The State Of Gujarat vs Choodamani Parmeshwaran Iyer on 17 July, 2023

Author: Prashant Kumar Mishra

Bench: Prashant Kumar Mishra

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS. OF 2023
(Arising out of SLP(Crl.) No. 4212-4213 of 2019)

THE STATE OF GUJARAT ETC. Appellant(s)
VERSUS

CHOODAMANI PARMESHWARAN
IYER & ANR. ETC. Respondent(s)

O R D E R

1. Leave granted.

2. The learned counsel appearing for the private respondents (Assessees) submitted that he is not in a position to assist this Court as his clients are not in touch with him past almost six months.

3. In view of the aforesaid, we had no benefit of any assistance from the learned counsel appearing for the private respondents.

4. We have heard Mr. Kanu Agrawal, the learned counsel appearing for the State of Gujarat.

It appears from the materials on record that 16:13:16 IST Reason:

> a summons came to be issued dated 31.10.2018 to the respondents under Section 145 of the Central Excise Act, 1944 (for short ”the Act 1944”) as made applicable to the service tax vide Section 83 of the Finance Act, 1994 and Section 70 of the Central Goods and Service Tax Act, 2017 (for short “the CGST Act 2017”) calling upon them to remain present for the purpose of interrogation in connection with an inquiry

against one M/s. Iyer Enterprise Mundra Kutch. The authority concerned wants to interrogate the respondents in regard to the alleged evasion of Goods and Service Tax Liability/Contravention of the Provision of the Finance Act 1994 and CGST Act 2017.

6. Upon receipt of the summons, the respondents apprehended arrest at the end of the concerned officials of the Department.

7. In such circumstances as referred to above, two writ applications came to be filed before the High Court being Special Criminal Application Nos.

11010 of 2018 and 11076 of 2018 resply. Both the writ applications came to be disposed by a common order dated 24.12.2018. The relevant part of the impugned order reads thus:-

"7. Considering the voluntary nature of pleadings where the petitioners are desirous of getting themselves assisted by the adjudicatory process, let them represent their case before the concerned authority. The authority concerned shall complete the same in 8 weeks' time and if there is a need for any apprehension after once the adjudicatory process is completed, if they are not ready to fulfill their obligation, they may be given an opportunity of two more weeks for taking necessary steps. Petitioners shall appear on or before 11/01/2019 before the concerned Police Station.

In view of the above, the present applications stand disposed of. Direct service is permitted."

8. The State of Gujarat being dissatisfied with the aforesaid order passed by the High Court is here before this Court with the present appeal.

9. For the first time, this Court took up the matter on 29.04.2019 and issued notice. While issuing notice, this Court granted relief staying the directions issued by the High Court that the adjudicatory process must be completed within a period of eight weeks.

10. The learned counsel appearing for the State of Gujarat pointed out that as many as 14 summons have been issued to one of the respondents. Only once, one of the respondents appeared for the purpose of interrogation. Thereafter, none of the respondents appeared before the authority. It's been now 5 years that the inquiry is still pending. He further submitted that it is only after the respondents are interrogated, that the department will be able to ascertain whether there is any evasion or not and on the basis of which the future course of action like filing of complaint etc., would be decided.

> 11. We are not convinced with the manner in which the High Court has disposed of both the writ applications filed by the respondents. It was expected of the respondents to honour the summons and appear before the authority for the purpose of interrogation.
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> 12. It is well-settled position of law that power to arrest a person by an empowered authority under the GST Act and could be termed as statutory in character and ordinarily the writ court should not interfere with exercise of such power. We say so because such power of arrest can be exercised only in those cases where the Commissioner or his delegatee has reasons to believe that the person has committed any offence specified in Clause (a) or Clause (b) or Clause(c) or Clause (d) of sub-Section (1) of Section 132 which is punishable under clause (i) or (ii) or sub-section (1) or sub-

Section (2) of the said Section.

13. As observed by this Court in Union of India Vs. Padam Narain Aggarwal and Ors. (2008) 13 SCC 305, (which was in context with the powers of Custom Officers to arrest under the Customs Act) such statutory powers must be exercised on objective facts of commission of an offence enumerated and the officer concerned must have reason to believe that a person sought to be arrested has been guilty of such an offence.

14. This Court in Padam Narain Aggarwal (supra) made it very clear that ordinarily the Court should not impose any condition before effecting arrest. If any conditions are imposed before effecting arrest for instance giving prior intimation to the person concerned etc., the statutory provisions would be rendered ineffective, nugatory and meaningless.

15. What is important are the observations made in paragraphs 44 and 45 resply of the decision of this Court in the case of Padam Narain Aggarwal (supra), which read thus:-

> "44. In the case on hand, the respondents were only summoned under Section 108 of the Act for recording of their statements. The High Court was conscious and mindful of that fact. It, therefore, held that the applications for anticipatory bail, in the circumstances, were premature. They were, accordingly, disposed of by directing the respondents to appear before the Customs Authorities. The Court, however, did not stop there. It stated that even if the Customs Authorities find any non-bailable offence against the applicants (the respondents herein), they shall not be arrested without ten days' prior notice to them.
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> 45. In our judgment, on the facts and in the circumstances of the present case, neither of the above directions can be said to be legal, valid or in consonance with law.

Firstly, the order passed by the High Court is a blanket one as held by the Constitution Bench of this Court in Gurbaksh Singh and seeks to grant protection to the respondents in respect of any non-bailable offence. Secondly, it illegally obstructs, interferes and curtails the authority of the Customs Officers from exercising statutory power of arrest of a person said to have committed a non-bailable offence by imposing a condition of giving ten days' prior notice, a condition not warranted by law. The order passed by the High Court to the extent of directions issued to the Customs Authorities is, therefore, liable to be set aside and is hereby set aside." (Emphasis supplied)

16. Thus, the position of law is that if any person is summoned under Section 69 of the CGST Act, 2017 for the purpose of recording of his statement, the provisions of Section 438 of Criminal Procedure Code, 1908 cannot be invoked. We say so as no First Information Report gets registered before the power of arrest under Section 69(1) of the CGST Act, 2017 is invoked and in such circumstances, the person summoned cannot invoke Section 438 of the Code of Criminal Procedure for anticipatory bail. The only way a person summoned can seek protection against the pre-trial arrest is to invoke the jurisdiction of the High Court under Article 226 of the Constitution of India.

Undoubtedly, this is exactly what the respondents did in the present case. What the respondents sought by filing two criminal applications under Article 226 of the Constitution before the High Court was the direction to the appellant herein not to arrest them in exercise of the power conferred by Section 69(1) of the GST Act, 2017. This, in essence, is key to prayer for anticipatory bail. However, as we have explained aforesaid, at the stage of summons, the person summoned cannot invoke Section 438 of the Code of Criminal Procedure.

17. This Court in Kartar Singh Vs. State of Punjab, (1994) 3 SCC 569, has, in no uncertain terms, observed that a claim for pre-arrest protection is neither a statutory right nor a right guaranteed under Articles 14, 19 and 21 resply of the Constitution of India.

Although the Constitution Bench of this Court 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, yet it was held that such power should be exercised sparingly. There is a fundamental distinction between a petition for anticipatory bail and the writ of mandamus directing an officer not to effect arrest. A writ of mandamus would lie only to compel the performance of the statutory or other duties. No writ of mandamus would lie to prevent an officer from performing his statutory function. When a writ application is filed before the High Court under Article 226 of the Constitution, the writ court owes a duty to examine the fact of the case and ascertain whether the case of the writ applicant falls under the category of exceptional cases as indicated in Kartar Singh (supra). The writ court should also ensure whether by issuing the writ of mandamus, it would be preventing the competent authority or proper officer from performing any of their statutory functions.

18. In the aforesaid context, we may refer to a Division Bench decision of the High Court of Telangana which ultimately came to be affirmed by this Court in the Special Leave Petition (Crl.) No. 4430 of 2019 order dated 27.05.2019. We are referring to a decision in the case of P.V. Ramana Reddy Vs. Union of India Writ Petition Nos. 4764 of 2019 and allied petitions decided on 18th April, 2019. There are few important observations made by the High Court and we are in complete

agreement with the said observations. The observations of the High Court fell in the context of certain incongruities noticed in Section 69(1) and Section 132 resply of the CGST Act, 2017. We quote the relevant observations hereunder:-

> "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.
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> 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.
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> 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, not- withstanding 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 modi- fication that the word "Commissioner" shall substitute the word "Magistrate" appearing in Section 165 (5) of Cr.P.C., in its applica- tion to CGST Act, 2017.

40. Therefore, (1) in the light of the fact that Section 69(1) of the CGST Act, 2017 au- thorizes 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 Commis- sioner 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 um- brage 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 en- quiry 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 rela- tion to the grant of bail for a person ar- rested 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 Sec- tion 132 (1) of CGST Act, 2017 as non-cogniz- able and bailable and (4) the reference to Sections 193 and 228 of IPC in Section 70(2) of the CGST Act, 2017. Therefore, the con- tention of learned Additional Solicitor Gen- eral that in view of Section 69(3) of the CGST Act, 2017, the petitioners cannot fall back upon the limited protection against ar-

rest, 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 Proce- dure (Amendment) Act, 2008. Under sub-Section (3) of Section 41A Cr.P.C., a person who com- plies with a notice for appearance and who continues to comply with the notice for ap- pearance 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 con- fers 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 contin- gency.

42. In any case, the moment the Commissioner has reasons to believe that a person has com- mitted a cognizable and non-bailable offence warranting his arrest, then we think that the safeguards before arresting a person, as pro- vided 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 abso- lute irrevocable guarantee against arrest. Despite the compliance with the notices of appearance, a Police Officer himself is enti- tled under Section 41A(3) Cr.P.C., for rea- sons to be recorded, arrest a person. At this stage, we may notice the difference in lan- guage 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 ar- rested. 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.”

19. We are still inclined to give one more opportunity to both the respondents to appear before the authorities for the purpose of recording of their statements. If the respondents fail to appear, then it shall be open for the authority concerned to proceed further in accordance with law.

20. In view of the aforesaid, both the appeals stand allowed. The common order dated 24.12.2018 passed by the High Court is set aside.

21. Pending application(s), if any, stand(s) disposed of.

.....J (J.B. PARDIWALA) .....J (PRASHANT KUMAR MISHRA) New Delhi July 17, 2023 ITEM NO.30 COURT NO.4 SECTION II-B S U P R E M E C O U R T O F I N D I A RECORD OF PROCEEDINGS Petition(s) for Special Leave to Appeal (Crl.) No(s). 4212- 4213/2019 (Arising out of impugned final judgment and order dated 24-12-2018 in SCRA No. 11010/2018 24-12-2018 in SCRA No. 11076/2018 passed by the High Court Of Gujarat At Ahmedabad) THE STATE OF GUJARAT ETC. Petitioner(s) VERSUS CHOODAMANI PARMESHWARAN IYER & ANR. ETC. Respondent(s) (IA No. 68284/2019 - EXEMPTION FROM FILING O.T.) Date : 17-07-2023 These matters were called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE J.B. PARDIWALA HON'BLE MR. JUSTICE PRASHANT KUMAR MISHRA For Petitioner(s) Mr. Kanu Agarwal, Adv.

Ms. Deepanwita Priyanka, AOR Mr. Madhav Sinhal, Adv.

For Respondent(s) Mr. R. P. Gupta, AOR Mr. K.M. Nataraj, A.S.G. Mr. Mukesh Kumar Maroria, AOR Mr. Prashant Singh I, Adv.

Mr. V. Balaji, Adv.

Ms. Manjula Gupta, Adv.

Mr. Shailesh Madiyal, Adv.

Mr. Sharath Nambiar, Adv.

UPON hearing the counsel the Court made the following O R D E R

1. The criminal appeals are allowed in terms of the signed reportable order.

2. Pending applications, if any, stand disposed of.

(DEEPAK SINGH)
COURT MASTER (SH)

(ANJU KAPOOR)
COURT MASTER (NSH)

[Signed reportable order is placed on the file]