case of **VIMAL YASHWANTGIRI GOSWAMI Vs STATE OF GUJARAT 2019-TIOL-1746-HC-AHM-GST** has concluded in relevant Para as below:

“ 3.1 To put it in other words, the powers of arrest under Section 69 of the Act, 2017 are to be exercised with lot of care and circumspection. Prosecution should normally be launched only after the adjudication is completed. To put it in other words, there must be in the first place a determination that a person is "liable to a penalty". Till that point of time, the entire case proceeds on the basis that there must be an apprehended evasion of tax by the assessee. In the two decisions referred to above, emphasis has been laid on the safeguards as enshrined under the Constitution of India and in particular Article 22 which pertains to arrest and Article 21 which mandates that no person shall be deprived of his life and liberty for the authority of law. The two High Courts have extensively relied upon the decision of the Supreme Court in the case of *D.K. Basu vs.*

State of West Bengal reported in 1997 (1) SCC 416 = 2002-TIOL-230-SC-MISC. ”

7.3. Gujarat High Court in the case of **CLEARTRIP PVT LTD MUMBAI & ORS Vs THE UNION OF INDIA 2016-TIOL-863-HC-MUM-ST** has concluded in relevant para as below:

“ 16. We are clear in our minds and from the scheme of the Act and the Law as a whole that coercive measures, including effecting any arrest, would arise only when investigation has been completed and on launching the prosecution. If the prosecution is a criminal prosecution, then, there is no question of deviating or defeating from the Criminal Law. The Criminal Law contains several provisions including protective measures, which would enable the Petitioners to resist any arrest, as apprehended. In the scheme of the Criminal Law and particularly the Finance Act, 1994 as well, if it contains any penal provisions, it is not as merely because the investigations are underway that the arrest would be effected. Eventually, all that the Respondents are presently contemplating is to investigate the matter. The Petitioners do not dispute the right to investigate and in accordance with law. That they have already attended the offices of the concerned Respondents and once the statement of the Petitioners was recorded goes without saying that on further summons being issued and on called upon to attend the Officers of the Respondents, they will attend and co-operate in these investigations by producing all the documents and answering the requisite queries, subject, of-course, to their rights in law. It is only when these investigations conclude that the authorities would be in a position to take a decision whether to launch any prosecution. In such a prosecution as well, if the provisions of the Criminal Law, which enable arrest in cases of cognizable offences and nonbailable, that the Petitioners can have an apprehension and which also can be taken care of by approaching a competent Criminal Court. Secondly, there is no question

of any recovery of tax by coercive means, unless the investigation results into issuance of a show cause notice, an opportunity to the Petitioner to resist the demand, a adjudication thereof by a reasoned order and protective remedies such as appeals. We do not think that any recovery by coercive measures is straightway permissible and particularly in the given facts and circumstances of the case.

17. Once we also note the stand of the Respondents as not precipitating the matter particularly harming the life and liberty of those, who are in-charge of Petitioner No.1-Company, then, all the more, any detailed discussion by referring to the arguments in-depth, consideration of the case law becomes unnecessary. ”

7.4 Hon’ble Supreme Court in the case of C. PRADEEP Petitioner(s) VERSUS THE COMMISSIONER OF GST AND CENTRAL EXCISE SELAM & ANR. Special Leave to Appeal (Crl.) No(s). 6834/2019 has passed interim order as below**:**

“ Learned counsel for the petitioner submits that indisputably assessment for the relevant period has not been completed by the Department so far. In which case, invoking Section 132 of the Central Goods and Services Tax Act, 2017 does not arise. He further submits that, even if, the alleged liability of Rs. 19 crores as is assumed by the Department is accepted, it is open to the petitioner to file appeal after the assessment order is passed; and as per the statutory stipulation, such appeal could be filed upon deposit of only 10% of the disputed liability. In that event, the deposit amount may not exceed Rs. 2,00,00,000/- (Rupees Two Crores), which the petitioner is willing to deposit within one week from today without prejudice to his rights and contentions in the assessment proceedings and the appeal to be filed thereafter, if required.

Issue notice on condition that the petitioner shall deposit Rs.

2,00,00,000/- (Rupees Two Crores) to the credit of C.No. IV/16/27/201HPU on the file of the Commissioner of GST & Central Excise, Salem, Tamil Nadu and produce receipt in that behalf in the Registry of this Court within ten days from today, failing which the special leave petition shall stand dismissed for non prosecution without further reference to the Court.

Subject to the above, notice returnable within three weeks.

Dasti, in addition, is permitted.

For a period of one week, no coercive action be taken against the petitioner in connection with the alleged offence and the interim protection will continue upon production of receipt in the Registry about the deposit made with the Department within one week from today, until the disposal of this Special Leave Petition.

7.5. Telangana High Court in the case of **P.V. RAMANA REDDY Vs. UNION OF INDIA** **2019 (25) G.S.T.L. 185 (Telangana**) relied upon by the Respondent has concluded in relevant Para as below:

" 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 be 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, someone 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 41A 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. **"**

(***Emphasis supplied***)

From above quoted enunciation of law relating to arrest during investigation i.e. prior to determination of tax evaded under Finance Act, 1994 (service Tax) as well CGST Act, 2017 by different High Courts and interim order passed by Hon'ble Supreme Court, we find that it is consistent opinion of courts that power of arrest should be resorted in exceptional circumstances and with full circumspection. The maximum sentence prescribed under GST is 5 years and it is directly linked with quantum of evasion of tax. Prosecution of any person is directly linked with determination of evasion of tax because if there is no evasion of tax, there cannot be criminal liability. The determination of tax liability does not fall within realm of criminal courts whereas liability of tax and penalty is determined by adjudicating authority under GST Act which is subject to challenge before Tribunal and Courts. To record statement under CGST Act, 2017 summons are served and if any person complies with summons, the mandate of Section 41 and 41A of Criminal Procedure Code should be taken care of.

The opinion expressed by Telangana High Court cannot be made applicable to each and every case and cannot be treated an authority to conclude that DGGI has power to arrest in every case during investigation and that too without determination of tax evaded as well finding that accused has committed an offence described under Section 132 of the CGST Act, 2017.

8. Arrest deprives any person from his right of liberty enshrined under Article 21 of the Constitution of India. It would be useful to look at judgment of Hon'ble Supreme Court in the case of **Siddharam Satlingappa Mhetre Versus State of Maharashtra and Others, 2011(1) SCC 694** where Hon'ble Court considering Article 21 of the Constitution has dealt at length with question of anticipatory bail and use of power of arrest. The relevant findings/Paras are extracted below:

> **"** 118. A good deal of misunderstanding with regard to the ambit and scope of section 438 Criminal Procedure Code could have been avoided in case the Constitution Bench decision of this court in Sibbia's case (supra) was correctly understood, appreciated and applied.
>
> 119. This Court in the Sibbia's case (supra) laid down the following principles with regard to anticipatory bail:
>
> a) Section 438(1) is to be interpreted in light of Article 21 of the Constitution of India.
>
> b) Filing of FIR is not a condition precedent to exercise of power under section 438.
>
> c) Order under section 438 would not affect the right of police to conduct investigation.
>
> d) Conditions mentioned in section 437 cannot be read into

section 438.

e) Although the power to release on anticipatory bail can be described as of an "extraordinary" character this would "not justify the conclusion that the power must be exercised in exceptional cases only." Powers are discretionary to be exercised in light of the circumstances of each case.

f) Initial order can be passed without notice to the Public Prosecutor. Thereafter, notice must be issued forthwith and question ought to be re-examined after hearing. Such ad interim order must conform to requirements of the section and suitable conditions should be imposed on the applicant.

120. The Law Commission in July 2002 has severely criticized the police of our country for the arbitrary use of power of arrest which, the Commission said, is the result of the vast discretionary powers conferred upon them by this Code. The Commission expressed concern that there is no internal mechanism within the police department to prevent misuse of law in this manner and the stark reality that complaint lodged in this regard does not bring any result. The Commission intends to suggest amendments in the Criminal Procedure Code and has invited suggestions from various quarters. Reference is made in this Article to the 41st Report of the Law Commission wherein the Commission saw 'no justification' to require a person to submit to custody, remain in prison for some days and then apply for bail even when there are reasonable grounds for holding that the person accused of an offence is not likely to abscond or otherwise misuse his liberty. Discretionary power to order anticipatory bail is required to be exercised keeping in mind these sentiments and spirit of the judgments of this court in Sibbia's case (supra) and Joginder Kumar v. State of U.P. and Others, 1994(2)

R.C.R.(Criminal) 601 : (1994) 4 SCC 260.

Relevant consideration for exercise of the power

121. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. We are clearly of the view that no attempt should be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualised for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on facts and circumstances of each case. As aptly observed in the Constitution Bench decision in Sibbia's case (supra) that the High Court or the Court of Sessions to exercise their jurisdiction under section 438 Criminal Procedure Code by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. In any event, this is the legislative mandate which we are bound to respect and honour.

122. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:

i. The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

ii. The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

iii. The possibility of the applicant to flee from justice;

iv. The possibility of the accused's likelihood to repeat similar or the other offences.

v. Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him

or her.

vi. Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.

vii. The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

viii. While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

ix. The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

x. Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.

123. The arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of that case.

124. The court must carefully examine the entire available record and particularly the allegations which have been directly attributed to

the accused and these allegations are corroborated by other material and circumstances on record.

125. These are some of the factors which should be taken into consideration while deciding the anticipatory bail applications. These factors are by no means exhaustive but they are only illustrative in nature because it is difficult to clearly visualise all situations and circumstances in which a person may pray for anticipatory bail. If a wise discretion is exercised by the concerned judge, after consideration of entire material on record then most of the grievances in favour of grant of or refusal of bail will be taken care of. The legislature in its wisdom has entrusted the power to exercise this jurisdiction only to the judges of the superior courts. In consonance with the legislative intention we should accept the fact that the discretion would be properly exercised. In any event, the option of approaching the superior court against the court of Sessions or the High Court is always available.

126. Irrational and Indiscriminate arrest are gross violation of human rights. In Joginder Kumar's case (supra), a three Judge Bench of this Court has referred to the 3rd report of the National Police Commission, in which it is mentioned that the quality of arrests by the Police in India mentioned power of arrest as one of the chief sources of corruption in the police. The report suggested that, by and large, nearly 60% of the arrests were either unnecessary or unjustified and that such unjustified police action accounted for 43.2% of the expenditure of the jails.

127. Personal liberty is a very precious fundamental right and it should be curtailed only when it becomes imperative according to the peculiar facts and circumstances of the case.

128. In case, the State consider the following suggestions in proper

perspective then perhaps it may not be necessary to curtail the personal liberty of the accused in a routine manner. These suggestions are only illustrative and not exhaustive.

1) Direct the accused to join investigation and only when the accused does not cooperate with the investigating agency, then only the accused be arrested.

2) Seize either the passport or such other related documents, such as, the title deeds of properties or the Fixed Deposit Receipts/Share Certificates of the accused.

3) Direct the accused to execute bonds;

4) The accused may be directed to furnish sureties of number of persons which according to the prosecution are necessary in view of the facts of the particular case.

5) The accused be directed to furnish undertaking that he would not visit the place where the witnesses reside so that the possibility of tampering of evidence or otherwise influencing the course of justice can be avoided.

6) Bank accounts be frozen for small duration during investigation.

129. In case the arrest is imperative, according to the facts of the case, in that event, the arresting officer must clearly record the reasons for the arrest of the accused before the arrest in the case diary, but in exceptional cases where it becomes imperative to arrest the accused immediately, the reasons be recorded in the case diary immediately after the arrest is made without loss of any time so that the court has an opportunity to properly consider the case for grant or refusal of bail in the light of reasons recorded by the arresting officer.

130. Exercise of jurisdiction under section 438 of Criminal Procedure Code is extremely important judicial function of a judge and must be entrusted to judicial officers with some experience and good track record. Both individual and society have vital interest in orders passed by the courts in anticipatory bail applications. **"**

9. The provisions of CGST Act are not subject to exclusion of Criminal Procedure Code rather Section 67(10) as well Section 69(3) borrow provisions of Code of Criminal Procedure, 1973. As per Section 41(1)(b) as amended by Code of Criminal Procedure (Amendment) Act, 2008 applicable w.e.f. 01.11.2010, a person may be arrested if he has committed a cognizable offence punishable with imprisonment which may be less than 7 year or may extent to 7 year if conditions specified therein are satisfied. As per Section 41A of Cr.P.C., a notice shall be issued to the person against whom complaint has been made or creditable information has been received or reasonable suspicion exists and he shall not be arrested if he complies with the notice. Relevant extracts of Section 41(1) and 41A are as under:

41. When police may arrest without warrant-(1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person-

(a) who commits, in the presence of a police officer, a cognizable offence;

(b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years

whether with or without fine, if the following conditions are satisfied, namely:

(i) the police officer has reason to believe on the basis of such complaint, information, or suspicion that such person has committed the said offence;

(ii) the police office is satisfied that such arrest is necessary-

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

(b) for proper investigation of the offence or;

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

(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; or

(e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured;

And the police officer shall record while making such arrest, his reasons in writing:

Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section, record the reasons in writing for not making the arrest;

41-A Notice of appearance before police officer- (1) The

police officer shall, in all cases where the arrest of a person is not required under the provisions of sub-section (1) of section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.

(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

(3) 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 officers is of the opinion that he ought to be arrested.

(4) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice.

9.1. Hon'ble Supreme in **Dr. Rini Johar & Anr. Versus State of M.P. & Ors.** **2016(11) SCC 703** while dealing with Section 41 and 41A of Code of Criminal Procedure has opined as under:

" 19. Mr. Fernandes, learned Amicus Curiae, in a tabular chart has pointed that none of the requirements had been complied with. Various reasons have been ascribed for the same. On a scrutiny of enquiry report and the factual assertions made, it is limpid that some of the guidelines have been violated. It is strenuously urged by Mr. Fernandes that Section

66A(b) of the Information Technology Act, 2000 provides maximum sentence of three years and Section 420 Cr.P.C. stipulates sentence of seven years and, therefore, it was absolutely imperative on the part of the arresting authority to comply with the procedure postulated in section 41A of the Code of Criminal Procedure. The Court in Arnesh Kumar v. State of Bihar and another, 2014(3) R.C.R. (Criminal) 527 : (2014) 8 SCC 273, while dwelling upon the concept of arrest, was compelled to observe thus:-

> " Arrest brings humiliation, curtails freedom and casts scars forever. Lawmakers know it so also the police. There is a battle between the lawmakers and the police and it seems that the police has not learnt its lesson: the lesson implicit and embodied in CrPC. It has not come out of its colonial image despite six decades of Independence, it is largely considered as a tool of harassment, oppression and surely not considered a friend of public. The need for caution in exercising the drastic power of arrest has been emphasised time and again by the courts but has not yielded desired result. Power to arrest greatly contributes to its arrogance so also the failure of the Magistracy to check it. Not only this, the power of arrest is one of the lucrative sources of police corruption. The attitude to arrest first and then proceed with the rest is despicable. It has become a handy tool to the police officers who lack sensitivity or act with oblique motive."

20. Thereafter, the Court referred to Section 41 Cr.P.C. and analysing the said provision, opined that a person accused of an offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years with or without fine, cannot be arrested by the police officer only on his satisfaction that such person had committed the offence. It has been further held that a police officer before arrest, in such cases has to be further satisfied that such arrest is

necessary to prevent such person from committing any further offence; or for proper investigation of the case; or to prevent the accused from causing the evidence of the offence to disappear; or tampering with such evidence in any manner; or to prevent such person from making any inducement, threat or promise to a witness so as to dissuade him from disclosing such facts to the court or the police officer; or unless such accused person is arrested, his presence in the court whenever required cannot be ensured. These are the conclusions, which one may reach based on facts. Eventually, the Court was compelled to state:-

> " In pith and core, the police officer before arrest must put a question to himself, why arrest? Is it really required? What purpose it will serve? What object it will achieve? It is only after these questions are addressed and one or the other conditions as enumerated above is satisfied, the power of arrest needs to be exercised. In fine, before arrest first the police officers should have reason to believe on the basis of information and material that the accused has committed the offence. Apart from this, the police officer has to be satisfied further that the arrest is necessary for one or the more purposes envisaged by sub-clauses (a) to (e) of clause (1) of Section 41 Cr.P.C."

21. In the said authority, Section 41A Cr.P.C., which has been inserted by section 6 of the Code of Criminal Procedure (Amendment) Act, 2008 (5 of 2009) was introduced and in that context, it has been held that Section 41A Cr.P.C. makes it clear that where the arrest of a person is not required under Section 41(1) Cr.P.C., the police officer is required to issue notice directing the accused to appear before him at a specified place and time. Law obliges such an accused to appear before the police officer and it further mandates that if such an accused complies with the terms of notice he shall not be arrested, unless for reasons to be recorded, the police officer is of the opinion that the arrest

is necessary. At this stage also, the condition precedent for arrest as envisaged under Section 41 Cr.P.C. has to be complied and shall be subject to the same scrutiny by the Magistrate as aforesaid.

22. We have referred to the enquiry report and the legal position prevalent in the field. On a studied scrutiny of the report, it is quite vivid that the arrest of the petitioners was not made by following the procedure of arrest. Section 41A Cr.P.C. as has been interpreted by this Court has not been followed. The report clearly shows there have been number of violations in the arrest, and seizure. Circumstances in no case justify the manner in which the petitioners were treated. **"**

(*Emphasis Supplied*)

10. Taking cue from judgment of Delhi High Court in the case of **Make My Trip** (**Supra)** followed by Madras High Court in the case of **Jayachandran Alloys (P) Ltd** (**Supra**), law laid down by Hon'ble Supreme Court in the case of **Siddharam Satlingappa Mhetre (supra)** as well keeping in mind Section 69 and 132 of CGST Act which empower Proper Officer to arrest a person who has committed any offence involving evasion of tax more than Rs.5 Crore and prescribed maximum sentence of 5 years which falls within purview of Section 41A of Cr. P.C., we are of the opinion that power of arrest should not be exercised at the whims and caprices of any officer or for the sake of recovery or terrorising any businessman or create an atmosphere of fear, whereas it should be exercised in exceptional circumstances during investigation, which illustratively may be:

(i) a person is involved in evasion of huge amount of tax and is having no permanent place of business,

(ii) a person is not appearing inspite of repeated summons and is involved in huge amount of evasion of tax,

(iii) a person is a habitual offender and he has been prosecuted or convicted on earlier occasion,

(iv) a person is likely to flee from country,

(v) a person is **originator** of fake invoices i.e. invoices without payment of tax,

(vi) when direct documentary or otherwise concrete evidence is available on file/record of active involvement of a person in tax evasion.

10.1. The persons who are having established manufacturing units and paying good amount of direct or indirect taxes; persons against whom there is no documentary or otherwise concrete evidences to establish direct involvement in the evasion of huge amounts of tax, should not be arrested prior to determination of liability and imposition of penalty. Similarly, arrest of Chartered Accountant or Advocates who had filed returns or otherwise assisted in business but are not beneficiary or part of fraud merely on the basis of statement without any corroborative evidence linking the professional with alleged offence should be avoided. It is well known that if top brass of a running concern is arrested, there are all possibilities of closure of unit which results into unemployment and wastage of precious natural resources.

11. In the case in hand, we find that Petitioner No. 2 was interrogated on 11.9.2019 & 12.9.2019 by DGGI and thereafter handed over to DRI, who arrested him. There is nothing on record showing admission by Petitioner No. 2 and no further statement has been recorded in jail though he is in judicial custody since 13.9.2019. Petitioner No. 1 has already put appearance on various occasions and there is nothing in file to show which indicates that Petitioner No. 1 was connected with alleged illegal refund

sought by Exporters. Concededly, the Petitioner No. 1 is neither proprietor nor partner nor shareholder of any Exporter Concern/Firm/Company, who availed refund of IGST. There is no evidence of transfer of funds in the accounts of Petitioners or withdrawal of cash by any one of them. The Petitioner No. 1 is in legal profession since 2017 and after introduction of GST he had not dealt with directly or indirectly with export consignments. The Respondent has produced copy of an order dated 1.10.2019 (date of hearing 22.5.2019) passed by Tribunal wherein Petitioner No. 1 has represented Appellants as an Advocate which buttress the argument of Petitioner that he in practice and appeared as an Advocate on behalf of four exporters who availed alleged illegal refund of IGST.

12. We find that it is case of some mis-understanding between Petitioners and officers of Respondent/DGGI who now want to implicate Petitioner and his family members. The investigation is going on for last couple of months and Respondents are unable to produce any evidence showing direct involvement of Petitioners. The Respondent did not record statement while both the Petitioners were in judicial custody for a week in FIR dated 15.8.2019 lodged at the instance of DGGI, and till date no statement of Petitioner No. 2 has been recorded though he is in judicial custody since 13.9.2019. The Respondent-DGGI handed over Petitioner No. 2 to DRI after recording his statement and there is nothing on record to show that he made any confession. The Respondents are recording one after another statement of Petitioner No. 1 (Akhil Krishan Maggu) with perhaps to intimidate him in giving a self incriminating confession. They have not been able to arrest him because of the oral assurance given before this Court, and have not handed him over to DRI for arrest because he is not

required by DRI in any case. Intention of Respondents seems only to arrest Petitioner No. 1, one way or the other, which is evident from the fact that Petitioner No. 2 was handed over to DRI without concluding investigation at least *qua* petitioner no.2 and there is nothing contained in different affidavits of Respondent, filed before this Court, indicating that involvement of Petitioner No. 2 is apparent from his statements.

13. Though the Petitioners have prayed quashing of summons, however on the directions of this Court both the Petitioners had already put their appearance. The Petitioner No. 2 was handed over to DRI on 12.9.2019 and since 13.9.2019 he is in judicial custody, hence no direction is warranted *qua* him, however *qua* Petitioner No. 1 (Akhil Krishan Maggu), we deem it appropriate to direct to Respondent not to take him in custody without prior approval of this court. The Petitioner No. 1 shall appear before Respondent as and when summoned between 10 AM to 5 PM.

14. Petition is disposed of in above terms. We make it clear that we have not expressed any opinion on merits of the controversy and Respondents are free to continue with their investigation and thereafter proceed as per law.

(JASWANT SINGH)
JUDGE

(LALIT BATRA)
JUDGE

November 15th, 2019
Vinay

Whether speaking/reasoned	***Yes/No***
Whether Reportable	***Yes/No***