Radhika Agarwal vs Union Of India on 27 February, 2025

Author: Bela M. Trivedi

Bench: Bela M. Trivedi

2025 INSC 272 REPOR

IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

WRIT PETITION (CRIMINAL) NO.336 OF 2018

RADHIKA AGARWAL … PETITIONE

VERSUS

UNION OF INDIA AND OTHERS … RESPONDEN

WITH

CRIMINAL APPEAL NO. OF 2025
(ARISING OUT OF SPECIAL LEAVE PETITION (CRIMINAL) NO.1534 OF

CRIMINAL APPEAL NO. OF 2025
(ARISING OUT OF SPECIAL LEAVE PETITION (CRIMINAL) NO.2971 OF

CRIMINAL APPEAL NO. OF 2025
(ARISING OUT OF SPECIAL LEAVE PETITION (CRIMINAL) NO.4078 OF

CRIMINAL APPEAL NO. OF 2025
(ARISING OUT OF SPECIAL LEAVE PETITION (CRIMINAL) NO.7408 OF

CRIMINAL APPEAL NO. OF 2025
(ARISING OUT OF SPECIAL LEAVE PETITION (CRIMINAL) NO.11049 OF 2

CRIMINAL APPEAL NO. OF 2025
(ARISING OUT OF SPECIAL LEAVE PETITION (CRIMINAL) NO.244 OF

CRIMINAL APPEAL NO. OF 2025
(ARISING OUT OF SPECIAL LEAVE PETITION (CRIMINAL) NO.3647 OF

CRIMINAL APPEAL NO. OF 2025
(ARISING OUT OF SPECIAL LEAVE PETITION (CRIMINAL) NO.5153 OF

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(ARISING OUT OF SPECIAL LEAVE PETITION (CRIMINAL) NO.4546 OF 2019)

CRIMINAL APPEAL NO. OF 2025
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CRIMINAL APPEAL NO. OF 2025
(ARISING OUT OF SPECIAL LEAVE PETITION (CRIMINAL) NO.3366 OF 2020)

CIVIL APPEAL NO. OF 2025
(ARISING OUT OF SPECIAL LEAVE PETITION (CIVIL) NO.20310 OF 2021)

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AND
WRIT PETITION (CRIMINAL) NO.198 OF 2024

JUDGMENT

SANJIV KHANNA, CJI.

Leave granted.

2. The fountainhead of legal controversy regarding the power to arrest under the Customs Act, 19621 and the Central Goods and Services Tax Act, 2017,2 stems from the decision of a three Judge Bench of this Court in Om Prakash and Another v. Union of India and Another.3 Before this decision, offences under the Customs Act were treated as non-bailable and once arrested, the accused would be detained for a few months before being released on bail. Om Prakash (supra) observed that the offences under the Customs Act and the Central Excise Act, 19444 were non-cognizable and, therefore, even if the officers had the power to arrest,5 they could do so only after obtaining a warrant from the Magistrate in terms of Section 416 of the Code of Criminal Procedure, 1973.7 It 1 For short, “Customs Act”.

2 For short, “GST Act”.

3 (2011) 14 SCC 1.

4 For short, “Excise Act”.

5 Pursuant to Sections 132, 133, 135, 135A and 136 of the Customs Act and Section 13 of the Central Excise Act, 1944.

6 Section 41 of the Code delineates circumstances when the police may arrest without a warrant. 7 For short, “Code”.

was also held that offences under the Customs Act and the Excise Act were both bailable, bearing a punishment of less than 3 years.8

3. The reasoning in Om Prakash (supra) proceeds on the interpretation of Sections 49 and 510 of the Code and holds that Section 155 and other provisions of Chapter XII of the Code are applicable. The principle being that the customs officers and excise officers, though conferred the power of arrest under the respective enactments, the offences being non-cognizable, were not vested with powers beyond that of a police officer in charge of the police station.

4. Before us, the ratio in Om Prakash (supra) has been questioned on various grounds. For the following reasons, we are not inclined to go into all the issues:

> • First, the decision in Om Prakash (supra) was pronounced on 30.09.2011 and held the field for more than 12 years.

• Secondly, and more significantly, it is apparent that the legislature has accepted the ratio of the said decision and made specific amendments to the Customs Act. The ratio is equally given effect to and incorporated in the GST Act.

8 Part II of the First Schedule to the Code provides that offences which bear an imprisonment term of less than 3 years are both non-cognizable and bailable. 9 "4. Trial of offences under the Indian Penal Code and other laws.— (1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained. (2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences." 10 "5. Saving.— Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force." • Thirdly, the ratio in Om Prakash (supra) promotes and protects the life and liberty of citizens and, corrects earlier prevalent wrongdoings which diminished the constitutional and statutory rights of citizens. However, we would refer to certain portions of Om Prakash (supra) in the context of the present litigation to interpret relevant provisions of the Customs Act and the GST Act.

5. 'Cognizable offence', defined in Section 2(c) of the Code, means an offence for which the police officer may, in accordance with the First Schedule of the Code or any other law for the time being in force, arrest without a warrant. 'Non- cognizable offence', defined in Section 2(l) of the Code, means an offence for which a police officer has no authority to arrest without a warrant.

6. Section 155 of the Code enjoins a duty on the officer in charge of a police station to enter, or cause to be entered, the substance of any information received regarding the commission of a non-cognizable offence in a book, maintained in the prescribed format. The officer must then refer such informant to the Magistrate. Police officers do not possess the authority to investigate non-

cognizable cases without an order from the Magistrate having the power to try such a case or committing it for trial.11 Upon receiving such an order from the Magistrate, the police officer gains the same investigative powers as those available for cognizable offences, with the exception of the power to arrest 11 Section 155(2) of the Code.

without a warrant.12 Therefore, without an order from the Magistrate and a warrant, a police officer cannot arrest an accused for a non-cognizable offence.

7. Section 104(4) of the Customs Act, post amendments in 2012,13 and 2019,14 reads:

> "(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), any offence relating to—
>
> (a) prohibited goods; or
>
> (b) evasion or attempted evasion of duty exceeding fifty lakh rupees; or
>
> (c) fraudulently availing of or attempting to avail drawback or any exemption from duty provided under this Act, where the amount of drawback or exemption from duty exceeds fifty lakh rupees; or
>
> (d) fraudulently obtaining an instrument for the purposes of this Act or the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992), and such instrument is utilised under this Act, where duty relatable to such utilisation of instrument exceeds fifty lakh rupees, shall be cognizable." Sub-section (5) to Section 104 reads:
>
> "Save as otherwise provided in sub-section (4), all other offences under the Act shall be non-cognizable."

8. After the 2012 Amendment, notwithstanding anything contained in the Code, offences provided in clauses (a) and (b) above are to be treated as cognizable offences. The 2019 Amendment added clauses (c) and (d) to Section 104(4), and these are again cognizable offences. Section 104(5) states that all offences other than those provided under Section 104(4) are non-cognizable. Therefore, 12 Section 155(3) of the Code.

13 Finance Act, 2012 (23 of 2012), with effect from 28.05.2012; for short, "2012 Amendment". 14 Finance Act, 2019 (Act 2 of 2019), with effect from 01.08.2019; for short, "2019 Amendment". the net effect of these amendments is that the offences enumerated in Clauses

(a) to (d) of Section 104(4) are cognizable and residual/unspecified offences are non-cognizable.

9. Section 104(6) of the Customs Act, post amendments in 2013 15 and 201916 reads:

> "(6) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an offence punishable under Section 135 relating to—
>
> (a) evasion or attempted evasion of duty exceeding fifty lakh rupees; or
>
> (b) prohibited goods notified under Section 11 which are also notified under sub-clause (c) of clause (i) of sub- section (1) of Section 135; or
>
> (c) import or export of any goods which have not been declared in accordance with the provisions of this Act and the market price of which exceeds one crore rupees; or
>
> (d) fraudulently availing of or attempt to avail of drawback or any exemption from duty provided under this Act, if the amount of drawback or exemption from duty exceeds fifty lakh rupees; or
>
> (e) fraudulently obtaining an instrument for the purposes of this Act or the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992), and such instrument is utilised under this Act, where duty relatable to such utilisation of instrument exceeds fifty lakh rupees, shall be non-bailable." Sub-section (7) to Section 104 reads:
>
> "(7) Save as otherwise provided in sub-section (6), all other offences under this Act shall be bailable."

10. The net effect is that offences in Clauses (a) to (d) to Section 104(6) above, inserted vide the 2013 Amendment, and Clause (e), inserted vide the 2019 Amendment, are treated as non-bailable offences. All other offences under the 15 Finance Act, 2013, (Act No. 17 of 2013), with effect from 17.05.2013; for short "2013 Amendment". 16 See 2019 Amendment (supra).

Customs Act, barring aforementioned Clauses (a) to (e) in Section 104(6) of the Customs Act, are bailable.17

11. Therefore, given the amendments enacted after Om Prakash (supra) — the 2012 Amendment, the 2013 Amendment, and the 2019 Amendment — certain categories of offences have been carved out and explicitly made cognizable in terms of Section 104(4). Some of the cognizable offences have been made non-bailable in terms of Section 104(6). All other offences under the Customs Act are non-cognizable, unless carved out in Section 104(4), and bailable, as they are excluded in Section 104(6).

12. In the aforesaid background, we would now refer to Sections 4 and 5 of the Code, which read:

> "4. Trial of offences under the Indian Penal Code and other laws.—(1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

> (2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

5. Saving.—Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.

(emphasis supplied)" 17 See Section 104(7) of the Customs Act.

13. Section 4(1) stipulates that offences under the Indian Penal Code, 1860, shall be investigated, inquired into, tried, and otherwise dealt with in accordance with the Code. For offences under any other local law, Section 4(2) stipulates that they shall be investigated, inquired, tried, or otherwise dealt with in accordance with the Code, subject to any other enactment governing the manner or place of investigation, inquiry, trying or otherwise dealing. Section 5, the savings clause, clarifies that the Code shall not affect any special or local law, or any special jurisdiction or power conferred, or any special procedure prescribed, unless there is a specific provision to the contrary. Thus, the provisions of the Code would be applicable to the extent that there is no contrary provision in the special act or any special provision excluding the jurisdiction and applicability of the Code.18 In A.R. Antulay v. Ramdas Sriniwas Nayak and Another,19 a Constitution Bench of this Court has clarified this position while discussing the applicability of the Code to offences under the Prevention of Corruption Act, 1988. The relevant portion reads:

> "16…In the absence of a specific provision made in the statute indicating that offences will have to be investigated, inquired into, tried and otherwise dealt with according to that statute, the same will have to be investigated, inquired into, tried and otherwise dealt with according to the Code of Criminal Procedure. In other words, Code of Criminal is the parent statute which provides for investigation, inquiring into and trial of cases by criminal courts of various designations."

14. Before discussing the provisions of Chapter XII of the Code and determining which of its provisions apply to offences under the Customs Act, it is relevant 18 See paragraph 128 of Directorate of Enforcement v. Deepak Mahajan, (1994) 3 SCC 440.

(1984) 2 SCC 500.

to address the writ petitioners' submission that customs officers are police officers. In our opinion, this submission is both unfounded and flawed.

15. In a line of decisions of this Court — State of Punjab v. Barkat Ram,20 Ramesh Chandra Mehta v. State of West Bengal,21 and Illias v. Collector of Customs22 — it has been decisively held that customs officers are not police officers. Ramesh Chandra Mehta (supra) and Illias (supra) are both

Constitution Bench judgments of this Court. Recently, this distinction was affirmed by the majority judgment of this Court in Tofan Singh v. State of Tamil Nadu,23 which observed:

> 427. The law which emerges from the Constitution Bench judgments of the Supreme Court in Badaku Joti Svant, Ramesh Chandra Mehta and Illias is that, an officer can be deemed to be a police officer within the meaning of Section 25 of the Evidence Act:
>
> (i) if the officer has all the powers of a police officer qua investigation, which includes the power to file a police report under Section 173 CrPC,
>
> (ii) the power to file a police report under Section 173 CrPC is an essential ingredient of the power of a police officer, and
>
> (iii) the power to file a police report under Section 173 CrPC has to be conferred by statute.
>
> xxx xxx xxx
>
> 429. As per the well-established norms of judicial discipline and propriety, a Bench of lesser strength cannot revisit the proposition laid down by at least three Constitution Benches, that an officer can be deemed to be a police officer within the meaning of Section 25 of the Evidence Act only if the officer is empowered to exercise all the powers of a police officer including the power to file a report under Section 173 CrPC." 20 (1962) 3 SCR 338.
>
> 21 (1969) 2 SCR 461.
>
> 22 (1969) 2 SCR 613.
>
> 23 (2021) 4 SCC 1.

16. We respectfully agree with the view expressed that the customs officers are not police officers.

17. Learned counsel for the writ petitioners have also relied upon Directorate of Enforcement v. Deepak Mahajan and Another.24 The submission was that since a customs officer is not a police officer, anyone arrested under the Customs Act should be sent to judicial custody. Deepak Mahajan (supra) answers this conundrum, albeit an entirely different issue – whether persons arrested under the Customs Act, on being produced before a Magistrate, can be committed to the custody of a customs officer.

18. Deepak Mahajan (supra) addresses the interplay of Section 167 of the Code25 and Section 104 of the Customs Act. Section 167(2) of the Code allows a police officer to request police remand/custody of a person arrested for a period not exceeding 15 days when an investigation cannot be completed within 24 hours of the arrest. Deepak Mahajan (supra) clarifies that Section 167(2) of the Code

applies equally to Section 104 of the Customs Act. Thus, a Magistrate has the 24 (1994) 3 SCC 440.

25 "167. Procedure when investigation cannot be completed in twenty-four hours.— (1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by Section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate. (2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction." authority under Section 167(2) of the Code to authorise detention of such person to the custody of a customs officer.

19. On the issue of anticipatory bail, Deepak Mahajan (supra), referring to the dictum in Shri Gurbaksh Singh Sibbia and Others v. State of Punjab, 26 observes that the registration of a case and entries of a case diary are not compulsory when entertaining an application for grant of anticipatory bail under Sections 438 and 439 of the Code. Anticipatory bail can be invoked on the likelihood of arrest based on reasonable belief of the person having committed a non-bailable offence. At the same time, Deepak Mahajan (supra) holds that customs officer must mandatorily maintain case diaries:

> "112. The expression 'diary' referred to in Section 167(1) of the Code is the special diary mentioned in Section 167(2) which should contain full and unabridged statements of persons examined by the police so as to give the Magistrates on a perusal of the said diary, a satisfactory and complete source of information which would enable him to decide whether or not the accused person should be detained in custody but it is different from the general diary maintained under Section 44 of the Police Act.
>
> 113. Though an authorised officer of Enforcement or Customs is not undertaking an investigation as contemplated under Chapter XII of the Code, yet those officers are enjoying some analogous powers such as arrest, seizures, interrogation etc. Besides, a statutory duty is enjoined on them to inform the arrestee of the grounds for such arrest as contemplated under Article 22(1) of the Constitution and Section 50 of the Code. Therefore, they have necessarily to make records of their statutory functions showing the name of the informant, as well as the name of the person who violated any other provision of the Code and who has been guilty of an offence punishable under the Act, nature of information received by them, time of the arrest, seizure of the contraband if any and the 26 (1980) 2 SCC 565.

statements recorded during the course of the detection of the offence/offences."

20. We now turn to a recent decision of this Court in Union of India v. Ashok Kumar Sharma and Others.27 This decision examines and harmoniously construes provisions of the Code and the Drugs and Cosmetics Act, 1940,28 addressing whether the police could register and investigate the offences under the Drugs and Cosmetics Act in accordance with the Code. Referring to Section 32 of the Drugs and Cosmetics Act, the Court held that there is an implied bar on police investigation and prosecution, as Section 32 provides for taking cognisance of the court only at the instance of four categories: (i) inspector under the Drugs and Cosmetics Act, (ii) gazetted officer empowered by the State or Central Government, (iii) aggrieved person, or (iv) voluntary association. Ashok Kumar Sharma (supra) refers to Om Prakash (supra) and Deepak Mahajan (supra) to observe:

> "148. On a perusal of the statement of law contained in para 41 of Om Prakash case, we find that this Court has found that as the provisions under the enactments in question declared the offences to be non-cognizable, the officer exercising the power of arrest, could not arrest, except after obtaining a warrant for the said purpose. That they may not arrest without obtaining a warrant in respect of the non-cognizable offences, being the view taken by this Court, cannot be squared with the view taken by the Punjab and Haryana High Court and the Gujarat High Court, respectively, in Sunil Gupta and also Bhavin Impex (P) Ltd., which took the view in effecting arrest under the Central Excise Act, no warrant was required. It is apparently consequent upon the same that the legislature stepped in with amendments.
>
> xxx xxx xxx

27 (2021) 12 SCC 674.
28 For short, "Drugs & Cosmetics Act".

> 150. The result would appear to be that acknowledging the effect of making the offences being non-cognizable to be to limit the power of the authorities under the Act for effecting arrest under the Act, to require a warrant, certain offences were declared to be cognizable as noticed in Section 9-A, as amended after the judgment in Om Prakash. The resultant position after the amendment is, it became open to the officers to effect the arrest in regard to a cognizable offence without obtaining a warrant.
>
> 151. In regard to the Customs Act, 1962 in Section 104, under the present avatar, two changes have been brought about. Firstly, the power to arrest is available in respect of offences under Sections 132, 133, 135, 135-A and 136.

The offences are divided into two categories. Under Section 104(4), the offences which fall within its ambit, are treated as cognizable. The other offences are treated as non-cognizable under Section 104(5). For instance, if a person is involved in an offence relating to evasion or attempted evasion of duty exceeding 50 lakh rupees (w.e.f. 1-8-2019), while the offence is cognizable, the power of arrest is conferred on the officers under Section 104(1). The power to arrest is conferred and the only condition to be fulfilled is that the officer has reason to believe that the person has committed the offence concerned. The position is the same in respect of offence relating to prohibited goods.

152. We have embarked upon referring to the provisions relating to arrest under the Excise Act and the Customs Act and the decision of this Court in Om Prakash in taking the view as it did in para 41, in order to appreciate the contention that, after the amendment to Section 36-AC, the offences have been declared cognizable. If we proceed on the basis that the power of arrest can be traced from Section 22(1)(d) of the Act, then, after the amendment in Section 36-AC, by which, the offences falling under Chapter IV of the Act, which are declared as cognizable and non-bailable, the decks are cleared for effecting arrest without a warrant by the Inspector."

21. Paragraphs 151 and 152, quoted above, specifically addresses the legal position following the amendments made to the Customs Act. In 2008, the Drugs and Cosmetics was amended to insert Section 36-AC,29 which specifies that the offences enumerated in sub-clause (a) of sub-section (1) shall be cognizable. Clause (b) of the same sub-section outlines the conditions for granting bail to a person arrested. Sub-section (2) further clarifies that these limitations on granting bail were in addition to the limitations under the Code or any other law for the time being in force. Despite the State's contrary arguments relying on Section 32(3) – which states that nothing in the Chapter shall be deemed to prevent any person from being prosecuted under any other law for any act or commission, which constitutes an offence under the Chapter of the Drugs and Cosmetics Act and the provisions of the Code – this Court rejected the contention that the police could investigate and file a charge-sheet under the provisions of the Code. There is also a detailed discussion on the power of arrest and its exercise, including power of search and seizure. While affirming that the power of arrest under the Drugs and Cosmetics Act does not vest with the officers in charge of the police station, this Court issued several directions emphasising the necessity of compliance with the provisions of the Code by the arresting officer. Additionally, the arresting officer shall follow the guidelines laid down in D.K. Basu v. State of West Bengal.30 Finally, this Court issued a saving order in exercise of power under Article 142 of the Constitution to fend earlier cases where FIR had been registered, and cognisance had already been taken.

29 Drugs and Cosmetics (Amendment) Act, 2008, Act No. 26 of 2008. 30 (1997) 1 SCC 416.

22. The amendments made to the Customs Act in 2012, 2013 and 2019 are substantive and were introduced to effectively modify the application of Om Prakash (supra), which required a customs officer to obtain prior approval from a Magistrate before making an arrest. These amendments designated specified offences as cognizable and non-bailable, while also imposing certain pre-conditions and stipulations for making arrest. Consequently, the petitioners' reliance on Om Prakash (supra) is no longer valid and must be rejected. However, it remains important to examine the pre-conditions and safeguards established by the legislature to protect the life and liberty of

arrestees.

23. In paragraph 19 (supra), we referenced the dictum in Deepak Mahajan (supra) regarding the term "diary" as mentioned in Section 167(1) of the Code. Section 172 of the Code, which relates to the diary of proceedings to be maintained during the investigation, has been amended in 2009.31 Section 172(1B) now stipulates that the diary should be a duly paginated volume. In order to maintain the authenticity and accuracy of the diary, this mandate is required to be implemented.

24. In terms of Deepak Mahajan (supra), a statutory duty is enjoined on customs officers to inform the arrestee about their grounds of arrest. This duty flows from the rigours imposed by Article 22(1) of the Constitution of India and Section 50 of the Code. While customs officers do not undertake an investigation akin to Chapter XII of the Code, they enjoy analogous powers such as the power to investigate, arrest, seize, interrogate, etc under the Customs Act. Thus, the 31 Act 5 of 2009.

obligation to provide grounds of arrest is incumbent upon them. Customs officers must also maintain records of their statutory functions including details like the name of the informant, name of the person who has violated the law, nature of information received by the officers, time of arrest, seizure details, and statements recorded during the course of detection of the offence(s).

25. In 2009, the Parliament amended the Code32 to incorporate Section 41-B which outlines the procedures of arrest and the duties of the officer making the arrest.33 Although this section refers to the police officer, we believe, it equally imposes a duty on the customs officers. Officers making an arrest are required to bear an accurate, legible, and clear indication of their names to facilitate ease of identification by the arrestee. These provisions are in furtherance of the dictum of this Court in D.K. Basu (supra). The Central Board of Excise and Customs, in a Circular dated 20.02.1998 (File No. 591/01/98-CUS(AS)), referenced the decision in D.K. Basu (supra).34 They have reproduced the relevant portions of the judgment with the intent that these would be complied with by the customs officers. We trust that customs officers shall duly comply with this mandate.

26. We also hold that Section 41-D of the Code is applicable for offences under the Customs Act. Accordingly, a person arrested by a customs officer has the right 32 Act 5 of 2009.

33 41-B. Procedure of arrest and duties of officer making arrest.—Every police officer while making an arrest shall— (a) bear an accurate, visible and clear identification of his name which will facilitate easy identification; (b) prepare a memorandum of arrest which shall be— (i) attested by at least one witness, who is a member of the family of the person arrested or a respectable member of the locality where the arrest is made; (ii) countersigned by the person arrested; and (c) inform the person arrested, unless the memorandum is attested by a member of his family, that he has a right to have a relative or a friend named by him to be informed of his arrest.

34 See also Circular dated 17.09.2013 [File No. 394/68/2013-CUS(AS)]. to meet an advocate of his choice during interrogation, but not throughout interrogation.35 In Senior Intelligence Officer, Directorate of Revenue Intelligence v. Jugal Kishore Samra,36 this Court held that an advocate/authorised person may be present within visual distance during interrogation, but he

cannot be within hearing distance of the proceedings nor can there be any consultations with such advocate/authorised person during the course of the interrogation. The relevant portion reads:

> "29. Taking a cue, therefore, from the direction made in D.K. Basu and having regard to the special facts and circumstances of the case, we deem it appropriate to direct that the interrogation of the respondent may be held within the sight of his advocate or any other person duly authorised by him. The advocate or the person authorised by the respondent may watch the proceedings from a distance or from beyond a glass partition but he will not be within the hearing distance and it will not be open to the respondent to have consultations with him in the course of the interrogation."
>
> 27. Reference can also be made to Section 50A of the Code,37 which states that every police officer or other person making an arrest under the Code shall

35 In 2009, Section 41D was inserted in the Code vide Act 4 of 2009, in furtherance of the principles laid down in D.K. Basu (supra). It reads: "41-D. Right of arrested person to meet an advocate of his choice during interrogation.— When any person is arrested and interrogated by the police, he shall be entitled to meet an advocate of his choice during interrogation, though not throughout interrogation." 36 (2011) 12 SCC 362.

37 50-A. Obligation of person making arrest to inform about the arrest, etc., to a nominated person.— (1) Every police officer or other person making any arrest under this Code shall forthwith give the information regarding such arrest and place where the arrested person is being held to any of his friends, relatives or such other persons as may be disclosed or nominated by the arrested person for the purpose of giving such information.

(2) The police officer shall inform the arrested person of his rights under sub-section (1) as soon as he is brought to the police station.

(3) An entry of the fact as to who has been informed of the arrest of such person shall be made in a book to be kept in the police station in such form as may be prescribed in this behalf by the State Government.

(4) It shall be the duty of the Magistrate before whom such arrested person is produced, to satisfy himself that the requirements of sub-section (2) and sub-section (3) have been complied with in respect of such arrested person.

forthwith give information regarding such arrest and place where the arrested person is being held to any of his friends, relatives, or other person as may be disclosed or nominated by the arrested person for the purpose of giving such information. The arrested person must be informed of this right. In our opinion, the details of compliance with this mandate must be entered into the diary maintained by customs officer. It is the duty of the Magistrate, when an arrested person is produced, to satisfy himself that the requirements of Section 50A(2) and (3) have been complied with. Thus, we hold that these stipulations will apply in cases of arrests made by the customs officers.

28. Section 55A, inserted in 2009,38 states that it shall be the duty of the person having custody of the accused to take reasonable care of their health and safety. This provision shall be equally applicable to arrests under the Customs Act.

29. The findings recorded in paragraphs 23 to 28 above, which refer to the provisions of the Code, do not in any way fall foul of or repudiate the provisions of the Customs Act. They complement the provisions of the Customs Act and in a way ensure better regulation, ensuring due compliance with the statutory conditions of making an arrest.

30. Arvind Kejriwal v. Directorate of Enforcement,39 a recent judgment authored by one of us (Sanjiv Khanna, J.), is a dictum relating to the Prevention of Money 38 Act 5 of 2009.

39 (2025) 2 SCC 248.

Laundering Act, 2002.40 This Court held that the power of arrest granted to the Directorate of Enforcement41 under Section 19 of the PML Act is fenced with certain pre-conditions. These pre-conditions act as stringent safeguards to protect the life and liberty of individuals. The relevant portion reads:

> "9. A bare reading of the section reflects, that while the legislature has given power to the Director, Deputy Director, Assistant Director, or an authorised officer to arrest a person, it is fenced with preconditions and requirements, which must be satisfied prior to the arrest of a person. The conditions are -
>
> ☐The officer must have material in his possession. ☐On the basis of such material, the authorised officer should form and record in writing, "reasons to believe" that the person to be arrested, is guilty of an offence punishable under the PML Act.
>
> ☐The person arrested, as soon as may be, must be informed of the grounds of arrest.
>
> These preconditions act as stringent safeguards to protect life and liberty of individuals. We shall subsequently interpret the words "material", "reason to believe", and "guilty of the offence". Before that, we will refer to some judgments of this Court on the importance of Section 19(1) and the effect on the legality of the arrest upon failure to comply with the statutory requirements."
>
> 31. In Arvind Kejriwal (supra), a combined reading of Pankaj Bansal v. Union of India and Others,42 Prabir Purkayastha v. State of NCT of Delhi,43 and Vijay Madanlal Choudhary and Others v. Union of India and Others44 was adopted by this Court. It was held that the power to arrest a person without a warrant and without instituting a criminal case is a drastic and extreme power.

40 For short, "PML Act".

41 For short, “DoE”.

42 2023 SCC OnLine SC 1244.

43 (2024) 7 SCC 576.

44 2022 SCC OnLine SC 929.

Therefore, the legislature had prescribed safeguards in the language of Section 19 itself which act as exacting conditions as to how and when the power is exercisable. These safeguards include the requirement to have “material” in the possession of DoE, and on the basis of such “material”, the authorised officer must form an opinion and record in writing their “reasons to believe” that the person arrested was “guilty” of an offence punishable under the PML Act. The “grounds of arrest” are also required to be informed forthwith to the person arrested.

32. The contention of the DoE that while “grounds of arrest” were mandatorily required to be supplied to the arrestee, “reasons to believe”, being an internal and confidential document, need not be disclosed, was decisively rejected in Arvind Kejriwal (supra). It was held that “reasons to believe” are to be furnished to the arrestee such that they can challenge the legality of their arrest. Exceptions are available in one-off cases where appropriate redactions of “reasons to believe” are permissible. The relevant portion reads:

> “41. Once we hold that the accused is entitled to challenge his arrest under Section 19(1) of the PML Act, the court to examine the validity of arrest must catechise both the existence and soundness of the “reasons to believe”, based upon the material available with the authorized officer. It is difficult to accept that the “reasons to believe”, as recorded in writing, are not to be furnished. As observed above, the requirements in Section 19(1) are the jurisdictional conditions to be satisfied for arrest, the validity of which can be challenged by the accused and examined by the court. Consequently, it would be incongruous, if not wrong, to hold that the accused can be denied and not furnished a copy of the “reasons to believe”. In reality, this would effectively prevent the accused from challenging their arrest, questioning the “reasons to believe”. We are concerned with violation of personal liberty, and the exercise of the power to arrest in accordance with law. Scrutiny of the action to arrest, whether in accordance with law, is amenable to judicial review. It follows that the “reasons to believe” should be furnished to the arrestee to enable him to exercise his right to challenge the validity of arrest.
>
> 42. We would accept that in a one-off case, it may not be feasible to reveal all material, including names of witnesses and details of documents, when the investigation is in progress. This will not be the position in most cases. DoE may claim redaction and exclusion of specific particulars and details. However, the onus to justify redaction would be on the DoE. The officers of the DoE are the authors of the “reasons to believe” and can use appropriate wordings, with details of the

> material, as are necessary in a particular case. As there may only be a small number of cases where redaction is justified for good cause, this reason is not a good ground to deny the accused's access to a copy of the “reasons to believe” in most cases. Where the non-

disclosure of the “reasons to believe” with redaction is justified and claimed, the court must be informed. The file, including the documents, must be produced before the court. Thereupon, the court should examine the request and if they find justification, a portion of the “reasons to believe” and the document may be withheld. This requires consideration and decision by the court. DoE is not the sole judge.

43. Section 173(6) of the Code, permits the police officer not to furnish statements or make disclosures to the accused when it is inexpedient in public interest. In such an event, the police officer is to indicate the specific part of the statement and append a note requesting the Magistrate to exclude that part from the copy given to the accused. He has to state the reasons for making such request. The same principle will apply.”

33. Arvind Kejriwal (supra) also holds that the courts can judicially review the legality of arrest. This power of judicial review is inherent in Section 19 as the legislature has prescribed safeguards to prevent misuse. After all, arrests cannot be made arbitrarily on the whims and fancies of the authorities. This judicial review is permissible both before and after criminal proceedings or prosecution complaints are filed.

34. On the nature of “material” examined by the DoE, Arvind Kejriwal (supra) states that such “material” must be admissible before a court of law. This is because the designated officer is required to arrive at a conclusion of guilt based on the “material” examined and such guilt can only be based on admissible evidence. The relevant portion reads:

> “47. DoE has drawn our attention to the use of the expression ‘material in possession’ in Section 19(1) of the PML Act instead of ‘evidence in possession’. Though etymologically correct, this argument overlooks the requirement that the designated officer should and must, based on the material, reach and form an opinion that the arrestee is guilty of the offence under the PML Act. Guilt can only be established on admissible evidence to be led before the court, and cannot be based on inadmissible evidence. While there is an element of hypothesis, as oral evidence has not been led and the documents are to be proven, the decision to arrest should be rational, fair and as per law. Power to arrest under Section 19(1) is not for the purpose of investigation. Arrest can and should wait, and the power in terms of Section 19(1) of the PML Act can be exercised only when the material with the designated officer enables them to form an opinion, by recording reasons in writing that the arrestee is guilty.”

35. The investigating officer is also required to look at the whole material and cannot ignore material that exonerates the arrestee. A wrong application of law or arbitrary exercise of duty by the

designated officer can lead to illegality in the process. The court can exercise judicial review to strike down such a decision. Referring to errors in the decision-making process, Arvind Kejriwal (supra) records how such errors can vitiate the judgment or decision of the statutory authority. The relevant portion reads:

> "67. Error in decision making process can vitiate a judgment/decision of a statutory authority. In terms of Section 19(1) of the PML Act, a decision-making error can lead to the arrest and deprivation of liberty of the arrestee. Though not akin to preventive detention cases, but given the nature of the order entailing arrest - it requires careful scrutiny and consideration. Yet, at the same time, the courts should not go into the correctness of the opinion formed or sufficiency of the material on which it is based, albeit if a vital ground or fact is not considered or the ground or reason is found to be non-existent, the order of detention may fail.
>
> 68. In Centre for PIL v. Union of India, this Court observed that in judicial review, it is permissible to examine the question of illegality in the decision-making process. A decision which is vitiated by extraneous considerations can be set aside. Similarly, in Uttamrao Shivdas Jankhar v.

Ranjitsinh Vijaysinh Mohite Patil, elaborating on the expression "decision making process", this Court held that judicial interference is warranted when there is no proper application of mind on the requirements of law. An error in the decision-making process crops up where the authority fails to consider a relevant factor and considers irrelevant factors to decide the issue."

36. On the extent of judicial review available with the court viz. "reasons to believe", it was held that judicial review cannot amount to a merits review. The exercise is confined to ascertain if, based upon "material" in possession of the DoE, the DoE had "reasons to believe" that the arrestee is guilty of an offence under the PML Act. The relevant portion reads:

> "44. We now turn to the scope and ambit of judicial review to be exercised by the court. Judicial review does not amount to a mini-trial or a merit review. The exercise is confined to ascertain whether the "reasons to believe" are based upon material which 'establish' that the arrestee is guilty of an offence under the PML Act. The exercise is to ensure that the DoE has acted in accordance with the law. The courts scrutinize the validity of the arrest in exercise of power of judicial review. If adequate and due care is taken by the DoE to ensure that the "reasons to believe" justify the arrest in terms of Section 19(1) of the PML Act, the exercise of power of judicial review would not be a cause of concern. Doubts will only arise when the reasons recorded by the authority are not clear and lucid, and therefore a deeper and in-depth scrutiny is required. Arrest, after all, cannot be made arbitrarily and on the whims and fancies of the authorities. It is to be made on the basis of the valid "reasons to believe", meeting the parameters prescribed by the law. In fact, not to undertake judicial scrutiny when justified and necessary, would be an abdication and failure of constitutional and statutory duty placed on the court to ensure that the fundamental

right to life and liberty is not violated."

37. On the different facets of judicial review available with the Court while examining the legality of arrests, Arvind Kejriwal (supra) states:

> "65. ...We have already referred to the contours of judicial review expounded in Padam Narain Aggarwal (supra), and Dr. Pratap Singh (supra). We have also referred to the principles of Wednesbury reasonableness.
>
> 66. In Amarendra Kumar Pandey v. Union of India, this Court elaborated on the different facets of judicial review regarding subjective opinion or satisfaction. It was held that the courts should not inquire into correctness or otherwise of the facts found except where the facts found existing are not supported by any evidence at all or the finding is so perverse that no reasonable man would say that the facts and circumstances exist. Secondly, it is permissible to inquire whether the facts and circumstances so found to exist have a reasonable nexus with the purpose for which the power is to be exercised. In simple words, the conclusion has to logically flow from the facts. If it does not, then the courts can interfere, treating the lack of reasonable nexus as an error of law. Thirdly, jurisdictional review permits review of errors of law when constitutional or statutory terms, essential for the exercise of power, are misapplied or misconstrued. Fourthly, judicial review is permissible to check improper exercise of power. For instance, it is an improper exercise of power when the power is not exercised genuinely, but rather to avoid embarrassment or for wreaking personal vengeance.

Lastly, judicial review can be exercised when the authorities have not considered grounds which are relevant or has accounted for grounds which are not relevant."

38. Arvind Kejriwal (supra) also refers to the doctrine of proportionality, which has come to permeate constitutional law when questions of life and liberty are involved.45 Courts may employ this four-part doctrinal test in their examination of the legality of arrest as arrest often involves contestation between the fundamental right to life and liberty of individuals against the public purpose of punishing the guilty.

39. In the present context, the power of arrest is provided in Section 104(1) of the Customs Act. For ease of reference, we have provided a tabular comparison between Section 19(1) of the PML Act, envisaging the DoE's power of arrest, and Section 104(1) of the Customs Act, envisaging the customs officer's power of arrest:

Section 19(1) of the PML Act	Section 104(1) of the Customs Act
19. Power to arrest.—(1) If the	104. Power to arrest.—429[(1) If an Director, Deputy Director, Assistant officer of customs empowered in this Director or any other officer behalf by general or special order of authorised in this behalf by the the Principal

> Commissioner of Central Government by general or Customs or Commissioner of special order, has on the basis of Customs has reason to believe that material in his possession, reason to any person has committed an offence believe (the reason for such belief to punishable under Section 132 or 45 The doctrine of proportionality has been expounded by this Court in a line of decisions, including the recent judgment of Association of Democratic Reforms and Another v. Union of India and Others, 2024 INSC 113. It comprises four prongs - (i) legitimate aim/purpose - The first step is to examine whether the act/measure restricting the fundamental right has a legitimate aim and/or purpose; (ii) rational connection -The second step is to examine whether the restriction has rational connection with the aim;

(iii) minimal impairment/necessity test - The third step is to examine whether there should have been a less restrictive alternate measure that is equally effective; and (iv) balancing stage - The last stage is to strike an appropriate balance between the fundamental right and the pursued public purpose. be recorded in writing) that any Section 133 or Section 135 or Section person has been guilty of an offence 135-A or Section 136, he may arrest punishable under this Act, he may such person and shall, as soon as arrest such person and shall, as soon may be, inform him of the grounds for as may be, inform him of the grounds such arrest.

for such arrest.

40. Section 104(1) stipulates that arrests may be made if a customs officer, empowered by general or special order of the Principal Commissioner of Customs or Commissioner of Customs, has "reasons to believe" that an offence has been "committed" in terms of Section 132 or Section 133 or Section 135 or Section 135-A or Section 136 of the Customs Act. Thus, Section 104(1), effectively incorporates safeguards similar to those outlined in Section 19(1) of the PML Act. The semantical distinction, however, between Section 19(1) and Section 104(1), is twofold: first, Section 104(1) does not explicitly stipulate the requirement of a customs officer having "material in their possession"; and second, Section 104(1) does not explicitly state that the customs officer must reasonably believe that the arrestee is "guilty of an offence". Instead, Section 104(1) states that the customs officer must have "reasons to believe" that the arrestee has "committed an offence".

41. We are of the opinion that there is substantively no difference between a person being guilty of an offence and a person committing an offence. In a catena of judgments of this Court, it has been held that words of a statute must be understood in their natural, ordinary or popular sense and construed according to their grammatical meaning, unless such construction leads to some absurdity or unless there is something in the context or in the object of the statute to suggest to the contrary.46 Applying these principles to the present case, the Cambridge Dictionary defines "guilty party" as "someone who has done something wrong or who has 'committed' a crime". According to the Oxford Dictionary, the etymology of "guilty" also traces back to the Old English Period (pre-1150), referring in the context of law to someone who "has 'committed' some specified offence". Thus, when we apply a plain language interpretation, a person being "guilty" of an offence and a person "committing" an offence is self-same and identical insofar as Section 19(1) vis-à-vis Section 104(1) is concerned.

42. The Code also uses the terms interchangeably. For instance, Section 173 of the Code, relating to filing of a chargesheet, stipulates in subsection (2)(i)(d) that the police officer must state in the chargesheet, "whether any offence appears to have been 'committed' and, if so, by whom". Would this then mean that chargesheet, a prosecution document based on which a court takes cognisance of a matter, does not relate to the guilt of a person? Naturally, such an interpretation would lead to anomalous circumstances and hence cannot be sustained.

43. Secondly, the fact that Section 104(1) does not explicitly require a customs officer to have "material in their possession" does not imply that a customs officer can conclude that an offence has been committed out of thin air or mere 46 See Gurudevdatta VKSSS Maryadit v. State of Maharashtra, AIR 2001 SC 1980; S. Mehta v. State of Maharashtra, 2001 (8) SCC 257; Patangrao Kaddam v. Prithviraj Sajirao Yadav Deshmugh, AIR 2001 SC 1121; and Ku. Sonia Bhatia v. State of Uttar Pradesh & Ors., (1981) 2 SCC 585. suspicion. The threshold for arrest under Section 104(1) of the Customs Act is higher than that under Section 41 of the Code. Section 41 allows the police to arrest a person without a warrant, if a "reasonable complaint has been made", or "credible information has been received", or "a reasonable suspicion exists" that the person has committed a cognizable offence. In contrast, Section 104(1) sets a higher threshold, stipulating that a customs officers may only arrest a person if they have "reasons to believe" that a person has committed an offence. A person is said to have a "reason to believe" a thing, if they have sufficient cause to believe that thing but not otherwise. 47 This represents a more stringent standard than the "mere suspicion" threshold provided under Section

41.

44. Thirdly, given the framework of the Customs Act, which explicitly classifies offences into bailable and non-bailable, as well as cognizable and non- cognizable, the "reasons to believe" must reflect these classifications when justifying an arrest. The reasoning must weigh in why an arrest is being made in a specific case, particularly given the specific severity assigned to the offence by the legislature. The reasoning must also state how the monetary thresholds outlined in the Act are met. Subclauses (b) to (d) of Section 104(4) provide monetary thresholds for cognizable offences, while subclauses (a) and (c) to

(e) of Section 104(6) provide those for non-bailable offences. The "reasons to believe" must include a computation and/or an explanation, based on factors such as the goods seized, from which a conclusion of guilt can be drawn. This 47 See Section 26 of the Indian Penal Code, 1860.

level of detail is crucial, as it facilitates judicial review of the exercise of the power to arrest. The department's authority to arrest under Section 104 hinges on satisfying these statutory thresholds.

45. Moreover, the framework of the Customs Act clearly reflects the legislative intent to establish a distinct and unique procedure for the exercise of arrest powers by a customs officer. For example, Section 104(4), specifies only 4 categories of offences as cognizable, outlined under sub-sections (a) to (d). Section 104(5) clarifies that all other offences under the Customs Act are non- cognizable in nature, meaning that arrests for these offences cannot be made without a warrant. We have

cautioned in Arvind Kejriwal (supra) how the unbridled exercise of the power to arrest without a warrant can result in arbitrariness and errors in decision making process. A similar error made by a customs officer can lead to a frustration of the constitutional and statutory rights of the arrestee.

46. For the aforesaid reasons, we do not find any inconsistency between Section 19(1) of the PML Act and Section 104(1) of the Customs Act. We are of the opinion that principles and ratio developed in the case of Arvind Kejriwal (supra), and the principles specifically discussed and delineated in paragraphs 30 to 45 of this judgment, are equally applicable to the power of arrest under Section 104 of the Customs Act. The respondent authorities are, therefore, directed to comply with the mandate of this judgment and that of Arvind Kejriwal (supra).

47. Lastly, Section 104(1) requires that a person arrested as soon as may be is required to be informed of the grounds of such arrest. The grounds of arrest must be given in writing to the arrestee before he is produced before the Magistrate in terms of Section 104(2). This is necessary as it enables the accused to contest and challenge his arrest and seek bail from the court. To deny and not give the grounds in writing would be to deprive the accused of his right in terms of Section 104(1) and also to seek right of bail under the provisions of the Code. This interpretation would be in consonance with Article 22(1) of the Constitution which states that no person who is arrested shall be detained in custody without being informed as soon as may be of the grounds of such arrest, nor shall such arrest be denied the right to consult and to be defended by a legal practitioner of his choice.

48. In view of the aforesaid discussion, we reject the challenge to the amendments as well as provisions of the Customs Act. Reliance placed by the petitioners on the decision of this Court in Om Prakash (supra) is misconceived as the statutory provisions have undergone amendments to bring them in consonance with the law of the land. Moreover, the provisions themselves provide enough safeguards against arbitrary and wrongful arrests.

49. We shall now draw our attention to the provisions of the GST Acts.48

50. To a large extent, our reasoning and the ratio on the applicability of the Code to the Customs Act would equally apply to the GST Acts in view of Sections 4 48 We have collectively referred to the Central as well as the State GST Acts as “GST Acts”. and 5 of the Code. Sub-section (10) to Section 67 of the GST Acts postulates that the provisions of the Code relating to search and seizure shall, as far as may be, apply to search and seizure under the GST Acts, subject to the modification that for the purpose of sub-section (5) to Section 165 of the Code, the word ‘Magistrate’ shall be substituted with the word ‘Commissioner’. Section 69, which deals with the power of arrest, a provision which we will refer to subsequently, also deals with the provisions of the Code when the person arrested for any offence under the GST Acts is produced before a Magistrate. It also deals with the power of the authorised officers to release an arrested person on bail in case of non-cognizable and bailable offence, having the same power and subject to the same provisions as applicable to an officer in charge of a police station. We would, therefore, agree with the contention that the GST Acts are not a complete code when it comes to the provisions of search and seizure, and arrest, for the provisions of the Code would equally apply when they are not expressly or impliedly excluded by provisions of

the GST Acts.

51. There is no specific stipulation or provision in the GST Acts in respect of facets of investigation, inquiry or trial. This Court in Ashok Munilal Jain and Another v. Assistant Director, Directorate of Enforcement49 has held that in view of Section 4(2) of the Code, the procedure prescribed under the Code also applies to the special statutes unless the applicability is expressly barred or prohibited. The provisions of the GST Acts in this regard can be contrasted with the 49 (2018) 16 SCC 158.

Railway Property (Unlawful Possession) Act, 1966. However, in our opinion, this does not help and assist the petitioners' contention.

52. Section 69 of the GST Acts states that where a Commissioner has reasons to believe that a person has committed any offence specified in clauses (a) to (d) of sub-section (1) to Section 132, which is punishable under clauses (i) or (ii) of sub-section (1), or sub-section (2) of the said section, he may authorise any officer of central or state tax to arrest such person. Sub-section (2) requires that when a person is arrested for an offence specified in sub-section (5) to Section 132, the officer authorised to arrest, must inform the person of the grounds of arrest and produce him before the Magistrate within 24 hours.

53. Section 132 of the GST Acts deals with punishment of offences and reads as under:

> "132. Punishment for certain offences.—(1) Whoever commits, or causes to commit and retain the benefits arising out of, any of the following offences, namely:—
>
> (a) supplies any goods or services or both without issue of any invoice, in violation of the provisions of this Act or the rules made thereunder, with the intention to evade tax;
>
> (b) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act, or the rules made thereunder leading to wrongful availment or utilisation of input tax credit or refund of tax;
>
> (c) avails input tax credit using the invoice or bill referred to in clause (b) or fraudulently avails input tax credit without any invoice or bill;
>
> (d) collects any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;
>
> (e) evades tax or fraudulently obtains refund and where such offence is not covered under clauses (a) to (d);
>
> (f) falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information with an intention to evade payment of tax due under this Act;

(h) acquires possession of, or in any way concerns himself in transporting, removing, depositing, keeping, concealing, supplying, or purchasing or in any other manner deals with, any goods which he knows or has reasons to believe are liable to confiscation under this Act or the rules made thereunder;

(i) receives or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reasons to believe are in contravention of any provisions of this Act or the rules made thereunder;

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

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

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

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

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

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

(3) The imprisonment referred to in clauses (i), (ii) and (iii) of sub-

section (1) and sub-section (2) shall, in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the Court, be for a term not less than six months. (4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), all offences under this Act, except the offences referred to in sub-section (5) shall be non-cognizable and bailable.

(5) The offences specified in clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) and punishable under clause (i) of that sub-section shall be cognizable and non-bailable. (6) A person shall not be prosecuted for any offence under this section except with the previous sanction of the Commissioner. Explanation.—For the purposes of this section, the term "tax" shall include the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or refund wrongly taken under the provisions of this Act, the State Goods and Services Tax Act, the Integrated Goods and Services Tax Act or the Union Territory Goods and Services Tax Act and cess levied under the Goods and Services Tax (Compensation to States) Act."

54. Sub-section (1) to Section 132 consists of as many as 9 clauses in the form of clauses (a) to (l). Offences under the said clauses are then graded in clauses

(i) to (iii) depending upon the amount of tax evaded, the amount of input tax wrongly availed or utilised, or the amount of refund wrongly taken. In case of clause (i) where the amount exceeds Rs.500 lakhs, the punishment may extend to imprisonment for five years and with fine; where the amount is less than Rs.500 lakhs but exceeds Rs. 200 lakhs, the punishment may extend to imprisonment for three years and with fine. Where the amount of tax is less than Rs. 200 lakhs but exceeds Rs. 100 lakh, the punishment may extend to imprisonment for one year and with fine. Clause (iv) to Section 132(1) deals with cases where the accused commits or abets the commission of an offence specified in clause (f) and provides a punishment which may extend to imprisonment for six months, with or without fine. Sub-section (2) to Section 132 deals with repeat offenders. Sub-section (3) to Section 132 requires that the minimum term of imprisonment for the offences under clauses (i) to (iii) of sub-section (1) and sub-section (2), in the absence of special and adequate reasons to the contrary to be recorded by the court, shall not be for less than six months.

55. Sub-section (4) to Section 132, an important provision for our consideration, states that notwithstanding anything in the Code, all offences under the GST Act, except the offences referred to in sub-section (5), are non-cognizable and bailable. Thus, non-cognizable offences have been made bailable. Sub-section (4) to Section 132 has to be read in light of the dictum of Om Prakash (supra) which decision the legislature was fully aware and conscious of when they enacted the GST Acts. This is also clear from sub-section (5) to Section 132 which states that the offences specified under clauses (a) to (d) of sub-section (1) to Section 132 and punishable under clause (i) of that sub-section are cognizable and non-bailable. Thus, only when the offence falls under the limited categories specified in clauses (a) to (d) of sub-section (1) to Section 132, and, when the amount of tax evaded, amount of input tax credit wrongly availed or utilised, or the amount of refund wrongly taken exceeds Rs.500 lakhs, that the offence is non-bailable and cognizable. At this stage, we must note the submission made on behalf of the Revenue that in cases of bailable and non- cognizable offences, the central/state officers do not make arrests. Arrests are made only when the offence is non-bailable and cognizable, satisfying the conditions of sub-section (5) to Section 132, as specified in clauses (a) to (d) of sub-section (1) to Section 132 of the GST Acts.

56. It is clear from the aforesaid provisions that, to pass an order of arrest in case of cognizable and non-cognizable offences, the Commissioner must satisfactorily show, vide the reasons to believe recorded by him, that the person to be arrested has committed a non-bailable offence and that the

pre-conditions of sub-section (5) to Section 132 of the Act are satisfied. Failure to do so would result in an illegal arrest. With regard to the submission made on behalf of the Revenue that arrests are not made in case of bailable offences, in our considered view, the Commissioner, while recording the reasons to believe should state his satisfaction and refer to the 'material' forming the basis of his finding regarding the commission of a non-bailable offence specified in clauses

(a) to (d) of sub-section (1) to Section 132. The computation of the tax involved in terms of the monetary limits under clause (i) of sub-section (1), which make the offence cognizable and non-bailable, should be supported by referring to relevant and sufficient material.

57. The aforesaid exercise should be undertaken in right earnest and objectively, and not on mere ipse dixit without foundational reasoning and material. The arrest must proceed on the belief supported by reasons relying on material that the conditions specified in sub-section (5) of Section 132 are satisfied, and not on suspicion alone. An arrest cannot be made to merely investigate whether the conditions are being met. The arrest is to be made on the formulation of the opinion by the Commissioner, which is to be duly recorded in the reasons to believe. The reasons to believe must be based on the evidence establishing – to the satisfaction of the Commissioner – that the requirements of sub-section (5) to Section 132 of the GST Act are met.

58. Our attention was drawn to the judgment of the High Court of Delhi in Makemytrip (India) Private Limited and Another v. Union of India and Others,50 which is a decision interpreting the power of arrest under the Finance Act, 1994. These provisions are related to service tax. Excise duty, service tax, and other taxes are subsumed under the GST regime. Accordingly, we are in agreement with the findings recorded in this decision to the extent that the power of arrest should be used with great circumspection and not casually. Further, as in the case of service tax, the power of arrest is not to be used on mere suspicion or doubt, or for even investigation, when the conditions of sub-section (5) to Section 132 of the GST Acts are not satisfied.

59. However, relying upon the judgment in the case of Makemytrip (supra), it has been submitted on behalf of the petitioners, that the power under sub-section (5) to Section 132 cannot be exercised unless the procedure under Section 73 of the GST Act is completed and an assessment order is passed quantifying 50 2016 SCC OnLine Del 4951.

the tax evaded or erroneously refunded or input tax credit wrongly availed.

According to us, this contention should not be accepted as a general or broad proposition. We would accept that normally the assessment proceedings would quantify the amount of tax evaded, etc. and go on to show whether there is any violation in terms of clauses (a) to (d) to sub-section (1) of Section 132 of the GST Acts and that clause (i) to sub-section (1) is attracted. But there could be cases where even without a formal order of assessment, the department/Revenue is certain that it is a case of offence under clauses (a) to

(d) to sub-section (1) of Section 132 and the amount of tax evaded, etc. falls within clause (i) of sub-section (1) to Section 132 of the GST Acts with sufficient degree of certainty. In such cases, the

Commissioner may authorise arrest when he is able to ascertain and record reasons to believe. As indicated above, the reasons to believe must be explicit and refer to the material and evidence underlying such opinion. There has to be a degree of certainty to establish that the offence is committed and that such offence is non-bailable. The principle of benefit of doubt would equally be applicable and should not be ignored either by the Commissioner or by the Magistrate when the accused is produced before the Magistrate.

60. The findings and the ratio recorded in paragraphs 30 to 47 above with reference to the Customs Act would equally apply insofar as maintenance of records as well as obligations of the arresting officer and rights of the accused/person arrested are concerned. Compliance in this regard must be made.

61. The Central Board of Indirect Taxes and Customs (GST-Investigation Wing), has accepted the said position vide circular dated 17.08.2022, the relevant portion of which reads as under:

> “ F.No. GST/INV/Instructions/2021-22
> GST-Investigation Unit
> 17th August 2022
>
> Instruction No. 02/2022-23 [GST – Investigation] Subject: Guidelines for arrest and bail in relation to offence punishable under the CGST Act, 2017 – reg.
>
> Hon’ble Supreme Court of India in its judgment dated 16th August, 2021 in Criminal Appeal No. 838 of 2021, arising out of SLP (Crl.) No. 5442/2021, has observed as follows:
>
> > “We may note that personal liberty is an important aspect of our constitutional mandate. The occasion to arrest an accused during investigation arises when custodial investigation becomes necessary or it is a heinous crime or where there is a possibility of influencing the witnesses or accused may abscond. Merely because an arrest can be made because it is lawful does not mandate that arrest must be made. A distinction must be made between the existence the existence of the power to arrest and the justification for exercise of it. If arrest is made routine, it can cause incalculable harm to the reputation and self-esteem of a person. If the Investigating Officer has no reason to believe that the accused will abscond or disobey summons and has, in fact, throughout cooperated with the investigation we fail to appreciate why there should be a compulsion on the officer to arrest the accused.” xx xx xx
> >
> > 3. Conditions precedent to arrest:
> >
> > 3.1 Sub-section (1) of Section 132 of CGST Act, 2017 deals with the punishment for offences specified therein. Sub-section (1) of Section 69 gives the power to the Commissioner to arrest a person where he has reason to believe that the alleged offender 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 clause (ii) of subsection (1), or sub-

section (2) of the Section 132 of CGST Act, 2017. Therefore, before placing a person under arrest, the legal requirements must be fulfilled. The reasons to believe to arrive at a decision to place an alleged offender under arrest must be unambiguous and amply clear. The reasons to believe must be based on credible material. 3.2 Since arrest impinges on the personal liberty of an individual, the power to arrest must be exercised carefully. The arrest should not be made in routine and mechanical manner. Even if all the legal conditions precedent to arrest mentioned in Section 132 of the CGST Act, 2017 are fulfilled, that will not, ipso facto, mean that an arrest must be made. Once the legal ingredients of the offence are made out, the Commissioner or the competent authority must then determine if the answer to any or some of the following questions is in the affirmative:

3.2.1 Whether the person was concerned in the non-

bailable offence or credible information has been received, or a reasonable suspicion exists, of his having been so concerned?

3.2.2 Whether arrest is necessary to ensure proper investigation of the offence?

3.2.3 Whether the person, if not restricted, is likely to tamper the course of further investigation or is likely to tamper with evidence or intimidate or influence witnesses?

3.2.4 Whether person is mastermind or key operator effecting proxy/ benami transaction in the name of dummy GSTIN or non-existent persons, etc. for passing fraudulent input tax credit etc.?

3.2.5 As unless such person is arrested, his presence before investigating officer cannot be ensured.

3.3 Approval to arrest should be granted only where the intent to evade tax or commit acts leading to availment or utilization of wrongful Input Tax Credit or fraudulent refund of tax or failure to pay amount collected as tax as specified in sub-section (1) of Section 132 of the CGST Act 2017, is evident and element of mens rea / guilty mind is palpable.

3.4 Thus, the relevant factors before deciding to arrest a person, apart from fulfillment of the legal requirements, must be that the need to ensure proper investigation and prevent the possibility of tampering with evidence or intimidating or influencing witnesses exists.

3.5 Arrest should, however, not be resorted to in cases of technical nature i.e. where the demand of tax is based on a difference of opinion regarding interpretation of Law. The prevalent practice of assessment could also be one of the determining factors while ascribing intention to evade tax to the alleged offender. Other factors influencing the decision to arrest could be if the alleged offender is co-operating in the investigation, viz. compliance to summons, furnishing of documents called for, not giving evasive replies, voluntary payment of tax etc. xx xx xx”

62. The circular also refers to the procedure of arrest and that the Principal Commissioner/Commissioner has to record on the file, after considering the nature of the offence, the role of the person involved, the evidence available and that he has reason to believe that the

person has committed an offence as mentioned in Section 132 of the GST Act. The provisions of the Code, read with Section 69(3) of the GST Acts, relating to arrest and procedure thereof, must be adhered to. Compliance must also be made with the directions in D.K. Basu (supra). The format of arrest, as prescribed by the Central Board of Indirect Taxes and Customs in Circular No. 128/47/2019-GST dated 23.12.2019, has also been referred to in this Instruction. Therefore, the arrest memo should indicate the relevant section(s) of the GST Act and other laws. In addition, the grounds of arrest must be explained to the arrested person and noted in the arrest memo. This instruction regarding the grounds of arrest came to be amended by the Central Board of Indirect Taxes and Customs (GST- Investigation Wing) vide Instruction No. 01/2025-GST dated 13.01.2025 (GST/INV/Instructions/21-22). The circular dated 13.01.2025 now mandates that the grounds of arrest must be explained to the arrested person and also be furnished to him in writing as an Annexure to the arrest memo. The acknowledgement of the same should be taken from the arrested person at the time of service of the arrest memo. Instruction 02/2022-23 GST (Investigation) dated 17.08.2022 further lays down that a person nominated or authorised by the arrested person should be informed immediately, and this fact must be recorded in the arrest memo. The date and time of the arrest should also be mentioned in the arrest memo. Lastly, a copy of the arrest memo should be given to the person arrested under proper acknowledgement. The circular also makes other directions concerning medical examination, the duty to take reasonable care of the health and safety of the arrested person, and the procedure of arresting a woman, etc. It also lays down the post-arrest formalities which have to be complied with. It further states that efforts should be made to file a prosecution complaint under Section 132 of the GST Acts at the earliest and preferably within 60 days of arrest, where no bail is granted. Even otherwise, the complaint should be filed within a definite time frame. A report of arrests made must be maintained and submitted as provided in paragraph 6.1 of the Instruction. The aforesaid directions in the Circular/instruction should be read along with the specific directions outlined in the earlier judgments of this Court and the present judgment.

63. One of the assertions and allegations made on behalf of the petitioners is that the parties are compelled and coerced to admit and make payment of tax in view of the threat of arrest. This is in spite of the fact that there is no assessment or adjudication as to the alleged demand.

64. In this regard, we may refer to the circular F.No.GST/INV/Instructions/2022- 2023 (Instruction No. 01/2022-23) dated 25.05.2022 issued by the Central Board of Indirect Taxes and Customs referring to the taxpayers depositing partial or full GST liability during the course of search, inspection or investigation. The relevant extracts of the circular reads:

“ F.No. GST/INV/Instructions/2022-23
GST-Investigation Unit

25th May 2022

Instruction No. 01/2022-23 [GST – Investigation] Subject: Deposit of tax during the course of search, inspection or investigation – reg.

xx xx xx

3. It is further observed that recovery of taxes not paid or short paid, can be made under the provisions of Section 79 of CGST Act, 2017 only after following due legal process of issuance of notice and subsequent confirmation of demand by issuance of adjudication order. No recovery can be made unless the amount becomes payable in pursuance of an order passed by the adjudicating authority or otherwise becomes payable under the provisions of CGST Act and rules made therein. Therefore, there may not arise any situation where "recovery" of the tax dues has to be made by the tax officer from the taxpayer during the course of search, inspection or investigation, on account of any issue detected during such proceedings. However, the law does not bar the taxpayer from voluntarily making payment of any tax liability ascertained by him or the tax officer in respect of such issues, either during the course of such proceedings or subsequently.

4. Therefore, it is clarified that there may not be any circumstance necessitating 'recovery' of tax dues during the course of search or inspection or investigation proceedings. However, there is also no bar on the taxpayers for voluntarily making the payments on the basis of ascertainment of their liability on non-payment/short payment of taxes before or at any stage of such proceedings. The tax officer should however inform the taxpayers regarding the provisions of voluntary tax payments through DRC-03.

xx xx xx"

65. The circular notes that instances have been noticed where allegations of force and coercion were made by the officers for making recovery during the course of search, inspection and investigation. Some of the taxpayers had accordingly approached the High Courts. Reference is made to Section 79 of the GST Acts to state that recovery can be made only after following the due process of issuance of notice and subsequent confirmation of demand by issuance of an adjudicating order. On the last aspect, reference is made to Sections 73(5) and 74(5) of the GST Acts, which help the taxpayers in discharging their admitted liability, self-ascertained or as ascertained by the tax officer, without having to bear the burden of interest under Section 50 of the GST Acts. The statement in the circular that an assessee may voluntarily deposit tax as noticed was a cause of discussion before us. In this regard, our attention was drawn to Section 74(5) of the GST Acts, which states that a person chargeable with tax may, before service of notice under sub-section (1), pay the amount of tax along with interest payable under Section 50 and a penalty equivalent to 15% of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer, and inform the proper officer in writing of such payment. Sub- section (5) to Section 74 relates to voluntary payment, and does not postulate payment under force, coercion or threat of arrest. The aforesaid circulars are binding and should be adhered to in letter and spirit. The authorities must exercise due care and caution as coercion and threat to arrest would amount to a violation of fundamental rights and the law of the land. It is desirable that the Central Board of Indirect Taxes and Customs promptly formulate clear guidelines to ensure that no taxpayer is threatened with the power of arrest for recovery of tax in the garb of self-payment. Way back in the year 1978, a three Judges Bench of this Court in Nandini Satpati v. P.L. Dani and Another51 had observed as under:

> "57. (...) We are disposed to read "compelled testimony" as evidence procured not merely by physical threats or violence but by psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidatory methods and the like — not legal penalty for violation. (...)"

66. We called upon the Revenue to submit data in this regard. A chart has been filed before us and the same is reproduced below:

> Total Number of GST Offence Cases Period: July 2017 to March 2024 Period Formation No. of Cases Detection Recovery No. of Arrest (In Rs. Cr.) (In Rs. Cr.) 51 (1978) 2 SCC 424.

Total Number of ITC Fraud Cases Period: July 2017 to March 2024 Period Formation No. of Cases Detection Recovery No. of Arrest (In Rs. Cr.) (In Rs. Cr.)

67. Analysing the aforesaid data indicates that the number of people arrested is normally in hundreds or more.52 However, it is to be noted that the figures with regard to the tax demand and the tax collected would, in fact, indicate some force in the petitioners' submission that the assessees are compelled to pay tax as a condition for not being arrested. Sub-section (5) to Section 74 of the GST Acts gives an option to the assessee and does not confer any right on the tax authorities to compel or extract tax by threatening arrest. This would be unacceptable and violative of the rule of law.

68. We would observe that in case there is a breach of law, and the assessees are put under threat, force or coercion, the assessees would be entitled to move the courts and seek a refund of tax deposited by them. The department would also take appropriate action against the officers in such cases.

69. However, we may clarify that a person summoned under Section 70 of the GST Acts is not per se an accused protected under Article 20(3) of the Constitution, as has been held in the case of Deepak Mahajan (supra). This is because the prohibitive sweep of Article 20(3) of the Constitution does not go back to the stage of interrogation. Reference in this regard has been placed on Poolpandi and Others v. Superintendent, Central Excise and Others53 and Dukhishyam Benupani, Asst. Director, Enforcement Directorate (FERA) v. 52 The data reflects that the number of arrests is inversely proportional to the percentage of amount recovered against the amount detected. i.e., when payments are made, the power of arrest is not being exercised. Further, the amount classified as the 'detection' amount is not the amount ascertained through assessment/adjudication, but an amount quantified by the department/authority conducting search and seizure.

53 (1992) 3 SCC 259.

Arun Kumar Bajoria.54 It is obvious that the investigation must be allowed to proceed in accordance with law and there should not be any attempt to dictate the investigator and at the same time, there should not be any misuse of power and authority.

70. We also wish to clarify that the power to grant anticipatory bail arises when there is apprehension of arrest. This power, vested in the courts under the Code, affirms the right to life and liberty under Article 21 of the Constitution to protect persons from being arrested. Thus, in Gurbaksh Singh Sibbia (supra), this Court had held that when a person complains of apprehension of arrest and approaches for an order of protection, such application when based upon facts which are not vague or general allegations, should be considered by the court to evaluate the threat of apprehension and its gravity or seriousness. In appropriate cases, application for anticipatory bail can be allowed, which may also be conditional. It is not essential that the application for anticipatory bail should be moved only after an FIR is filed, as long as facts are clear and there is a reasonable basis for apprehending arrest. This principle was confirmed recently by a Constitution Bench of Five Judges of this Court in Sushila Aggarwal and others v. State (NCT of Delhi) and Another.55 Some decisions56 of this Court in the context of GST Acts which are contrary to the aforesaid ratio should not be treated as binding.

54 (1998) 1 SCC 52.

55 (2020) 5 SCC 1.

56 State of Gujarat v. Choodamani Parmeshwaran Iyer and Another, 2023 SCC OnLine SC 1043; Bharat Bhushan v. Director General of GST Intelligence, Nagpur Zonal Unit Through Its Investigating officer, SLP (Crl.) No. 8525/2024.

71. The petitioners contend that Section 162(1) of the GST Acts permits compounding of offences and therefore, the ratio in Makemytrip (supra) should be applied to the GST Acts. The decision in Makemytrip (supra), we would observe, itself carves out an exception when an assessment order under the Finance Act may not be required, namely cases where a person who is shown to be a habitual evader as one who has not filed service tax returns for a continuous period of time, who has a history of repeated defaults for which there have been fines, penalties imposed, and prosecutions launched, etc. It is possible to ascertain these facts from past records. Thereafter, it is observed that it might be possible for the department to justify resorting to coercive provisions but the notes on the file must offer convincing justification for resorting to such an extreme measure. It is this latter aspect which according to us is of relevance. The petitioners further submitted that till an assessment order was passed under Section 74 of the GST Acts, the liability cannot be quantified and hence an assessee cannot move an application for compounding of offences. We would reject the said submission because there is a difference between the compounding of offences and the arrest of a person. We have already stipulated sufficient safeguards to ensure that no arrests are made till the Commissioner is able to show and establish, on the basis of material and evidence, that the conditions of clauses (a) to (d) as well as clause

(i) of sub-section 1 to Section 132 of the GST Acts are satisfied and therefore the offences are non-bailable.

72. The last issue for our determination concerns the constitutional validity of Sections 69 and 70 of the GST Acts which provide for the power to arrest and the power to summon. The petitioners assail

the vires of these provisions on the grounds of legislative competence. It is submitted that Article 246-A of the Constitution while conferring legislative powers on Parliament and State Legislatures to levy and collect GST, does not explicitly authorize the violations thereof to be made criminal offences. Our attention was drawn to Lists I and II of the Seventh Schedule to the Constitution which demarcate the legislative fields for the Union and the States to enact laws and make violations of the enactments as offences. Referring to Entry 93 of List I to the Seventh Schedule, it is submitted that the Parliament can enact criminal provisions only for the matters in List I. It is further submitted that the power to summon, arrest and prosecute are not ancillary and incidental to the power of levying GST and therefore, are beyond the legislative competence of the Parliament under Article 246-A of the Constitution.

73. This argument, in our opinion, must be rejected. Article 246-A of the Constitution is a special provision defining the source of power and the field of legislation for the Parliament and the State Legislature with respect to GST:

> "246-A. Special provisions with respect to goods and services tax.—(1) Notwithstanding anything contained in Articles 246 and 254, Parliament, and, subject to clause (2), the legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.
>
> (2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.

Explanation.—The provisions of this article, shall, in respect of goods and services tax referred to in clause (5) of Article 279- A, take effect from the date recommended by the Goods and Services Tax Council."

74. This Court in Union of India and Others v. VKC Footsteps (India) Private Ltd.,57 took note of the change brought about by Article 246-A of the Constitution and observed:

> "52.1. Firstly, Article 246-A defines the source of power as well as the field of legislation (with respect to goods and services tax) obviating the need to travel to the Seventh Schedule.

52.2. Secondly, the provisions of Article 246-A are available both to Parliament and the State Legislatures, save and except for the exclusive power of Parliament to enact GST legislation where the supply of goods or services takes place in the course of inter-State trade or commerce. (...)"

75. The Parliament, under Article 246-A of the Constitution, has the power to make laws regarding GST and, as a necessary corollary, enact provisions against tax evasion. Article 246-A of the Constitution is a comprehensive provision and the doctrine of pith and substance applies. The impugned provisions lay down the power to summon and arrest, powers necessary for the effective levy and collection of GST. Time and again this Court has held that while deciding the issue of

legislative competence, entries should not be read in a narrow or pedantic sense but given their broadest meaning and the widest amplitude because they are intrinsic to a machinery of government.58 The ambit of an 57 (2022) 2 SCC 603.

58 Mineral Area Development Authority and Another v. Steel Authority of India and Another, (2024) 10 SCC 1; Hans Muller of Nurenburg v. Superintendent, Presidency Jail, Calcutta and Others, (1955) 1 SCR 1284; Elel Hotels & Investments Ltd. and Others v. Union of India, (1989) 3 SCC 698; State of Rajasthan v. G. Chawla and Another, 1958 SCC OnLine SC 33. entry or article laying down the legislative field extends to all ancillary and subsidiary matters which fairly and reasonably can be said to be comprehended in it.59 This settled dictum regarding the interpretation of legislative entries equally applies to the special provision of Article 246-A of the Constitution. In the context of the legislative power to levy and collect tax, a Constitution Bench of Seven Judges in R.S. Joshi, Sales Tax Officer, Gujarat and Others v. Ajit Mills Limited and Another,60 held:

> "47. The principle in construing words conferring legislative power is that the most liberal construction should be put on the words so that they may have effect in their widest amplitude. None of the items in the List is to be read in a narrow restricted sense. Each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. All powers necessary for the levy and collection of the tax concerned and for seeing that the tax is not evaded are comprised within the legislative ambit of the Entry as ancillary or incidental. It is also permissible to levy penalties for attempted evasion of taxes or default in the payment of taxes properly levied." Thus, a penalty or prosecution mechanism for the levy and collection of GST, and for checking its evasion, is a permissible exercise of legislative power. The GST Acts, in pith and substance, pertain to Article 246-A of the Constitution and the powers to summon, arrest and prosecute are ancillary and incidental to the power to levy and collect goods and services tax. In view of the aforesaid, the vires challenge to Sections 69 and 70 of the GST Acts must fail and is accordingly rejected.

59 The United Provinces v. Mst. Atiqa Begum and Others, AIR 1941 FC 16 : 1940 SCC OnLine FC 11; Mineral Area Development Authority (supra); Express Hotels (P) Ltd. v. State of Gujarat and Another, (1989) 3 SCC 677; Sardar Baldev Singh v. Commissioner of Income Tax Delhi and Ajmer, 1960 SCC OnLine SC 147.

60 (1977) 4 SCC 98.

76. In some of the cases, Section 135 of the GST Acts which relates to culpable mental intent has been challenged. We are not examining the said aspect as prosecution has not been initiated in any of these cases. If any person is aggrieved and is advised to challenge the said Section, he/she may do so before the High Court.

77. In view of the aforesaid discussion the challenge to the constitutional validity as also the right of the authorised officers under the Customs Act and the GST Acts to arrest are rejected and dismissed

with elucidation and clarification on the pre-conditions and when and how the power of arrest is to be exercised.

78. We, accordingly, answer the question in the aforesaid terms. The matters are directed to be listed before an appropriate Bench in the week commencing 17.03.2025 for final hearing and disposal.

.....CJI.

(SANJIV KHANNA) .....J. (M.M. SUNDRESH) NEW DELHI, FEBRUARY 27, 2025.

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL ORIGINAL JURISDICTION
WRIT PETITION (CRIMINAL) NO. 336 OF 2018

RADHIKA AGARWAL .... PETITIONER

Versus

UNION OF INDIA AND OTHERS .... RESPONDENTS

WITH

CONNECTED MATTERS

JUDGMENT

BELA M. TRIVEDI, J.

1. While completely agreeing with the well-considered opinion expressed by the Hon'ble Chief Justice, on when and how the power of arrest should be exercised by the authorized officers, I have thought it expedient to pen down my views on the jurisdictionary powers of judicial review under Article 32 and Article 226 of the Constitution of India, when the arrest of a person is challenged.

2. At the outset, it may be noted that as well settled, though the powers of judicial review under Article 32 and 226 of the Constitution of India are very wide and untrammeled and are vested in the superior courts to protect the legal and fundamental rights of the citizens and even non-citizens, the courts over the years have evolved certain self-restraints for exercising these powers. They have

done so in the interest of the administration of justice and for better and more efficient and informed exercise of the said powers. The self-restraints or limitations are imposed as a matter of prudence, propriety, policy and practice. The extra- ordinary jurisdiction under Article 32 and 226, by its very nature is used sparingly and in the extraordinary circumstances.

3. It may further be noted that again as well settled, the Fundamental Rights under Part-III of the Constitution are part of the integrated scheme of the Constitution. They are not exclusive of each other but operate, and are, subject to each other. The action complained of must satisfy the tests of all the said rights so far as they are applicable to the individual cases. Though Article 21 grants a person right to life and personal liberty, it permits the State to deprive a person of his life and personal liberty, provided it is done strictly according to the procedure established by law. This permission is expressly controlled by Article 22 in cases both of arrest and detention. Therefore, reading the Articles 21 and 22 together, it is very clear that the Constitution permits both punitive and preventive detention provided it is according to the procedure established by law made for the purpose, and if both the law and the procedure laid down by the law, are valid.

4. Whenever the jurisdiction of the High Court or the Supreme Court is invoked under Article 226 or Article 32 as the case may be, challenging the punitive or preventive detention, the Court is expected to take into consideration the nature of right infringed, the scope and object of the legislation under which such arrest or detention is made, the need to balance the rights and interests of the individual as against those of the society, the circumstances under which and the persons by whom the jurisdiction is invoked etc. In exercise of their discretionary jurisdiction, the High Courts and the Supreme Court do not, as courts of appeal or revision, correct errors of law or of facts. The judicial intervention is warranted only in exceptional circumstances when the arrest is prima facie found to be malafide; or is prompted by extraneous circumstances, or is made in contravention of or in breach of provisions of the concerned statute; or when the authority acting under the concerned statute does not have the requisite authority etc.

5. In this regard, a beneficial reference of the very apt observations made in Additional Secretary to the Government of India and Others vs. Smt. Alka Subhash Gadia and Another1, deserves to be made.

The three judge bench in the said case while discussing the Law on Preventive Detention, observed as under:-

> “11. The provisions of Articles 21 and 22 read together, therefore, make it clear that a person can be deprived of his life or personal liberty according to procedure established by law, and if the law made for the purpose is valid, the person who is deprived of his life or liberty has to challenge his arrest or detention, as the case may be, according to the provisions of the law under which he is arrested or detained. This proposition is valid both for punitive and preventive detention. The difference between them is made by the limitations placed by sub- clauses (1) and (2) on the one hand and sub-

> clauses (4) to (7) on the other of Article 22, to which we have already referred above. What is necessary to remember for our purpose is that the Constitution permits both punitive and preventive detention provided it is according to procedure established by law made for the (1992) Supp (1) SCC 496 purpose and if both the law and the procedure laid down by it, are valid.

12. This is not to say that the jurisdiction of the High Court and the Supreme Court under Articles 226 and 32 respectively has no role to play once the detention — punitive or preventive — is shown to have been made under the law so made for the purpose. This is to point out the limitations which the High Court and the Supreme Court have to observe while exercising their respective jurisdiction in such cases. These limitations are normal and well known, and are self-imposed as a matter of prudence, propriety, policy and practice and are observed while dealing with cases under all laws. Though the Constitution does not place any restriction on these powers, the judicial decisions have evolved them over a period of years taking into consideration the nature of the right infringed or threatened to be infringed, the scope and object of the legislation or of the order or decision complained of, the need to balance the rights and interests of the individual as against those of the society, the circumstances under which and the persons by whom the jurisdiction is invoked, the nature of relief sought etc."

6. The safeguards provided in the Special Acts against the arrest of a person, are provided keeping in view the fundamental rights of life and personal Liberty of a person enshrined in the Constitution of India. It cannot be gainsaid that such safeguards provided against the arrest of a person under the Special Acts or the Code of Criminal Procedure, must be observed not only to protect his fundamental right of personal liberty but also to prevent a potential misuse of the power to arrest a person at the instance of the authorized officer. The safeguards are - the requirement to have "material" in possession of the authorized officer, to form an opinion and record in writing the "reasons to believe" that the person arrested is guilty of an offence or has committed an offence as the case may be, under the provisions of the concerned Act, and the requirement to inform the person arrested, as soon as may be, of the grounds of arrest. As per Article 21 of the Constitution, no person could be deprived of his life or personal liberty except according to procedure established by law. Since, the personal liberty of a person is deprived, when he is arrested, the procedure laid down in the Statute while depriving his personal liberty, has to be followed. Similarly, as per Article 22(1) of the Constitution, no person who is arrested, could be detained in custody without being informed, as soon as may be, of the grounds for such arrest.

Thus, the grounds for such arrest have to be communicated to him as soon as may be after the arrest is made. Tersely put, there has to be due compliance of the Constitutional and Statutory mandates, whenever an arrest is made of a person under the Special Acts.

7. So far as the arrest made under the Customs Act, 1962 is concerned, in Union of India Vs. Padam Narain Aggarwal and Others2, it has been observed that the power to arrest a person by a Custom officer is statutory in character and cannot be interfered with. Such power of arrest can be exercised only in those cases where the Customs officer has a reason to believe that the person is guilty of an offence punishable under the said Act. Thus, the power must be exercised on objective facts of

commission of an offence enumerated, and when the customs officer has a reason to believe that the person sought to be arrested has been guilty of commission of such offences. It has been further observed that the law on one hand allows a customs officer to exercise power to arrest a person who has committed certain offences, and on the other hand takes due care to ensure individual freedom and liberty, by laying down norms and providing safeguards so that the power of arrest is not abused or misused by the authorities.

2008 (13) SCC 305

8. So far as the arrest is made under the Prevention of Money Laundering Act, 2002 is concerned, in Vijay Madanlal Choudhary and Others Vs. Union of India and Others3, also the three Judge Bench of this Court has held inter alia that the safeguards provided in the PMLA and the pre-conditions to be fulfilled by the authorized officer before effecting arrest as contained in Section 19 of the said Act are stringent and of higher standard. Those safeguards ensure that the authorized officers do not act arbitrary, but make them accountable for their judgment about the necessity to arrest any person as being involved in the commission of offence of money laundering even before filing of the complaint before the Special Court under the Act.

9. However, when the legality of such an arrest made under the Special Acts like PMLA, UAPA, Foreign Exchange, Customs Act, GST Acts, etc. is challenged, the Court should be extremely loath in exercising its power of judicial review. In such cases, the exercise of the power should be confined only to see whether the statutory and constitutional safeguards are properly complied with or not, namely to ascertain whether the officer was an authorized officer under the Act, 2022 SCC OnLine SC 929 whether the reason to believe that the person was guilty of the offence under the Act, was based on the “material” in possession of the authorized officer or not, and whether the arrestee was informed about the grounds of arrest as soon as may be after the arrest was made. Sufficiency or adequacy of material on the basis of which the belief is formed by the officer, or the correctness of the facts on the basis of which such belief is formed to arrest the person, could not be a matter of judicial review.

10. It hardly needs to be reiterated that the power of judicial review over the subjective satisfaction or opinion of the statutory authority would have different facets depending on the facts and circumstances of each case. The criteria or parameters of judicial review over the subjective satisfaction applicable in Service related cases, cannot be made applicable to the cases of arrest made under the Special Acts. The scrutiny on the subjective opinion or satisfaction of the authorized officer to arrest the person could not be a matter of judicial review, in as much as when the arrest is made by the authorized officer on he having been satisfied about the alleged commission of the offences under the special Act, the matter would be at a very nascent stage of the investigation or inquiry. The very use of the phrase “reasons to believe” implies that the officer should have formed a prima facie opinion or belief on the basis of the material in his possession that the person is guilty or has committed the offence under the relevant special Act. Sufficiency or adequacy of the material on the basis of which such belief is formed by the authorized officer, would not be a matter of scrutiny by the Courts at such a nascent stage of inquiry or investigation.

11. As held in Adri Dharan Das vs. State of W.B.4, ordinarily arrest is a part of the process of investigation intended to secure several purposes. The accused may have to be questioned in detail regarding various facets of motive, preparation, commission and aftermath of crime and the connection of other persons, if any, in the crime. There may be circumstances in which the accused may provide information leading to discovery of material facts. It may be necessary to curtail his freedom in order to enable the investigation to proceed without hindrance and to protect witnesses and persons connected with the victim of the crime, to prevent his disappearance, (2005) 4 SCC 303 to maintain law and order in the society etc. For these or such other reasons, arrest may become an inevitable part of the process of investigation.

12. It is pertinent to note that the Special Acts are enacted to achieve specific purposes and objectives. The power of judicial review in cases of arrest under such Special Acts should be exercised very cautiously and in rare circumstances to balance individual liberty with the interest of justice and of the society at large. Any liberal approach in construing the stringent provisions of the Special Acts may frustrate the very purpose and objective of the Acts. It hardly needs to be stated that the offences under the PMLA or the Customs Act or FERA are the offences of very serious nature affecting the financial systems and in turn the sovereignty and integrity of the nation. The provisions contained in the said Acts therefore must be construed in the manner which would enhance the objectives of the Acts, and not frustrate the same. Frequent or casual interference of the courts in the functioning of the authorized officers who have been specially conferred with the powers to combat the serious crimes, may embolden the unscrupulous elements to commit such crimes and may not do justice to the victims, who in such cases would be the society at large and the nation itself. With the advancement in Technology, the very nature of crimes has become more and more intricate and complicated. Hence, minor procedural lapse on the part of authorized officers may not be seen with magnifying glass by the courts in exercise of the powers of judicial review, which may ultimately end up granting undue advantage or benefit to the person accused of very serious offences under the special Acts. Such offences are against the society and against the nation at large, and cannot be compared with the ordinary offences committed against an individual, nor the accused in such cases be compared with the accused of ordinary crimes.

13. Though, the power of judicial review keeps a check and balance on the functioning of the public authorities and is exercised for better and more efficient and informed exercise of their powers, such power has to be exercised very cautiously keeping in mind that such exercise of power of judicial review may not lead to judicial overreach, undermining the powers of the statutory authorities. To sum up, the powers of judicial review may not be exercised unless there is manifest arbitrariness or gross violation or non-compliance of the statutory safeguards provided under the special Acts, required to be followed by the authorized officers when an arrest is made of a person prima facie guilty of or having committed offence under the special Act.

.....J. [BELA M. TRIVEDI] NEW DELHI;

27th FEBRUARY, 2025