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HIGH COURT OF ORISSA: CUTTACK

BLAPL No.4125 OF 2020

(In the matter of an application under Section 439, Criminal
Procedure Code, 1973)

Pramod Kumar Sahoo ... **Petitioner**

Versus

State of Odisha ... **Opposite Party**

For petitioner : Shri Ravi Shankar Samal
S. Mishra, S.N. Kanungo,
S.P.Jena, & R. Mohanty
(Advocates)

For the Opp. Party: Shri Sunil Kumar Mishra,
Additional Standing Counsel

PRESENT

THE HONOURABLE SHRI JUSTICE S.K. PANIGRAHI

Date of Hearing: 16.10.2020 **Date of judgment: 23.12.2020**

1. The present petition arises out of a written arrest memo bearing No. 104/CT & GST issued by the Enforcement Unit Bhubaneswar dated 13.03.2020 U/s. 132(I)(b)(c)(i) of OGST Act 2017 whereunder the Petitioner has been arrested on 12.03.2020 and has since been in custody.
2. The brief facts of the case as alleged by the informant the CT & GST Enforcement unit, Bhubaneswar by the Deputy Commissioner of Sales Tax, CT& GST Enforcement Unit, BBSR,

is that the petitioner is the proprietor of M/s. Sahoo Traders having GSTIN – 21BSWP549B7B1ZH. The said firm is carrying out business at Plot No. 309/1825 Sailashree Vihar, Bhubaneswar. The allegation is that during the period between July 2017 to December 2019 the said firm has availed/utilized bogus input tax credit (ITC) of Rs. 2.48 crores on the strength of fake purchase invoices issued in the name of 21 fictitious entities. It has also allegedly been found to have passed on bogus Input Tax Credit (ITC) of 2.48 crores to the tax payers within and outside the state of Odisha in the name of the firm of the Petitioner. It has also been alleged that the Petitioner in collusion with others has been found to have created and operated 6 fictitious firms to avail/utilize bogus Input Tax Credit (ITC) of Rs.34.23 crores in their names on the strength of fake purchase invoices without physical receipt of goods and has passed on the same to recipients both within and outside the state.

- 3.** The learned Counsel for the Petitioner has contended that the petitioner has always made genuine sale and purchase of goods using genuine GSTN and has paid Tax (GST) accordingly. He further submitted that the petitioner has been in custody since the month of 12.3.2020 and in the meantime charge sheet has been filed on 07.05.2020 U/s.132(1)(b)(c)(i) of OGST Act 2017.

The fact that an earlier bail application has been rejected by the learned Addl. Sessions Judge–cum–Special Judge CBI, Court No.1, BBSR vide its order dated 25.03.2020 has been brought on record. The investigation has been kept pending for a long time and no purpose would be served by keeping the petitioner in custody since he has been examined and all the relevant evidences required for adjudication are now on record. He further submitted that the petitioner is willing to co-operate with the prosecution as and when required. He also further undertakes to produce the Audit report for the relevant period i.e. financial year from 2017 to 2019.

4. The learned Counsel for the State on the other hand, has made detailed submissions and has painstakingly taken us through the records of the case to demonstrate the alleged manner in which the bogus ITC has been claimed and passed on to other persons. He has taken us through the relevant rules to show that mere grant of a registration under the Act does not *ipso facto* grant a license to the accused person to abuse the process of law. He has contended that the Petitioner received invoices and E-waybills through his mail from the other accused persons i.e. Vikash Sarawagi and Ankit Agarwal of M/s. Utsav Enterprises, M/s. Blenders Iron & Steel and M/s. Shree Shyam Enterprises which is evidenced from the mail of the Petitioner.

5. He further contends that the Petitioner has allegedly admitted that he has purchased goods worth of Rs.2,96,10,354/- from M/s. Blenders Iron & Steel bearing during the period from August 2018 to October 2018. However, as per the Bank statement belonging to M/s. Sahoo Traders, an amount of Rs.3,34,31,625 seems to have been paid to M/s. Blenders Iron & Steel for the period from 31.08.2018 to 19.01.2019. Similar connivance has been attributed to other accused persons namely, Ankit Agarwal and Bhabagrahi Manik to contend that they have effected fictitious transactions with these fake firms to commit offences under the Act. Lastly, the learned counsel for the petitioner has placed strenuous reliance on the order passed by this Court in case of **Amit Beriwal v. State of Odisha**¹ decided on 27.7.2020.

6. The facts in issue here are that the present petitioner is having a business entity in the name and style of M/s. Sahoo Traders, office and stationed at Bhubaneswar since last 10 years. It has been contended that the petitioner being a genuine business man, has always paid the tax due, for which, he has been awarded by the concerned Department in the past. The records of GST paid have been produced for the financial years from 2017 to 2018, 2018 to 2019 and 2019 to 2020. It has been

¹BLAPL No. 2217 of 2020

submitted that the petitioner has been maintaining the records as required in law. It was further stated that the petitioner is a genuine businessman who prior to start the above iron and steel material products had availed a cash credit loan by mortgaging all his personal/parental property with the City Union Bank for an amount of Rs.1,22,26,269/-.

- 7.** This Court while dealing with the contention of the counsels for the parties has taken note of the fact that in such matters the evidence is largely based on documentary evidence. Once the charge-sheet has been filed unless antecedents to the contrary can be demonstrated, the presence of the accused may not be required to take the prosecution to its logical conclusion.
- 8.** The object of the law in question is to act as a deterrent in blocking loopholes in an otherwise nascent law which concerns itself with the collection of revenue for the State. Section 132(1) (i) of the Act provides that 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. Similarly, Section 132(ii) of the Act provides a punishment with imprisonment for a term which may extend to three years and with fine when the amount in question is greater than Rs.2 crores but does not exceed Rs. 5

crores. Likewise, the punishment prescribed under Section 132 (1)(iii) for amount between one crore to two crores, the maximum imprisonment can be for a maximum period of one year. In cases where the amount is less than one crore of rupees, the same has been made compoundable. It may also be noted that the present proceedings are still at a teething stage and may, if the parties choose, be subject to the rigours of law as prescribed under the Statute i.e. assessment, appeal and revision etc. Till such time the guilt of the accused person would not have crystallized and it would difficult to pre-judge at the stage of hearing an application for bail what the ultimate punishment imposed would be. In such circumstances, keeping an accused in custody, might not ultimately achieve the ends of justice.

- 9.** While deciding the controversy at hand, this Court was taken through the view taken by other High Courts in such matters with an endeavour to impress upon the fact that the Courts are gradually becoming more lenient and alive to the fact that the assessment in such matters is largely based on documents or documentary records and also that generally, the completion of proceedings has become tedious and time taking. It is these factors including the fact that the proceedings do not attain finality till the time the person in default or accused has availed all these remedies available to him under the act in question.

Such a view can be seen in the cases of **Rakesh Kumar Khandelwal v UOI**², **Kishor Wadhvani v State of M.P.**³, **Vijay Kumar Nair v State of M.P.**⁴, **Lalit Kumar Gandhi v State of M.P.**⁵ and **Nitesh Wadhvani v State of MP.**⁶ Considering the fact that the nature of the offence under the Act is compoundable in nature, the bail has been granted in the case of **Sanjay Kumar Bhuwalka v. Union of India**⁷ and **Sanjay Kumar Bhuwalka v. Union of India**⁸.

10. However, the most cogent reasoning has been adduced by the Madras High Court in the case of **Jayachandran Alloys (P) Ltd. Vs. Superintendent of GST & C. Ex., Salem**⁹ it has been aptly held that;

“38. Though the discussions and conclusions therein have been rendered in the context of Chapter V of the Finance Act, 1994, levying service tax, I am of the view that they are equally applicable to the provisions of the CGST Act as well. Section 132 of the Act as extracted earlier, imposes a punishment upon the Assessee that ‘commits’ an offence. There is no dispute whatsoever that the offences set out under (a) to (l) of the provision refer to those items, that

²2019 SCC OnLine Raj 6711

³2020 SCC OnLine MP 1734

⁴2020 SCC OnLine MP 1731

⁵2020 SCC OnLine MP 836

⁶2020 SCC OnLine MP 1732

⁷2018 SCC OnLine Cal 4674

⁸2018 SCC OnLine Cal 9774

⁹2019 (25) G.S.T.L. 321 (Mad.)

constitute matters of assessment and would form part of an order of assessment, to be passed after the process of adjudication is complete and taking into account the submissions of the Assessee and careful weighing of evidence found and explanations offered by the Assessee in regard to the same.

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

40. Thus, 'determination' of the excess credit by way of the procedure set out in Section 73 or 74, as the case may be is a prerequisite for the recovery thereof. Sections 73 and 74 deal with assessments and as such it is clear and

unambiguous that such recovery can only be initiated once the amount of excess credit has been quantified and determined in an assessment. When recovery is made subject to ‘determination’ in an assessment, the argument of the department that punishment for the offence alleged can be imposed even prior to such assessment, is clearly incorrect and amounts to putting the cart before the horse.”

11. In so far as the reliance is placed on the case of **Amit Beriwal** (supra) is concerned it is to be borne in mind that each case depends on the facts of that case. The position regarding bail in such offences as provided by the Delhi High Court in the case of **H. B. Chaturvedi vs C.B.I**¹⁰:

Para 9. *In Anil Mahajan v. Commissioner of Customs & Anr.*¹¹, this court after considering the judgments, *inter alia*, in **Gurcharan Singh & Others v. State (Delhi Administration)**¹², and **Gudikanti Narasimhulu and Others v. Public Prosecutor**¹³, summarized the legal position as follows:

There is no hard and fast rule and no inflexible principle governing the exercise of such discretion by the Courts. There cannot be an inexorable formula in the matter of granting bail. The facts and circumstances of each case will govern the exercise of judicial discretion in granting or refusing bail. The answer to the question whether to grant bail or not depends upon a variety of

¹⁰BAIL APPLN. 572/2010 & CRL.M.(BAIL) 459/2010.

¹¹84 (2000) DLT 854

¹²AIR 1978 SC 179.

¹³Air 1978 SC 729.

circumstances, the cumulative effect of which must enter into the judicial verdict. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail.

*For the purpose of granting or refusing bail there is no classification of the offences except the ban under Section 437(1) of the Criminal Procedure Code against grant of bail in the case of offences punishable with death or life imprisonment. Hence there is no statutory support or justification for classifying offences into different categories such as economic offences and for refusing bail on the ground that the offence involved belongs to a particular category. When the Court has been granted discretion in the matter of granting bail and when there is no statute prescribing a special treatment in the case of a particular offence the Court cannot classify the cases and say that in particular classes bail may be granted but not in others. Not only in the case of economic offences but also in the case of other offences the Court will have to consider the larger interest of the public or the State. Hence only the considerations which should normally weigh with the Court in the case of other non-bailable offences should apply in the case of economic offences also. **It cannot be said that bail should invariably be refused in cases involving serious economic offences.** Similarly, the Supreme Court in the case of **Sanjay Chandra vs CBI**¹⁴, iterated the importance position of bail in criminal jurisprudence:*

¹⁴AIR2012SC830.

Para 26. *The trial may take considerable time and it looks to us that the appellants, who are in jail, have to remain in jail longer than the period of detention, had they been convicted. It is not in the interest of justice that accused should be in jail for an indefinite period. No doubt, the offence alleged against the appellants is a serious one in terms of alleged huge loss to the State exchequer, that, by itself, should not deter us from enlarging the appellants on bail when there is no serious contention of the respondent that the accused, if released on bail, would interfere with the trial or tamper with evidence. We do not see any good reason to detain the accused in custody, that too, after the completion of the investigation and filing of the charge-sheet.*

*This Court, in the case of **State of Kerala Vs. Raneef**¹⁵, has stated: -*

15. In deciding bail applications an important factor which should certainly be taken into consideration by the court is the delay in concluding the trial. Often this takes several years, and if the accused is denied bail but is ultimately acquitted, who will restore so many years of his life spent in custody? Is Article 21 of the Constitution, which is the most basic of all the fundamental rights in our Constitution, not violated in such a case? Of course, this is not the only factor, but it is certainly one of the important factors in deciding whether to grant bail. In the present case the respondent has already spent 66 days in custody (as

¹⁵(2011) 1 SCC 784

stated in Para 2 of his counter-affidavit), and we see no reason why he should be denied bail.”

12.In view of the above discussion, it is directed that the petitioner be released on bail on furnishing a bail bond of Rs.5,00,000/- (Rupees five lakhs) with one surety for the like amount to the satisfaction of the learned trial court with the following conditions:

(i) The petitioner shall co-operate with the trial and shall not seek unnecessary adjournments on frivolous grounds to protract the trial;

(ii) The petitioner shall not directly or indirectly allure or make any inducement, threat or promise to the prosecution witnesses so as to dissuade him from disclosing truth before the Court;

(iii) The involvement of the petitioner in any other similar nature of offence under the GST Act would entail cancellation of bail;

(iv) In case of his involvement in any other criminal activities or breach of any other aforesaid conditions, the bail granted in this case may also be cancelled.

(v) The petitioner shall submit his passports, if any, before the learned trial court and shall not leave India without prior permission of this Court.

It is also clarified that the discussions hereinabove, are only limited to the purpose of the instant application and that the assessment of the tax liability of the petitioner and his firm

shall be carried out strictly in accordance with the applicable provisions of law, uninfluenced by the observations as aforesaid. It is further stipulated that in such matters the adjudicating authority shall do well to expeditiously complete the assessment process.

The bail application is accordingly disposed of.

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S. K. Panigrahi, J.