

Anticipatory bail granted in case of absence of concrete incriminating evidence to implicate the assessee

The Hon'ble Kerala High Court in case of ***Abdul Shaji v. The Commissioner of Central Tax and Central Excise, The Superintendent of Central Tax and Central Excise (Order dated April 22, 2021 against Bail Application No. 220 of 2021)*** allowed anticipatory bail under Section 438 of the Code of Criminal Procedure, 1973 ("**Cr.P.C. Act**") to the assessee who apprehended arrest for an alleged offence of non-payment of GST to the tune of Rs 17.53 Crores and non-filing of GSTR 3B returns. Debunks the stance of Superintendent of Central Tax and Central Excise ("**the Respondent**") that the incriminating documents have been discovered to implicate the assessee as an accused or to proceed against him.

Facts:

Abdul Shaji ("**the Applicant**") apprehended arrest for an alleged offence of non-payment of GST to the tune of Rs 17.53 Crores and non-filing of GSTR 3B returns for the period from October, 2020 onwards. Hence, the Applicant seeks anticipatory bail.

Investigation was initiated against M/s A. R. Agencies ("**the Agency**") by Anti Evasion Unit of Cochin Commissionerate. The proprietor of the Agency, Shri. Rajoo P.A ("**the Proprietor**"), and his primary colluder, Shri. Abdul Saleem ("**the Colluder**") of Ittonam, Palakkad. Both of them were arrested and remanded to judicial custody. On questioning, the Colluder alleged that he had shared the GST login credentials of the Agency with the Applicant and the Applicant had filed GSTR-1 returns of the Agency. The Colluder also stated that the Applicant had prepared GST invoices valued at ₹ 348.7 crores using the credentials of the Agency.

Accordingly, the Applicant's residence was searched and that too in his absence. Certain blank cheques and documents were recovered from the Applicant's house. Consequently, a summons was issued to the Applicant under Section 70 of the Central Goods and Services Tax Act, 2017 ("**CGST Act**"), directing him to appear before the Respondent with the relevant documents.

Issue:

Whether the Applicant who apprehended arrest should be entitled to the relief of anticipatory bail or not?

Held:

The Hon'ble Kerala High Court in ***Order dated April 22, 2021 against Bail Application No. 220 of 2021*** held as under:

- Noted that, there is no embargo under the CGST Act restraining the Applicant from seeking pre-arrest bail.
- Observed that, Section 69 of the CGST Act permits the Commissioner to authorise arrest of the person whom he has 'reasons to believe' to have committed offences as prescribed under Section 132 of CGST Act, based on the seriousness and the amount involved, but in all other cases, arrests are to be conducted according to provisions of the Cr.P.C. Act.
- The expression 'reasons to believe' must not be purely subjective satisfaction and must have a rational connection with, or a relevant bearing on the formation of the belief. It demonstrates the legislature's intention to make an affirmative attempt to circumscribe the discretionary powers and permit their exercise only in a bona fide manner, to further the interest of revenue. Thus, the discretion of the Commissioner to authorise arrest is in the most serious offences listed under the CGST Act. Further, the CGST Act also provides the process to be followed once arrests are conducted by a Central Tax officer on the authorisation of the Commissioner. The officer in question is required to inform the arrested person of the grounds of his arrest and must produce such person before the Magistrate within 24 hours of arrest. These are in line with the safeguards provided under Section 49 of the Cr.P.C. Act and Article 22 of the Constitution of India.
- Further noted that the Colluder has made the statement that the Applicant has allegedly dealt with the filing of returns of the Agency and has made false invoices. However, no concrete evidence sufficient either to implicate the Applicant as an accused or proceed against him has been collected. Further, the Agency is a proprietorship belonging to Proprietor and therefore he alone is to answer for anything done by the Agency. The Applicant has nothing to do with the Agency and has not gained any income from the same. Further, the Applicant's bank accounts are available for scrutiny, and the Applicant is willing to cooperate by producing those documents in investigation.
- Furthermore, the CGST officials had sufficient power to implicate the Applicant if they had the required materials with them. The fact that they have not arraigned him as
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an accused indicates lack of material. Therefore, the Applicant's custodial interrogation may not be necessary under the circumstances.

- Since there is no incriminating evidence against the Applicant, merely by stating that the Respondent recovered incriminating materials will not suffice for rejecting the bail application. Noted that it is settled position that the Applicant apprehending arrest need not be made an accused in a crime to seek the relief of anticipatory bail. Establishing that the Applicant's apprehension of arrest is reasonable, is sufficient for the grant of anticipatory bail which is established by the fact that the colluder has been arrested.
- Accordingly, the Applicant is entitled to the relief of anticipatory bail. Further, directed the Applicant to appear before the investigating officer within three weeks and to cooperate with the investigation and produce all documents called for. Furthermore, after interrogation, in the event of Applicant's arrest, the Applicant shall be released on bail on execution of a bond for ₹ 5,00,000/- with two solvent sureties each for like sum to the satisfaction of the arresting officer and shall appear before for investigating officer as and when called for, and refrain from tampering with evidence or witnesses.

Relevant Provisions:

Section 132 of the CGST Act:

"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;

(g) obstructs or prevents any officer in the discharge of his duties 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;

(j) tampers with or destroys any material evidence or documents;

(k) fails to supply any information which he is required to supply under this Act or the rules made thereunder or (unless with a reasonable belief, the burden of proving which shall be upon him, that the information supplied by him is true) supplies false information; or

(l) attempts to commit, or abets the commission of any of the offences mentioned in clauses (a) to (k) 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 any other offence 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) or clause (g) or clause (j), 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”.

Section 69 of the CGST Act:

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“69. Power to arrest:

1) Where the Commissioner has reasons to believe that a person has committed any offence specified in clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) of section 132 which is punishable under clause (i) or (ii) of sub-section (1), or sub-section (2) of the said section, he may, by order, authorise any officer of central tax to arrest such person.

(2) Where a person is arrested under sub-section (1) for an offence specified under sub-section (5) of section 132, the officer authorised to arrest the person shall inform such person of the grounds of arrest and produce him before a Magistrate within twenty-four hours.

(3) Subject to the provisions of the Code of Criminal Procedure, 1973 (2 of 1974),—

(a) where a person is arrested under sub-section (1) for any offence specified under sub-section (4) of section 132, he shall be admitted to bail or in default of bail, forwarded to the custody of the Magistrate;

(b) in the case of a non-cognizable and bailable offence, the Deputy Commissioner or the Assistant Commissioner shall, for the purpose of releasing an arrested person on bail or otherwise, have the same powers and be subject to the same provisions as an officer-in-charge of a police station.”

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