

## **Chief Justice's Court**

**Case :-** WRIT TAX No. - 834 of 2023

**Petitioner :-** Ashish Kakkar

**Respondent :-** Union Of India And Another

**Counsel for Petitioner :-** Raghav Dev Garg

**Counsel for Respondent :-** A.S.G.I.,Dhananjay Awasthi,Gopal Verma

**Hon'ble Pritinker Diwaker,Chief Justice**

**Hon'ble Ashutosh Srivastava,J.**

### **Order on Civil Misc. Stay Application:**

Sri Vikram Chaudhary, learned Senior Advocate, assisted by Sri Pranjali Krishna and Sri Raghav Dev Garg, for the petitioner, Sri Shashi Prakash Singh, learned ASGI, assisted by Sri Gopal Verma, for the Union of India and Sri Dhananjay Awasthi & Sri Lakshya Kumar Singh, for respondent no.2.

2. The main grievance in the instant writ petition is to declare Section 69 of the Central Goods and Service Tax Act, 2017 (in short 'the Act, 2017') as unconstitutional. The challenge, in this regard, is mainly on the ground that the said provision is arbitrary and *ultra vires* of Articles 14 and 21 of the Constitution of India. Alternately, it has been prayed that the impugned Section 69 of the Act, 2017 be construed in the manner suggested in the writ petition or in such manner as this Court may deem fit. The petitioner has also prayed for summoning of records and for setting aside his illegal arrest made purportedly under the impugned Section 69 of the Act, 2017. It has also been prayed that the arrest of the petitioner dated 27.6.2023 in DGGI MeZU Case No.887 of 2023 be declared illegal.

3. The interim relief prayed for is that the petitioner be released on interim/ad-interim bail in DGGI MeZU Case No.887 of 2023 pending before the Court of Special Chief Judicial Magistrate, Meerut on such terms and conditions as this Court deems fit and proper pending final disposal of the writ petition.

4. The brief facts of the case necessary for consideration of the application for interim relief are that on 26.6.2023 at 6:30 am, the officers of DGGI came to the petitioner's residence at Greater Kailash, New Delhi and after interrogation and conclusion of search, the petitioner was taken from his residence to the office at Rajendra Nagar, New Delhi and thereafter, to the office of his Chartered Accountants. Further, according to the petitioner, after the search/enquiry, he was taken to the DGGI Office in Kaushambi, Ghaziabad. It has also

been submitted by the petitioner that forcibly his confession was recorded and he was compelled to sign the same. On 27.6.2023, based on the proposal of the Investigating Team, an order was passed by the Principal Commissioner/Commissioner on 27.6.2023, agreeing with the proposal and arriving at reason to believe that the petitioner has committed offences specified under clause (b), clause (c), clause (d), clause (l) of Section 132 (1) of CGST Act and then the petitioner was arrested. On 27.6.2023, a formal arrest memo was served upon the petitioner by the Investigating Officer authorized by the Principal Commissioner, a copy whereof has been filed along with writ petition. On 28.6.2023, the petitioner was produced before the Special Chief Judicial Magistrate, Meerut, to obtain judicial custody for a period of fourteen days. As his confession was already recorded, no custodial interrogation was sought by the Department.

5. The ground taken by the petitioner is that the sanction order dated 27.6.2023 is silent regarding the requirement specified in Section 41 (1) of Cr PC or the Arrest Memo does not record any satisfaction and opinion regarding the 'necessity to arrest' and whatever reason recorded is regarding the commission of offence besides they are silent and the same ought to have been followed in the light of the general directions issued by the Supreme Court. The petitioner states that there is complete violation of the law laid down by the Apex Court in the cases of **Arnesh Kumar vs. State of Bihar**, (2014) 8 SCC 273 and **Satendra Kumar Antil vs. CBI**, (2022) 10 SCC 51.

6. Learned counsel for the petitioner has submitted that even the remand application which narrates the allegation for forming reasons to believe the commission of offence under clause (a) or clause (b) or clause (c) or clause (d) or clause (l) of sub section (1) of Section 132 of the Act, 2017, is silent about the 'necessity to arrest' and compliance of Section 41 (1) Cr PC. It has also been pleaded by the petitioner that he was neither served with any show cause notice nor adjudicated to ascertain any tax evasion before such arrest. Learned counsel has also argued that in almost similar facts and circumstances of the case, the Bombay High Court in a writ petition filed by **Daulat Samirmal Mehta vs Union of India**, 2021 (55) GSTL 264 (Bom) has held that Section 41 (1) of Cr PC has to be complied with in every arrest under the Act, 2017. The Court has also granted bail to the petitioner therein by imposing certain conditions, including the condition of depositing some amount. The order passed by the Bombay High Court reads as under:

*"41. In the light of the above discussions and having reached the conclusion as above, we direct that the petitioner Mr.*

*Daulat Samirmal Mehta shall be enlarged on bail subject to the following conditions:*

*1) petitioner shall be released on bail on furnishing cash surety of Rs.5,00,000.00 before the Additional Chief Metropolitan Magistrate, 8th Court, Esplanade, Mumbai and within two weeks of his release, to furnish two solvent sureties of the like amount before the said authority;*

*2) petitioner shall co-operate in the investigation and shall not make any attempt to interfere with the ongoing investigation;*

*3) petitioner shall not tamper with any evidence or try to influence or intimidate any witness;*

*4) petitioner shall also deposit his passport before the Additional Chief Metropolitan Magistrate, 8th Court, Esplanade, Mumbai;*

*5) within 15 days of his release, petitioner or any of the companies in which he has a substantial interest and which are under investigation, shall deposit a sum of Rs.10 crores with respondent Nos.2 and 3 which shall be without prejudice to his rights and contentions;*

*6) after the said amount is deposited, the petitioner or any of the companies in which he has a substantial interest and which are under investigation shall deposit a further amount of Rs.15 crores before respondent Nos.2 and 3 within 30 days of the first deposit which again shall be without prejudice to his rights and contentions;*

*6.1) However, the last two conditions shall be executed by the petitioner upon his release which shall not be a ground for delaying his release."*

*7. The aforesaid order was assailed before the Apex Court and by affirming the same, it has been observed by the Apex Court:*

*"The petitioner would contend that payment of substantial sum as has been ordered cannot be a pre-condition for grant of bail and bail prayer has to be considered on the basis of the merit of the petition.*

*On the above legal projection on the conditional bail order, the learned ASG submits in tandem that bail application has to be considered on its own merits and deposit of large sum of money cannot be pre-condition for bail.*

*Taking note of the aforesaid submission, we deem it appropriate to dispose of this petition and pass the following order:*

*(1) The bail order given to the petitioner stands confirmed.*

*(2) The Conditions 5 and 6, as noted above, shall not be pre-condition for release on bail.*

*However, other conditions are left undisturbed and shall be complied by the petitioner.*

*Pending application (s), if any, shall stand disposed of."*

8. It is submitted by learned counsel for the petitioner that the decision of the Division Bench of the Bombay High Court has been upheld by the Apex Court vide order dated 1.3.2023 passed in SLP (C) No.3879 of 2021. The condition imposed for depositing additional amount was, however, struck down.

9. Learned counsel for the petitioner has also argued that probably after recording the alleged confession of the petitioner, the Department is not keen to carry further investigation and that is why, only judicial remand has been requested. It has been argued that after fifteen days of the expiry of judicial remand, now the Department appears to be not keen to interrogate the petitioner.

10. Placing strong reliance upon the judgment in **Arnesh Kumar vs. State of Bihar** (supra) and **Satendra Kumar Antil vs. CBI** (supra), it has been submitted that the offence which has been registered is under clause (b), clause (c), clause (d) and clause (l) of sub-section (1) of Section 132 of the Act, 2017. According to the petitioner, even the Department is not sure as to what offence is to be registered. The petitioner has also made an attempt to satisfy this Court on the ground that he was taken into custody on 26.6.2023, but his arrest has been shown on 27.6.2023 and was produced before the Magistrate on 28.6.2023.

11. The word 'may' used in Section 69 (1) of the Act, 2017 for issuing order authorizing any officer to arrest a person, who has committed any specified offence, clearly shows the discretion which has to be exercised, if there is 'necessity to arrest'. No such satisfaction regarding 'necessity to arrest', required under Section 41 (1) of Cr PC, appears to have been shown in the arrest memo. Further, there is no mention of any past conduct of the petitioner, showing that, in any manner, he has not cooperated in the investigation or has created any obstruction in the investigation.

12. In **Satendra Kumar Antil** (supra), it has been held by the Apex Court:

*"100. In conclusion, we would like to issue certain directions. These directions are meant for the investigating agencies and also for the courts. Accordingly, we deem it appropriate to issue the following directions, which may be subject to State amendments.:*

*100.1. The Government of India may consider the introduction of a separate enactment in the nature of a Bail Act so as to streamline the grant of bails.*

*100.2. The investigating agencies and their officers are duty-bound to comply with the mandate of Section 41 and 41A of the Code and the directions issued by this Court in Arnesh Kumar (supra). Any dereliction on their part has to be brought to the notice of the higher authorities by the court followed by appropriate action.*

*100.3. The courts will have to satisfy themselves on the compliance of Section 41 and 41A of the Code. Any non-compliance would entitle the accused for grant of bail.*

*100.4. All the State Governments and the Union Territories are directed to facilitate standing orders for the procedure to be followed under Section 41 and 41A of the Code while taking note of the order of the High Court of Delhi dated 07.02.2018 in Writ Petition (C) No. 7608 of 2018 and the standing order issued by the Delhi Police i.e. Standing Order No. 109 of 2020, to comply with the mandate of Section 41A of the Code.*

*100.5. There need not be any insistence of a bail application while considering the application under Sections 88, 170, 204 and 209 of the Code.*

*100.6. There needs to be a strict compliance of the mandate laid down in the judgment of this court in Siddharth vs. State of UP, (2022) 1 SCC 676.*

*100.7. The State and Central Governments will have to comply with the directions issued by this Court from time to time with respect to constitution of special courts. The High Court in consultation with the State Governments will have to undertake an exercise on the need for the special courts. The vacancies in the position of Presiding Officers of the special courts will have to be filled up expeditiously.*

*100.8. The High Courts are directed to undertake the exercise*

*of finding out the under trial prisoners who are not able to comply with the bail conditions. After doing so, appropriate action will have to be taken in light of Section 440 of the Code, facilitating the release.*

*100.9. While insisting upon sureties the mandate of Section 440 of the Code has to be kept in mind.*

*100.10. An exercise will have to be done in a similar manner to comply with the mandate of Section 436A of the Code both at the district judiciary level and the High Court as earlier directed by this Court in **Bhim Singh vs. Union of India**, (2015) 13 SCC 605, followed by appropriate orders.*

*100.11. Bail applications ought to be disposed of within a period of two weeks except if the provisions mandate otherwise, with the exception being an intervening application. Applications for anticipatory bail are expected to be disposed of within a period of six weeks with the exception of any intervening application."*

13. The Bombay High Court has categorically held that the 'necessity to arrest' and compliance of Section 41 (1) of Cr PC must be complied with in each and every case of arrest. Further, the order passed by the Court in writ jurisdiction in the case of **Daulat Samirmal Mehta vs Union of India** has been approved by the Apex Court, with some modifications.

14. Opposing the prayer for interim relief, learned counsel for the respondents submits that the petitioner is the mastermind involving creation of 92 fake GST Forms and passing of fake Input Tax Credit (ITC) to the tune of Rs.88 crores. Searches of the premises of 16 such firms have confirmed that they are unoperational. Statement of the petitioner was recorded on 26.6.2023 and 27.6.2023 and on the basis of incriminating evidence, the petitioner has been arrested. The petitioner can always apply for regular Bail before the Court below and is not entitled to any indulgence by this Court. The case laws relied upon by the petitioner are distinguishable in as much as they predominantly do not pertain to GST Act. He, thus, apprehend that the petitioner may not cooperate in the investigation and will tamper the evidence and influence the witnesses. He placed reliance upon the judgment of the Supreme Court in **The State of Kerala vs. Mahesh**, Criminal Appeal No.343 of 2021, decided on 19.3.2021.

15. In view of the aforesaid, we are of the view that there is no force in the argument raised by the Department that the release of the petitioner by this Court may hamper the investigation.

Undisputedly, the Department has merely asked for judicial custody of the petitioner and it appears that they were satisfied with the interrogation held by them till seeking of such judicial remand and till date, no request has been made by the Department before the Court that they need the petitioner for any interrogation. *Prima facie*, the conduct of the Department shows that they are satisfied with the interrogation made by them and they may not be interested to further interrogate the petitioner. Moreover, assurance has been given by the petitioner that he will cooperate in the investigation and will not, in any manner, hamper the same.

16. Yet another important aspect of the case is that even in the arrest memo, the Department is not sure as to what offence has been committed by the petitioner and they have used the words 'clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) of Section 132 of the Act, 2017'.

17. It has also been submitted by the Department that the judgment in **Satendra Kumar Antil** (supra) is *per in curium* because the Apex Court has not considered the law laid down by the Apex Court in the case of **The State of Kerala vs. Mahesh** (supra). We are surprised to hear the argument advanced by the Department that the judgment of the Apex Court in **Satendra Kumar Antil** (supra) is *per in curium*. The Department has completely misunderstood the parameters laid down by the Apex Court in **Satendra Kumar Antil** and **Arnesh Kumar** (supra). The law laid by the Apex Court in **Satendra Kumar Antil** (supra) and **Arnesh Kumar** (supra) very specifically state about the investigation and arrest of a person. Further, this law has been duly followed by all the courts.

18. In view of above, we are satisfied that the petitioner has made out a case for proper construction of Section 69 of the Act, 2017 and the issues concerning violation of statutory and constitutional procedural safeguards in the matter of arrest, do merit consideration and in the meantime, a case for bail is also made out.

19. Accordingly, the prayer for interim relief is allowed and it is directed that petitioner, Ashish Kakkar, be released on bail in DGGI MeZU Case No.887/2023 pending before the Court of Special Chief Judicial Magistrate, Meerut, on furnishing a personal bond in the sum of Rs.1.00 crore and two sureties each in the like amount to the satisfaction of the Court concerned, with the following conditions, which are being imposed in the interest of justice:

(i) The petitioner shall cooperate in the investigation in all possible manner and will produce himself before the Investigating Team as and when required except in unavoidable circumstances.

(ii) The petitioner shall not make any effort or attempt to influence any witness or tamper with any documents.

(iii) The petitioner shall deposit his Passport before the Court concerned after his release on bail, within one week, and shall not leave the Country without leave of the Court.

(iv) The petitioner shall file an undertaking to the effect that he shall not seek any adjournment on the date fixed for evidence when the witnesses are present in court. In case of default of this condition, it shall be open for the trial court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(v) The petitioner shall remain present before the trial court on each date fixed, either personally or through his counsel. In case of his absence, without sufficient cause, the trial court may proceed against him under section 229-A I.P.C.

(vi) In case, the petitioner misuses the liberty of bail during trial and in order to secure his presence proclamation under section 82 Cr.P.C., may be issued and if the petitioner fails to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against him, in accordance with law, under section 174-A I.P.C.

(vii) The petitioner shall remain present, in person, before the trial court on dates fixed for (1) opening of the case, (2) framing of charge and (3) recording of statement under section 313 Cr.P.C. If in the opinion of the trial court absence of the petitioner is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

(viii) All endeavour would be made by the Investigating Agency to conclude the investigation expeditiously.

(ix) The trial court may also make all possible effort/endeavour and try to conclude the trial within a period of one year after the release of the petitioner.

20. However, it is made clear that any willful violation of above conditions by the petitioner will have serious repercussion on his bail so granted by this court and the trial court shall be at liberty to cancel the bail, after recording the reasons for doing

so.

21. Parties may exchange their pleadings within eight weeks.

22. List the case immediately after eight weeks.

**Order Date :- 13.7.2023**

RKK/-

(Pritinker Diwaker, CJ)

(Ashutosh Srivastava, J)