IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 13679 of 2019

With
R/SPECIAL CIVIL APPLICATION NO. 3209 of 2020
With
R/SPECIAL CIVIL APPLICATION NO. 4468 of 2020
With
R/SPECIAL CIVIL APPLICATION NO. 4456 of 2020
With
R/SPECIAL CIVIL APPLICATION NO. 13893 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 14141 of 2019

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J.B.PARDIWALA

and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	YES

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VIMAL YASHWANTGIRI GOSWAMI
Versus
STATE OF GUJARAT

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Appearance:
MR CHETAN K PANDYA, MR TUSHAR HEMANI- SENIOR ADVOCATE WITH MS VAIBHAVI PARIKH AND MR UCHIT SHETH for the Petitioners.
MR KAMAL TRIVEDI- ADVOCATE GENERAL, MR CHINTAN DAVE-

ASSITANT GOVERNMENT PLEADER, MR DEVANG VYAS- ADDITIONAL SOLICITOR GENERAL OF INDIA, MR NIRZAR DESAI AND MR ANKIT SHAH for the Respondents.

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CORAM: **HONOURABLE MR. JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

Date : 20/10/2020

CAV JUDGMENT

(PER : HONOURABLE MR. JUSTICE BHARGAV D. KARIA)

1. Rule. Mr. Devang Vyas, learned Additional Solicitor General of India waives service of notice of rule for and on behalf of the Union of India and its respondents. Mr. Chintan Dave, learned Assistant Government Pleader waives service of notice of rule for and on behalf of the State of Gujarat and its respondents.

2. Since the issues raised in all the captioned petitions are more or less the same, those were heard analogously and are being disposed of by this common judgment and order.

3. For the sake of convenience, Special Civil Application No.13679/2019 is treated as the lead matter.

4. A coordinate Bench of this Court to which one

of us (Coram : J.B. Pardiwala, J.) was a party passed the following order in the Special Civil Application No.13679/2019 dated 7th August, 2019:

> "1. One of the main reliefs prayed for by the writ applicant in the present writ application reads as follows :
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> "16(A) To issue a Writ of Mandamus and/or Writ of Prohibition and/or any other appropriate writ, order of direction, directing the respondents not to take any actions against the petitioner being proprietor of the Heugo Metal exercising powers under Section 69 read with Section 132 without following due procedure of law of assessment and adjudication of alleged evasion of GST as contemplated under Section 61, Section 73 of under Section 74 of the Central Goods and Service Tax Act, 2017 i.e. before following provisions of Chapter XII of Central Goods and Service Tax Act, 2017 and Gujarat Goods and Service Tax Act, 2017 and Chapter VIII of Central Goods and Service Tax Rules, 2017 and Gujarat Goods and Service Tax Rules, 2017 in connection with File No. ACST/UNIT-9/2019-20/B registered with State Tax (2), Unit-9, Ahmedabad."
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> 2. Mr. Chetan K. Pandya, the learned counsel appearing for the writ applicant has placed strong reliance on the decision of the Delhi High Court in the case of MAKEMYTRIP (INDIA) PVT. LTD. vs. UNION OF INDIA, reported in 2016 (44) S.T.R. 481 (Del.) as well as on the decision of the Madras High Court in the case of M/s. Jayachandran Alloys (P) Ltd. vs. The Superintendent of GST and Central Excise and Others in the Writ Petition No.5501 of 2019 decided on 4th April, 2019.
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> 3. We take notice of the fact that the Delhi High Court decision referred to above has

been affirmed by the Supreme Court. The ratio as laid in the Delhi High Court decision is as under :

"(i) The scheme of the provisions of the Finance Act 1994 (FA), do not permit the DGCEI or for that matter the Service Tax Department (ST Department) to bypass the procedure as set out in Section 73A (3) and (4) of the FA before going ahead with the arrest of a person under Sections 90 and 91 of the FA. The power of arrest is to be used with great circumspection and not casually. It is not to be straightway presumed by the DGCEI, without following the procedure under Section 73A (3) and (4) of the FA, that a person has collected service tax and retained such amount without depositing it to the credit of the Central Government.

(vii) In terms of C.B.E. & C.'s own procedures, for the launch of prosecution there has to be a determination that a person is a habitual offender. There is no such determination in any of these cases. There cannot be a habitual offender if there is no discussion by the DGCEI with the ST Department regarding the history of such Assessee. Assuming that, for whatever reasons, if the DGCEI does not talk to ST Department, certainly it needs to access the service tax record of such Assessee. Without even requisitioning that record, it could not have been possible for the DGCEI to arrive at a reasonable conclusion whether there was a deliberate attempt of evading payment of service tax. In the case of MMT, the decision to go in for the extreme step of arrest without issuing an SCN under Section 73 or 73A (3) of the FA, appears to be totally unwarranted."

3.1 To put it in other words, the powers of arrest under Section 69 of the Act, 2017 are to be exercised with lot of care and circumspection. Prosecution should normally be launched only after the adjudication is

completed. To put it in other words, there must be in the first place a determination that a person is “liable to a penalty”. Till that point of time, the entire case proceeds on the basis that there must be an apprehended evasion of tax by the assessee. In the two decisions referred to above, emphasis has been laid on the safeguards as enshrined under the Constitution of India and in particular Article 22 which pertains to arrest and Article 21 which mandates that no person shall be deprived of his life and liberty for the authority of law. The two High Courts have extensively relied upon the decision of the Supreme Court in the case of D.K. Basu vs. State of West Bengal reported in 1997 (1) SCC 416.

4. Let Notice be issued to the respondents returnable on 18th September, 2019.

4.1 In the meantime, no coercive steps of arrest shall be taken against the writ applicant. Direct service is permitted.

4.2 On the returnable date, notify this matter on top of the Board.

4.3 We propose to take up this matter for final hearing as far as possible on the returnable date. The State is requested to be ready with the matter having regard to the important issues which have been raised in the writ application.”

5. Following the above order, the other allied petitions were tagged and protection was granted to the respective petitioners against taking coercive steps of arrest.

6. As the discussion is under various heads of

topics and the judgment is running in more than 150 pages, for the sake of convenience, we provide this index :

7. The facts giving rise to the Special Civil Application No.13679/2019 may be summarised as under :

7.1) The petitioner is the proprietor of a Proprietary concern viz. M/s Heugo Metal engaged in the business of trading and/or supply of the stainless steel and scrap thereof and was using the godown on as is where is basis at Godown No. 503, Road No.13, Kathwada GIDC, Kathwada, Ahmedabad.

7.2) The Respondent No.2 along with the other officials of the Government of Gujarat Goods and Service Tax Department (for short 'GGGST') had come to visit the residential premises of the petitioner on 19th July, 2019 in connection with the investigation of the business transactions of M/s Heugo Metal. The Respondent No.2 had sealed a drawer in which the files, diary, mobile and laptop of the petitioner were stored and left the premises asking the petitioner to appear before the respondent authority with the provisional balance sheet of M/s Heugo Metal.

7.3) The respondent no.2 along with the other officials, on 23rd July, 2019 again visited and carried out search proceedings at the residence of the petitioner. It is the case of the petitioner that the officials left the premises without noting any reason in the sealing memo and the search was abandoned.

7.4) The Respondent no.2 thereafter, in exercise of the powers under section 70(1) of the Central Goods and Service Tax Act,

2017 (for short the 'CGST Act') and Gujarat Goods and Service Tax Act, 2017 (for short 'GGST Act') issued the summons dated 23rd July, 2019 to the petitioner to appear on 25th July, 2019 to give the statement. It is the case of the petitioner that since the petitioner was unable to remain present along with the documents and the provisional balance sheet, the petitioner through his advocate addressed a letter dated 25th July, 2019 to the respondent no.2 and requested to give one week time to appear before the respondent no.2 along with the requisite documents.

7.5) The Respondent no.2 again visited the residential premises of the petitioner on 26th July, 2019 and completed the search and seized the purchase and sales files along with the mobile and the laptop and removed the seal applied on the drawer.

7.6) It is the case of the petitioner that though the petitioner had requested for one week time, the respondent no.2 had issued the summons dated 27th July, 2019 to appear on the same day i.e. 27th July, 2019 to give the statement. It is the case of the

petitioner that since the petitioner was unable to remain present along with the documents and the provisional balance sheet, the petitioner again through his advocate addressed a letter dated 29th July, 2019 to the respondent no.2 and requested to give time for one week to appear before the respondent no.2 along with the requisite documents.

7.7) It is the case of the petitioner that the petitioner has filed the GST Returns till May 2019 and the returns for the month of June and July 2019 were yet to be filed. However, the petitioner did not receive any notice from the respondents under the relevant provisions of the CGST Act or GGST Act. Thus being aggrieved by the action of the respondent authorities, the petitioner has preferred this petition.

8. More or less, similar facts are present in other petitions with regard to the issuance of summons to the petitioners to give their statement before the respondent no.2 and the petitioners are apprehending that if they approach the respondent no.2 authority, they would be arrested under section 69 of the CGST

Act.

SUBMISSIONS ON BEHALF OF THE PETITIONERS:

9. The learned Senior Advocate Mr. Tushar Hemani assisted by the learned advocate Ms. Vaibhavi K. Parikh appearing in the Special Civil Applications No. 4456/2020 and 4468/2020 submitted on behalf of the petitioners that the petitioners strongly apprehend their arrest when the petitioners would appear before the respondent no.2 pursuant to the summons issued under section 70 the CGST Act.

10. The learned Senior Advocate further submitted that against the apprehension of the arrest of the petitioner, this petition is maintainable under the Article 226 of the Constitution of India, 1950 in view of the decision of the High Court of Telangana in case of **P.V. Ramana Reddy v. Union of India** reported in (2019) 104 taxmann.com 407 (Telangana) wherein the High Court of Telangana after discussing the issue in detail has held that the petition is maintainable under the Article 226 of the Constitution of India. It was also pointed out by Mr. Hemani that the SLP preferred against the decision of High Court of Telangana has been dismissed by the Supreme

Court in case of **P.V. Ramana Reddy v. Union of India** reported in 106 taxmann.com 301(SC).

11. The learned Senior Advocate Mr. Hemani thereafter submitted on merits of the matter that in order to invoke the provisions of section 69 read with section 132 of the CGST Act, the “twin conditions” need to be satisfied “cumulatively” i.e. (1) the Commissioner has “reasons to believe” that a person has committed the specified offence and (2) It is determined that the concerned person has “committed” an offence which has to be necessarily the post-determination of the demand by following the due process of law.

12. With respect to the first condition that the Commissioner must have “reasons to believe' that a person has committed any of the specified offences, it was submitted by Mr. Hemani that in order to invoke the power to arrest as envisaged under the section 69 of the CGST Act, the Commissioner must have “reasons to believe” that the concerned person has committed any offence specified in the clause (a) or clause (b) or clause (c) or clause (d) of the sub-section(1) of the section 132 which is punishable under the clauses (i) or (ii) of

the sub-section(1) or sub-section(2) of the said section. Reliance was placed on the decision of this Court in the case of **Desai Brothers v. DCIT** reported in 204 ITR 121 (Gujarat) to submit that the words "reason to believe" suggest that the belief must be that of an honest and reasonable person based upon reasonable ground; not a mere ipse dixit, suspicion, guess work, conjecture or surmises, gossip or rumor and such belief must lead to a conclusion that the offence has been committed by the concerned person. Reliance was also placed on the decision of this Court in the case of **Sheth Brothers v JCIT** reported in 251 ITR 270 (Guj), wherein settled legal position has been summarized what the "reasons to believe" includes as under:

> (a) There must be material for the belief.
>
> (b) The circumstances must exist and cannot be deemed to exist for arriving at an opinion.
>
> (c) The Reason to believe must be honest and not based on the suspicion, gossip, rumor or conjecture.
>
> (d) The Reasons referred to must

disclose the process of reasoning by which he holds the "reasons to believe" and change of opinion does not confer the jurisdiction to reassess.

(e) There must be nexus between the material and the belief; and

(f) The reasons referred to must show application of mind by the Assessing Officer.

13. Mr. Hemani referring to the above decisions submitted that the "reason to believe" is very much different from "reason to suspect". Reliance was placed on the provisions of section 132 of the Income Tax Act, 1961 and further reference was made to the decision of the Apex Court in the case of **GKN Driveshafts (India) Ltd. v. ITO** reported in 259 ITR 19 (SC) to canvas the submission that it is very much essential that the "reason to believe" as recorded by the Commissioner prior to invoking the provisions of section 69 of the CGST Act is required to be provided to the concerned person upon an application by such person so as to enable such person to avail the appropriate legal remedy.

14. Mr. Hemani further submitted that before exercising the "power to arrest" under section 69 read with the "power to punish" under section 132 of the CGST Act, it has to be determined that the concerned person has "committed" an offence which necessarily can only be after the post-determination of the demand by following the due process of the assessment. Referring to the provisions of sections 69 and 132 of the CGST Act, it was pointed out that the word used in the said sections is "commits", which makes it very much evident that act of the "committal of offence" is to be fixed first by following the due process of the assessment as envisaged under the Scheme of the CGST Act prior to imposing the punishment.

15. The learned Senior Advocate thereafter referred to the Scheme of the CGST Act for due process of the assessment by referring to the sections 61, 65, 66, 73 and 74 of the CGST Act and submitted that the powers under the section 69 of the CGST Act can be invoked only on the completion of the assessment as envisaged in the said provision so as to form a reason to believe by the Commissioner that the person has

committed the offences as specified in the clause (a) or clause (b) or clause (c) or clause (d) of the sub-section(1) of the section 132 of the CGST Act.

16. Mr. Hemani thereafter submitted that the parliament has not used the words “reasons to believe” in the section 132 of the CGST Act which implies that the provisions of the section 132 can be invoked only when it is established that the offence is committed. Therefore, an analogy was drawn by the learned Senior Advocate that the section 132 cannot be invoked merely on the basis of the “reason to believe” that the “specified offence has been committed” inasmuch as the factum of a person having committed any of the specified offence needs to be established by following the due process of law. It was therefore, submitted that the conjoint reading of the section 69 and the section 132 of the CGST Act would lead to a conclusion that unless it is established that the “offence is committed”, the provisions of the section 132 of the CGST Act cannot be invoked and unless the section 132 of the CGST Act is invoked, the provisions of the section 69 of the CGST Act cannot be invoked by the respondent authority.

17. The learned senior advocate thereafter, placed reliance upon the decision of the Madras High Court in the case of **Jaychandran Alloys Private Limited v. Superintended of GST and Central Excise** reported in 105 taxman.com 245(Madras) wherein the learned Single Judge of the Madras High Court held as under :

> "9. The following issues arise, in my view, for resolution:-
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> 1. Whether the petitioner is entitled to a mandamus as prayed for in regard to supply of the documents and statements sought for by it in the light of the provisions of the Act?
>
> 2. Whether the interim protection sought for to prevent the respondents from invoking the powers under Section 69 of the Act read with Section 132 thereof in respect of the petitioner is liable to be granted?
>
> 3. Whether the petitioner's request for a direction to the respondents to complete adjudication and make an assessment after following the due process of law is liable to be accepted?
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> xxx
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> 37. 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.

38. 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 pre- requisite 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.

39. The exceptions to this rule of assessment are only those cases where the assessee is a habitual offender, that/who has been visited consistently and often with penalties and fines for contraventions of statutory provisions. It is only in such cases that the authorities might be justified in proceedings to pre-empt the assessment and initiate action against the assessee in terms of section 132, for reasons to be recorded in writing. There is no allegation, either oral or in writing in this case that the petitioner is an offender, let alone a habitual one.

40. In the present case, the Department does not dispute that action was intended or envisaged in the light of Section 132 of the CGST Act, the counter fairly stating that the provisions of Section 132 of the CGST Act were 'shown' to the Assessee. There is thus no doubt in my mind that the Department intended to intimidate the petitioner with the possibility of punishment under 132 and this action is contrary to the scheme of the Act. While the activities of an assessee contrary to the scheme of the Act are liable to be addressed swiftly and effectively by the Department, (the statute in question being a revenue statute where strict interpretation is the norm), officials cannot be seen to be acting in excess of the authority vested in them under the statute. I am of the considered view that the power to punish set out in Section 132 of the Act

> would stand triggered only once it is established that an assessee has 'committed' an offence that has to necessarily be post-determination of the demand due from an assessee, that itself has to necessarily follow the process of an assessment.
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> 41. I draw support in this regard from the decision of the Division Bench of the Delhi High Court in the case of Make My Trip (India) (supra), as confirmed by the Supreme Court reiterating that such action, as in the present case, would amount to a violation of Constitutional rights of the petitioner that cannot be countenanced.
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> 46. Issue (ii) is answered in favour of the petitioner. Issue (iii) is allowed, directing the respondents to conclude the process of adjudication within a period of twelve (12) weeks from today, after issuing show cause notice to the petitioner setting out the proposals for assessment, affording full opportunity to the petitioner to respond to the same and advance submissions in person, and pass a reasoned and speaking order, in accordance with law."

18. The learned Senior Advocate Mr. Hemani thereafter placed reliance upon the decision of Punjab and Haryana High Court in case of **Akhil Krishan Magu v. Deputy Director, Directorate General of GST Intelligence** reported in (2019) 111 taxmann.com 367(P&H), wherein the Punjab

and Haryana High Court has held as under :

> “10. Taking cue from judgment of Delhi High Court in the case of Make My Trip (Supra) followed by Madras High Court in the case of Jayachandran Alloys (P) Ltd (Supra), law laid down by Hon'ble Supreme Court in the case of Siddharam Satlingappa Mhetre (supra) as well keeping in mind Section 69 and 132 of CGST Act which empower Proper Officer to arrest a person who has committed any offence involving evasion of tax more than Rs.5 Crore and prescribed maximum sentence of 5 years which falls within purview of Section 41A of Cr. P.C., we are of the opinion that power of arrest should not be exercised at the whims and caprices of any officer or for the sake of recovery or terrorising any businessman or create an atmosphere of fear, whereas it should be exercised in exceptional circumstances during investigation, which illustratively may be:
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> (i) a person is involved in evasion of huge amount of tax and is having no permanent place of business,
>
> (ii) a person is not appearing inspite of repeated summons and is involved in huge amount of evasion of tax,
>
> (iii) a person is a habitual offender and he has been prosecuted or convicted on earlier occasion,
>
> (iv) a person is likely to flee from country,
>
> (v) a person is originator of fake invoices i.e. invoices without payment of tax,

(vi) when direct documentary or otherwise concrete evidence is available on file/record of active involvement of a person in tax evasion.

10.1. The persons who are having established manufacturing units and paying good amount of direct or indirect taxes; persons against whom there is no documentary or otherwise concrete evidences to establish direct involvement in the evasion of huge amounts of tax, should not be arrested prior to determination of liability and imposition of penalty. Similarly, arrest of Chartered Accountant or Advocates who had filed returns or otherwise assisted in business but are not beneficiary or part of fraud merely on the basis of statement without any corroborative evidence linking the professional with alleged offence should be avoided. It is well known that if top brass of a running concern is arrested, there are all possibilities of closure of unit which results into unemployment and wastage of precious natural resources."

19. Mr. Hemani thereafter referred to the section 135 of the CGST Act which provides for presumption of the culpable mental state and submitted that the provisions of the section 135 of the CGST Act cannot be pressed into service at the time of invoking the provision of the section 69 of the CGST Act which provides for "power to arrest" because the section 135 can be pressed into service only at

the stage of the "prosecution for an offence" and only "the Court" shall presume the existence of the culpable mental state. It was submitted that the main object of the section 135 of the CGST Act is "to raise a presumption as to the culpable mental state on the part of the accused when he is being prosecuted in a Court of law". It was submitted that the earliest point of time when the "prosecution proceedings" can be deemed to have been commenced is when a private complaint is filed by a competent officer before the Magistrate under section 200 of the Code of Criminal Procedure, 1973 (for short "the Code") and that too after obtaining the previous sanction of the Commissioner as envisaged under the provisions of section 132(6) of the CGST Act. It was therefore, canvassed that a person can be said to be prosecuted only when a private complaint under the section 200 of the Code is filed and hence the section 135 of the CGST Act cannot be pressed into service while invoking the power to arrest under the section 69 of the CGST Act.

20. Reliance was also placed on the decision of the Punjab and Haryana High Court in the case of **Sukhdeep Singh Bhoday v. Joint Director General of Foreign Trade and others** rendered on

8th August, 2007 in the C.W.P. No. 208/2007 to submit that the power to arrest cannot be invoked before filing of FIR and prosecution can be said have been launched when the magistrate cognizance of the report made by the police and not when the FIR is registered. It was therefore submitted that without intervention of the Magistrate, provision of section 69 of the CGST Act cannot be invoked.

21. It was therefore, submitted that since the presumption under section 135 of the CGST Act is not available at the stage of arrest, the respondent authorities must follow the due process of adjudication and determination of the demand prior to invoking the power to arrest under section 69 of the CGST Act.

22. Mr. Hemani thereafter submitted that the decision of the Delhi High Court in case of **Make My Trip (India) Pvt. Ltd. v. Union of India** reported in 73 taxmann.com 31, rendered under the provisions of the Service Tax still holds the field. It was pointed out that the appeal preferred by the department against the decision of the Delhi High Court is dismissed by the Supreme Court as per the decision in case of **Union of India v. Make My Trip** reported

in 104 taxmann.com 245(SC). Mr. Hemani thereafter placed reliance upon the decisions of Supreme Court in the case of **Kunhayammed versus State of Kerala** reported in (2006) SCC 359, in the case of **Khoday Distilleries Ltd. (now known as Khoday India Limited) and others v. Sri Mahadeshwara Sahakarasakkare Karkhane Ltd., Kollegal (under liquidation)** reported in 2019 4 SCC 376 and in the case of **V.M. Salgacoar & Bros.(P.) Ltd. v. CIT** reported in (2000) 243 ITR 383 (SC) to submit that the dismissal of the appeal against the order of the judgment of the lower forum is an affirmation of the same even if such an order of the Supreme Court is non speaking and it constitutes a declaration of the law under the Article 141 of the Constitution of India and attracts the doctrine of merger and becomes the binding precedent.

23. Thereafter, the learned advocate Mr. Chetan Pandya appearing for the petitioners in Special Civil Applications No.13679/2019, 13893/2019 and 3209/2020 adopted the submissions advanced by the learned Senior Advocate Mr. Hemani and referred to the provisions of the CGST Act which provides for on-line digital way of the compliance of the procedure and for the assessment of the goods and service tax. Mr.

Pandya referred to the provisions of the section 13 of the CGST Act which provides for the time of supply of the services, the section 37 which provides for furnishing the details of the outward supplies, the section 38 which provides for furnishing the details of the inward supplies and the section 39 which provides for furnishing of the returns. Referring to such provisions of CGST Act, it was submitted that the compliance under the CGST Act is to be done on-line electronically. He thereafter referred to the provisions of the assessment as contained in the Chapter-XII comprising of the provisions of the section 59 to 64 of the CGST Act. The learned advocate Mr. Pandya thereafter, referred to the Chapter XIV of the CGST Act which provides for the inspection, search, seizure and arrest. Reference was made to the provisions of section 67 with regard to the power of inspection, search and seizure and the section 69 which provides for the power to arrest with reference to the section 132 prescribing the punishment for certain offences. After referring to the Scheme of the CGST Act, the learned advocate Mr. Pandya submitted that the decision of the Delhi High Court in the case of **Make My Trip (India) Pvt. Ltd** (supra) is applicable to the facts of the case. He placed reliance upon the

paragraph nos. 68 to 83 of the said decision to submit that the power to arrest under the section 69 of the CGST Act is required to be exercised with lot of care and circumspection and such powers can be exercised only after the adjudication is completed by determining the liability to pay the tax and the penalty and till such point of time, the power of arrest cannot be invoked on the basis of apprehension of evasion of tax by the assessee. He referred to the provisions of the section 132 of the CGST Act to submit that the entire objective of the CGST Act would be frustrated, if the power to arrest can be permitted to be invoked prior to the adjudication of the liability of the assessee. He also relied upon the decision in the case of **Jaychandran Alloys Private Ltd.** (supra) of the Madras High Court to submit that if the respondents are permitted to exercise the power to arrest without there being any adjudication as provided under the Scheme of the CGST Act, the safeguards as enshrined under the Constitution of India and more particularly, as per the Article 22 thereof which pertains to the arrest and the Article 21 which mandates that no person shall be deprived of his life and liberty before the authority of law, would be violated. It was further submitted that if the respondents are entitled

to invoke the power to arrest as per section 69 of the CGST Act without there being any adjudication, the same would also be contrary to the decision of the Supreme Court in the case of **D.K. Basu v. State of West Bengal** reported in 1997 (1) SCC 416.

24. Mr. Pandya therefore, prayed that the apprehension on part of the petitioners is well founded that the respondents would invoke the power to arrest under the section 69 read with section 132 of the CGST Act without following the due process of the law of adjudication of the alleged evasion of the GST as contemplated under the sections 61, 73 or 74 of the CGST Act before following the provisions of Chapter XII of the CGST Act and the Rules framed there under.

25. Thereafter, the learned advocate Mr. Uchit N. Sheth appearing in Special Civil Application No.14141/2019 adopted the arguments made by the other advocates for the petitioners and submitted that in view of the preamble of the CGST Act which provides for the imposition, assessment and recovery of the tax, the powers of inspection, search, seizure and arrest are conferred upon the respondents only with a view

to ensure that the tax is not evaded. The learned advocate Mr. Sheth relied upon the provisions of the sections 69 and 74 onwards of the CGST Act to submit that there has to be a notice for the prima facie adjudication for the initiation of the assessment proceedings. He referred to the section 64 of the CGST Act which provides for the summary assessment and submitted that ultimately, the provisions of the CGST Act determines the civil liability of the the assessee and fastening of the criminal liability has to be in the conjunction with that of the civil liability. Mr. Sheth further referred to the provisions of the section 132 and submitted that no prosecution is prescribed if the evasion of the tax is below Rs. One Crore. It was therefore, submitted that when there is no prosecution permitted before the adjudication under the provisions of the CGST Act, the power to arrest conferred by the section 69 read with the section 132 of the CGST Act has to be read as per the Scheme of the CGST Act and not otherwise.

26. The learned advocate Mr. Uchit Sheth relied upon the following decisions in support of his submissions:

i) In the case of **G.L. Didvania and another v. Income Tax Officer and another** reported in 1995 Supplement 2 SCC 724 wherein the Supreme Court held that the whole question was whether the appellant made a false statement regarding the income which according to the Assessing Officer has escaped assessment and apropos the same it was held that the findings of the appellate Tribunal was conclusive and therefore, the prosecution cannot be sustained. Relying upon the decision, it was pointed out that in order to invoke the powers of arrest; the adjudication is *sine qua non*.

ii) Mr. Sheth further relied upon the decision of this Court in the case of **Mahadev Enterprise v. State of Gujarat** reported in 2016 SCC OnLine Gujarat 8893 to point out that as per the scheme of the CGST Act, this Court has held that even in order to exercise revisional jurisdiction, the authority has to complete the adjudication on the basis of the material on record to arrive at a conclusion that there is evasion of the tax.

iii) Further reliance was also placed on the decision in the case of **State of Punjab**

v.Barkatram reported in (1962) 3 SCR 338, wherein a similar issue arose in relation to the provisions of Land Customs Act, 1924.

SUBMISSIONS OF THE RESPONDENTS :

27. On the other hand, the learned Advocate General Mr. Kamal B. Trivedi assisted by the learned Assistant Government Pleader Mr. Chintan K. Dave submitted that all the captioned writ petitions are filed seeking directions against the respondent authorities not to arrest the petitioners in exercise of powers under the Section 69 read with the Section 132 of the GGST Act by placing heavy reliance upon the decision of Telangana High Court case of **P. V. Ramana Reddy** (supra), which is confirmed by Apex Court, however, for upholding the maintainability of a writ petition for the pre-arrest protection under the Article 226 of the Constitution of India, the Telangana High Court in the aforesaid case, in the Para nos. 22 to 24, has followed the observations made by the Apex Court in the case of *Km.* ***Hema Mishra Vs. State of Uttar Pradesh*** reported in *(2014) 4 SCC 453* , but the said judgment rendered by the Apex Court would not be applicable in the present case as the observations made by the Apex Court in the said

judgment is with respect to the law prevailing in the State of Uttar Pradesh where the provisions of the Section 438 of the Code is not present in the statute book and in such situation, the Apex Court held that a party aggrieved can invoke the extraordinary jurisdiction under the provisions of Article 226 of the Constitution of India. It was submitted that in the State of Gujarat, the provisions of the Section 438 of the Code are very much available with the petitioners and therefore, the aforesaid judgment would not be applicable to the present cases and the captioned writ petitions filed under the provisions of the Article 226 of the Constitution of India deserve to be dismissed.

28. It was submitted that the petitions are pre-mature and not maintainable as the concerned respondent authority has merely exercised its statutory power conferred upon it under the provisions of Section 70 of the CGST/GGST Act, whereby the Petitioners have been called upon to give the evidence and their statements with respect to the on-going investigation. Hence, admittedly and undisputedly, as on date, the statutory powers conferred upon the concerned respondent authority under the provisions of the Section 69 of the CGST Act have not yet

been exercised and therefore, the captioned petitions filed by the respective petitioners are pre-mature and hence, not maintainable, as no cause of any action of the respondent authorities has arisen so far.

29. It was further submitted that even otherwise, the captioned petitions are not maintainable as the same are filed seeking the writ in the nature of prohibition from this Court against the respondent authorities from arresting the petitioners herein under the powers conferred upon the concerned respondent authority under the Section 69 of the CGST Act. Apropos this, it was submitted that it is nobody's case that the respondent authorities have no jurisdiction to arrest a person under the CGST Act. In fact, the provision of Section 69(1) of the CGST Act categorically empowers the concerned respondent authority to arrest any person if there is reason to believe that such person commits any offence specified under the said section read with the section 132 of the CGST Act.

30. It was submitted that on bare reading of the section 69 of the CGST Act, it is clearly discernible that the power to arrest vests with

the respondent authorities and therefore, once the power and jurisdiction of a concerned authority is established, the writ of prohibition ought not to be granted. It was further submitted that it is a settled position of the law that a writ of prohibition is primarily supervisory in nature and the object of the same is to restrain the courts or the inferior tribunals from exercising a jurisdiction which they do not possess at all or else to prevent them from exceeding the limits of their jurisdiction. In other words, the object is to confine the courts or the tribunals of inferior or limited jurisdiction within their bounds. It was submitted that it is also well-established that a writ of prohibition cannot be issued to a court or an inferior tribunal for an error of law unless by such error, it goes outside its jurisdiction. However, in the facts of the present case no allegation worth the name has been raised with respect to the jurisdiction of the concerned respondent authority.

31. It was submitted that the issue with respect to the delegation of the powers conferred upon the Commissioner the under Section 69 of the CGST Act to the lower authority is concerned, the said aspect is no longer *res integra,* in

view of the judgment of this Court dated 04.02.2020 passed in the Special Civil Application No.513 of 2020 and therefore, the captioned writ petitions may be dismissed along with exemplary costs.

32. With regard to the contention of the petitioners that the powers conferred upon the concerned authority under the provisions of the Section 69 of the CGST Act can only be exercised after the adjudication/ assessment of the offences referred under the provisions of Section 132 of the CGST Act and not prior thereto by placing heavy reliance on the word 'commits' referred in Section 132 of the CGST Act, it was submitted that on the face of it is neither sustainable nor in consonance with the provisions of the CGST Act and on the contrary, the same is making the entire Section 69 of the CGST Act nugatory / otiose.

33. It was submitted that the provisions of the Section 69 of the CGST are neither connected nor dependent upon the provisions of the Section 132 of the CGST Act and hence, it is incorrect to state that the arrest under the Section 69 of the CGST Act cannot be undertaken before the adjudication of the offences

referred to in the Section 132 of the CGST Act. In fact, the provisions of the Section 69(1) of the CGST Act can be read along with the Section 135 of the CGST Act, which is similar to the Section 138A of the Customs Act, 1962, which enables an authority to presume the culpable mental state on the part of the alleged offender. Reliance was placed on the decision of the Apex Court in the case of **Devchand Kalyan Tandel v. State of Gujarat and another** reported in (1996) 6 Supreme Court Cases 255 in support of above submissions.

34. It was further submitted that on a careful reading of the Section 69(1) of the CGST Act, it is discernible that the said sub-section merely refers the offences specified in the clauses (a), (b), (c) and (d) of the Section 132(1) which are punishable under the clauses (i) and (ii) of the Section 132(1) or 132(2) of the CGST Act, for which the power to arrest can be exercised by the concerned authority. However, the Section 69(1) of the CGST Act does not refer/acknowledge the entire Section 132(1) including its opening line i.e. "*whoever commits any of the following offences*". Thus, it is submitted that for interpreting the provisions of Section 69(1) of the CGST Act, the word 'commits' referred in Section 132(1)

of the CGST Act has no role to play and hence the same should not be taken into consideration. It was submitted that in other words, the Section 69(1) of the CGST Act merely borrows the classification of offences made under some of the clauses of the Section 132(1) of the CGST Act and that the same would not mean that the entire Section 132 of the CGST Act including the opening line of the Section 132(1) of the CGST Act is made applicable to the provisions of the Section 69 of the CGST Act.

35. It was submitted that the contention raised by the petitioners also falls flat on the ground as the legislature has specifically used the words “reason to believe” in the Section 69 of the GGST Act, which denotes that the offences have not been adjudicated / finalized / proved and that there is only reason to believe on the part of the concerned authority to the effect that the offences referred in the said section have been committed by any person. Thus, the contention of the petitioners to the effect that there should first be adjudication / finalization of the demand by following the due procedure of the assessment, then the words “reason to believe” would become redundant, because once

adjudication is completed there is no question of still forming an opinion to have the "reasons to believe" on the part of the concerned respondent authority.

36. It was further submitted that if first the adjudication is to be completed so as to ascertain the committal of the offences to invoke the powers of the arrest, then in that event, in terms of Section 132(1) of the CGST/GGST Act, the offenders would be punishable with imprisonment for a specific period and hence in there would not be any question of exercising the power of arrest by the concerned authority under the section 69 of the CGST Act. This is more particularly in view of the fact that after the said punishment, it is the concerned police officer who would give effect to such order to be passed under the provisions of the section 132 of CGST Act which would lead to a situation, where the provisions of the Section 69 of the CGST Act would get redundant / otiose.

37. It was submitted by the learned Advocate General that even otherwise, the steps undertaken under the provisions of the Section 69 of the CGST Act by the appropriate authority

are only for the purpose of holding an enquiry under the provisions of the CGST/GGST Act for finding any evasion of the GST and ultimately adjudicating the assessment and to punish the assessee for the offences committed by imposing penalties and initiating the proceedings for the prosecution as per the provisions of the Section 132 of the CGST Act. The concerned authority at the stage of invoking the power to arrest under the section 69 of the CGST Act, only forms an opinion that the concerned authority has the reason to believe the person has committed the specific offence as per the provisions of the section 132 of the CGST Act. It was further submitted that it may happen that after completion of the adjudication process for the assessment and the adjudging penalty and / or the confiscation of goods, as the case may be, the concerned authority may or may not proceed further with the prosecution. Thus, the provisions of the Section 69 of the CGST Act are independent and distinct of the provisions of the Section 132 of the CGST Act.

38. It was lastly submitted by the learned Advocate General that the reliance placed by the petitioners on the judgments rendered by the Madras High Court in cases of ***Jayachandran Alloys Pvt. Ltd*** *(supra)* and the Punjab & Haryana

High Court, in cases of ***Akhil Krishan Maggu*** *(supra) is* totally misplaced. This is more particularly in view of the fact that both the said judgments without taking into consideration the following distinguishing features, have followed the view taken by the Delhi High Court in the case of ***Make My Trip (India) Limited*** *(supra)* and have not followed the view taken by the Telangana High Court in the case of ***P. V. Ramanna Reddy*** *(supra)*:

> "(a) That the Delhi High Court in aforesaid case of Make My Trip (supra), was dealing with the provisions of the Finance Act, 1994, ("Service Tax Act" for short), where under, Section 73A(3) & (4) of the Service Tax Act categorically provides that where any amount is required to be paid to the Government and the same has not been so paid, the Central Excise Officer shall serve a notice and thereafter determine the same after considering the representation made by the person. In other words, in the aforesaid case, there are specific sections which require an authority to first issue a notice and then determine the same to the effect that though the amount was collected as service tax but not paid to the Government. In view of such specific provisions under the Service Tax Act it has been held that a person cannot be arrested by-passing the aforesaid procedure as contemplated under Sections 73A (3) and 73A(4) of the Service Tax Act.

(b) Whereas, under the CGST Act, there is no such separate provision like Section 73A(3) & (4) of Service Tax Act, which requires an authority to first issue a notice and then to determine the offences specified in Clauses (a), (b), (c) and (d) of Section 132(1) of the CGST Act. On the contrary, Section 135 of CGST Act raises presumption of culpable mental state, whereas, Service Tax Act does not have any such provision, which has been specifically taken note of by the Delhi Court in Para 74 of the aforesaid judgment. In view thereof, the judgment rendered by the Delhi High Court would not be applicable to the facts of the present case.

(c) It is incorrect to submit that the provisions of Section 73A of the Service Tax Act is similar to the provisions of Section 73 / 74 of the CGST Act inasmuch as, firstly, the provisions of Section 73 / 74 of the CGST Act are similar to the provisions of Section 73 of the Service Tax Act and not 73A of the Service Tax Act and secondly, the assessment as envisaged under the provisions of Section 74 of the CGST Act would only be undertaken after getting the necessary information from the concerned person and after completion of the investigation.

(d) In fact, the Division Bench of Telangana High Court in its aforesaid judgment dated 18.04.2019, has categorically held that the list of offences specified in Section 132(1) of the CGST Act have no correlation with assessment, and that therefore, prosecution can be launched even before the completion of the assessment.

(e) Against the said case, the Apex Court vide its order dated 27.05.2019, while dismissing the Special Leave Petition, has confirmed the aforesaid views of the Telangana High Court and in addition thereto, the Apex Court, in its order dated 29.05.2019 passed in the case of ***Union of India v/s Sapna Jain*** has observed as under:

> "… … … However, we make it clear that the High Courts while entertaining such request in future, will keep in mind that this Court by order dated 27.5.2019 passed in SLP(Crl.) No.4430/2019 had dismissed the special leave petition filed against the judgment and order of the Telangana High Court in a similar matter, wherein the High Court of Telangana had taken a view contrary to what has been held by the High Court in the present case.""

In view of the above, it was submitted that the contentions raised by the petitioners deserves to be rejected and that the captioned petitions may be dismissed.

39. It was submitted by the learned Advocate General that the Telangana High Court in the case of ***P. V. Ramanna Reddy*** (supra) has grossly erred in Para no. 32 in holding that the power to order the arrest under Section 69(1) is

confined only to cognizable and non-bailable offences. This is more particularly in view of the fact the Section 69(1) of the CGST Act deals with the two types of the punishment i.e. clauses(i) and (ii) of the Section 132(1) of the GGST Act.

40. It was submitted that in terms of the Section 132(5) of the CGST Act, the offences specified in the clauses (a), (b), (c) and (d) of the Section 132(1) and punishable under the clause (i) of that sub-section shall be 'cognizable and non-cognizable', whereas in the terms of the sub-section(4) of the section 132 of the CGST, notwithstanding anything contained in the Code of Criminal procedure, 1973, all other offences shall be non-cognizable and bailable. Thus, by referring the clauses (i) and (ii) of the Section 132(1) of the CGST Act, in the Section 69(1) of the CGST Act, it could be said that the power to arrest deals with both types of the offences i.e. the cognizable and the non-cognizable offences.

41. It was further submitted by the learned Advocate General that on a combined reading of the Section 69(1) along with the clauses (a), (b), (c) and (d) of the Sections 132(1), 132(4)

and 132(5) of the CGST Act, it is discernible that for effecting the arrest, the provisions of Code would not be applicable and more particularly, in view of the non-obstante clause used in Section 132(4)of the CGST Act, the provisions of the Code are not to be taken into account and that, even otherwise, the offences under the CGST Act cannot be equated with the offences under the Indian Penal Code which have been made cognizable or non-cognizable under the Code. It was further submitted that for exercising the powers of arrest under Section the 69(1) of the CGST Act, the provision of the Sections 87, 88, 155, 204 and 436 of the Code will not be applicable. It was therefore, submitted that the captioned writ petitions may be dismissed with exemplary costs.

REJOINDER ON BEHALF OF THE PETITIONERS :

42. In rejoinder, the learned Senior Advocate Mr. Tushar Hemani submitted that the contention made on behalf of the respondents that the decision in the case of **Make My Trip India Pvt. Ltd.**(supra) would not be applicable in relation to the proceedings under the CGST Act since the said judgment was delivered in context of the provisions of the Service Tax which did not contain any clause as to “presumption of

culpable mental state" as provided under the section 135 of the CGST Act, is not correct. It was submitted that the section 83 of the Service Tax Act makes certain sections of the Central Excise Act, 1944 applicable to the Service Tax and one such section is the section 9C of the Central Excise Act, 1944 which provides for "presumption of culpable mental state". It was therefore, submitted by Mr. Hemani that there was existence of similar provision even under the service tax regime. Mr. Hemani further reiterated that the provisions of the section 135 of the CGST Act cannot be pressed into service at the time of invoking provisions of the section 69 pertaining to the power to arrest.

43. With regard to the reliance placed on the decision of **Devchand Kalyan Tandel v. State of Gujarat and another** reported in (1996) 6 Supreme Court Cases 255, it was submitted that the said decision was rendered in relation to an appeal preferred against the judgment of Additional Chief Judicial Magistrate wherein the appellants were charged for the offence punishable under the section 135(1)(a) of the Customs Act, 1962 and it was not a case where trial Court was concerned with the "power to arrest" but the Court was concerned with regard

to dealing with the punishment for the prescribed offence and in such circumstances, reference to the provisions pertaining to the "presumption of culpable mental state" was made in the said decision. It was therefore, submitted that the controversy in the said case and the controversy in the present petitions are totally different and the ratio laid down in the said decision would not be applicable in the facts of the present case.

44. The learned Senior Advocate Mr. Hemani therefore, submitted that even if two interpretations are available, the one which is more favourable to the tax payer is required to be resorted to. Reliance was placed on the decision of the Supreme Court in the case of **CIT v. Vatika Township (P) Ltd.** reported in (2014) 367 ITR 466 (SC)in support of such submission. The learned Senior Advocate also relied upon the treatise on the Interpretation of Statutes by Maxwell (12th edition by P. St. J. Lagan) at page 239 wherein it is stated that the "The principle applied in construing a penal Act is that if in construing the relevant provisions, there appears any reasonable doubt or ambiguity, it will be resolved in favour of the person who would be liable to the penalty." Mr. Hemani thereafter referred to the remarks

of the Lord Esher M.R. in the case of **Tuck & Sons v. Priester** (1887) 19 OBD 629 at page 638 as below :

> "If there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections."

Reliance was also placed on the decision of the Supreme Court in the case of **CIT v. Vegetable Products Ltd.** reported in (1973) 88 ITR 192 (SC) in support of above submission.

45. The learned advocate Mr. Pandya submitted that the decision of **Make My Trip India Pvt. Ltd** (supra) is squarely applicable to the facts of the present case as the provisions of service tax are pari materia with that of the CGST Act. He relied upon the following paragraphs of the said judgment:

> "74. The Customs Act, 1962, has a different approach to the question of offences. Chapter XVI thereof describes with specificity the types of offences and the procedure adopted in prosecuting such offences. Section 138A enables the court to draw a presumption, which is rebuttable, of the culpable mental state

of the person charged with an offence under the Customs Act, 1962 which requires such culpable mental state. Even for the purposes of confiscation of smuggled goods, Section 123 of the Customs Act, 1962 shifts the burden of proof in the case of 'smuggling', to the person from whom the goods are seized to show that they are not smuggled goods. Powers are given to the Customs Officer under Section 108 to record statements which are admissible in law. The point to be noted is that coercive powers under taxing statutes are hedged in by limits W.P. (C) 525/2016 & 1283/2016 Page 48 of 77 on the use of that power by in-built restrictions and limitations.

75. It is for this reason that the powers of a Central Excise Officer under the FA cannot be compared with the powers exercised by the same officer either under the Customs Act or the Central Excise Act. Each of those statutes has a different and distinct scheme which does not bear comparison with the FA. For example, the FA envisages filing of periodic returns which is comparable to the Income Tax Act, whereas the assessment under the Customs Act is of individual bills of entry. AS noticed earlier, the scheme of the FA provisions points to an assessment, followed by an adjudication of penalty under Section 83 A of the FA. There are a separate set of provisions for launching prosecution."

46. The learned advocate Mr. Uchit Sheth in rejoinder submitted that the section 132(1)(a)

of the CGST Act talks of only the supply of goods or services or both without issuance of any invoice in violation of the provisions of the CGST Act and the Rules with the intention to evade tax whereas the clauses (b), (c) and (d) of the sub-section(1) of the section 132 provides for issuance of invoice or bill without supply of goods for availing of input tax credits by collecting of the amount and all of which has the actual fiduciary liability fastened upon the assessee. It was therefore, submitted that even for technical breach as per the provisions of the section 132(1)(a), power to arrest is provided and in such circumstances, such power can be invoked only if there is adjudication as provided under the Chapter XII of the CGST Act. He therefore, placed heavy reliance upon paragraph no. 52 of the judgment in the case of **P.V.Ramana Reddy** (supra) of the Telangana High Court.

ANALYSIS :

47. Having heard the learned counsel appearing for the parties and having considered the materials on record, the pivotal question which falls for our consideration is whether the power to arrest as provided under section 69 read with section 132 of the CGST Act can be

invoked by the Commissioner only upon completion of the adjudication process of finalising the assessment and determination of liability as per the provisions of the CGST Act?

48. The other ancillary questions which arise for our consideration are as under :

(i) Whether the provisions of section 69 of the CGST Act envisages that the Commissioner is obliged to record his reasons to believe and furnish the same to the person who is sought to be arrested?

(ii) Whether the provisions of sections 154, 155(1), 155(2), 155(3), 157, 172 of the Code of Criminal Procedure, 1973 are applicable or should be made applicable for the purpose of invoking the power to arrest under section 69 of the CGST Act? In other words, whether the authorised officer can arrest a person alleged to have committed non cognizable and bailable offences without a warrant of arrest issued by the Magistrate under the provisions of the Code of Criminal Procedure, 1973?

(iii) For the purpose of section 69(3) of the CGST Act, whether the officers of the GST department could be said to be a "police officer in charge of a police station" as defined under section 2(o) of the Code of Criminal Procedure, 1973?

(iv) Whether the constitutional safeguards laid out by the Supreme Court in **D.K. Basu's** case [1997 (1) SCC 416] in the context of the powers of the police officers under the Code of Criminal Procedure, 1973 and of officers of the Central Excise, Customs and Enforcement Directorate are applicable to the exercise of powers under the provisions of section 69 of the GST Act in equal measure?

49. In order to answer the above questions in light of the submissions made by the learned counsel of both the sides, it would be germane to refer to relevant provisions of the CGST Act, the Code of Criminal Procedure, 1973, the Finance Act 1994 and the Central Excise Act, 1944.

- Section 69 of the CGST Act Reads thus:

"Section 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 subsection(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,

(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.

- Section 132 of the CGST Act reads thus :

"Section 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 such invoice or bill referred to in clause (b);

(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, fraudulently avails input tax credit 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, all offences under this Act, except the offences referred to in sub-section (5) shall be noncognizable 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."

- Section 135 of the CGST Act reads thus :

"Section 135. Presumption of culpable mental state- In any prosecution for an offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation.-For the purposes of this section,-

(i) the expression "culpable mental state" includes intention, motive, knowledge of a fact, and belief in, or reason to believe, a fact;

ii) a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability."

- Sections 61, 66, 73 and 74 of the CGST Act read thus :

"Section 61: - Scrutiny of Returns-(1) The proper officer may scrutinize the return and related particulars furnished by the registered person to verify the correctness of the return and inform him of the discrepancies noticed, if any, in such manner as may be prescribed and seek his explanation thereto.

(2) In case the explanation is found acceptable, the registered person shall be informed accordingly and no further action shall be taken in this regard.

(3) In case no satisfactory explanation is furnished within a period of thirty days of being informed by the proper officer or such further period as may be permitted by him or where the registered person, after accepting the discrepancies, fails to take the corrective measure in his return for the month in which the discrepancy is accepted, the proper officer may initiate appropriate action including those under section 65 or section 66 or section 67, or proceed to determine the tax and other dues under section 73 or section 74.

Section 66:Special Audit:- (1) If at any stage of scrutiny, inquiry, investigation or any other proceedings before him, any officer not below the rank of Assistant Commissioner, having regard to the nature and complexity of the case and the interest of revenue, is of the opinion that the value has not been correctly declared or the credit availed is not within the normal limits, he may, with the prior approval of the Commissioner, direct such registered person by a communication in writing to get his records including books of account

examined and audited by a chartered accountant or a cost accountant as may be nominated by the Commissioner.

(2) The chartered accountant or cost accountant so nominated shall, within the period of ninety days, submit a report of such audit duly signed and certified by him to the said Assistant Commissioner mentioning therein such other particulars as may be specified:

Provided that the Assistant Commissioner may, on an application made to him in this behalf by the registered person or the chartered accountant or cost accountant or for any material and sufficient reason, extend the said period by a further period of ninety days.

(3) The provisions of sub-section (1) shall have effect notwithstanding that the accounts of the registered person have been audited under any other provisions of this Act or any other law for the time being in force.

(4) The registered person shall be given an opportunity of being heard in respect of any material gathered on the basis of special audit under sub-section (1) which is proposed to be used in any proceedings against him under this Act or the rules made thereunder.

(5) The expenses of the examination and audit of records under sub-section (1), including the remuneration of such chartered accountant or cost accountant, shall be determined and paid by the Commissioner and

such determination shall be final.

(6) Where the special audit conducted under sub-section (1) results in detection of tax not paid or short paid or erroneously refunded, or input tax credit wrongly availed or utilised, the proper officer may initiate action under section 73 or section 74.

Section 73- Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for any reason other than fraud or any wilful misstatement or suppression of facts-(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilised for any reason, other than the reason of fraud or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty leviable under the provisions of this Act or the rules made thereunder.

(2) The proper officer shall issue the notice under sub-section (1) at least three months prior to the time limit specified in sub-section (10) for issuance of order.

(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing

the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.

(4) The service of such statement shall be deemed to be service of notice on such person under sub-section (1), subject to the condition that the grounds relied upon for such tax periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.

(5) The person chargeable with tax may, before service of notice under sub-section (1) or, as the case may be, the statement under sub-section (3), pay the amount of tax along with interest payable thereon under section 50 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.

(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1) or, as the case may be, the statement under sub-section (3), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.

(7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under sub-section (1) or sub-section (3) pays the said tax along with interest

payable under section 50 within thirty days of issue of show cause notice, no penalty shall be payable and all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by person chargeable with tax, determine the amount of tax, interest and a penalty equivalent to ten per cent. of tax or ten thousand rupees, whichever is higher, due from such person and issue an order.

(10) The proper officer shall issue the order under sub-section (9) within three years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within three years from the date of erroneous refund.

(11) Notwithstanding anything contained in sub-section (6) or sub-section (8), penalty under sub-section (9) shall be payable where any amount of self-assessed tax or any amount collected as tax has not been paid within a period of thirty days from the due date of payment of such tax.

Section 74: - Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful misstatement or suppression of facts-(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the

person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.

(2) The proper officer shall issue the notice under sub-section (1) at least six months prior to the time limit specified in sub-section (10) for issuance of order.

(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.

(4) The service of statement under sub-section (3) shall be deemed to be service of notice under sub-section (1) of section 73, subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilful-misstatement or suppression of facts to evade tax, for periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.

(5) The 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 fifteen per cent. 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.

(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.

(7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under sub-section (1) pays the said tax along with interest payable under section 50 and a penalty equivalent to twenty-five per cent. of such tax within thirty days of issue of the notice, all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by the person chargeable with tax, determine the amount of tax, interest and penalty due from such person and issue an order.

(10) The proper officer shall issue the order under sub-section (9) within a period of five years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within five years from the date of erroneous refund.

(11) Where any person served with an order issued under sub-section (9) pays the tax along with interest payable thereon under section 50 and a penalty equivalent to fifty per cent. of such tax within thirty days of communication of the order, all proceedings in respect of the said notice shall be deemed to be concluded.

Explanation 1.- For the purposes of section 73 and this section,-

(i) the expression "all proceedings in respect of the said notice" shall not include proceedings under section 132;

(ii) where the notice under the same proceedings is issued to the main person liable to pay tax and some other persons, and such proceedings against the main person have been concluded under section 73 or section 74, the proceedings against all the persons liable to pay penalty under sections 122, 125, 129 and 130 are deemed to be concluded.

Explanation 2.- For the purposes of this Act, the expression "suppression" shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made there under, or failure to furnish any information on being asked for, in writing, by the proper officer."

Sections 41 , 41A 154, 155, 157, 172 of the Code reads thus :

Section 41: When police may arrest without warrant.

(1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person-

(a) who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned; or

(b) who has in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house- breaking; or

(c) who has been proclaimed as an offender either under this Code or by order of the State Government; or

(d) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or

(e) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or

(f) who is reasonably suspected of being a deserter from any of the Armed Forces of the Union; or

(g) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition,

or otherwise, liable to be apprehended or detained in custody in India; or

(h) who, being a released convict, commits a breach of any rule made under sub- section (5) of section 356; or

(i) for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

(2) Any officer in charge of a police station may, in like manner, arrest or cause to be arrested any person, belonging to one or more of the categories of persons specified in section 109 or section 110.

Section 41A: - (1) The police officer shall, in all cases where the arrest of a person is not required under the provisions of sub-section (1) of section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.

(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred

to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.

(4) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice."

Section 154: Information in cognizable cases.

(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read Over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

(2) A copy of the information as recorded under sub- section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in subsection (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be

made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.

Section 155. Information as to non-cognizable cases and investigation of such cases.

(1) When information is given to an officer in charge of a police station of the commission within the limits of such station of a non- cognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf, and refer the informant to the Magistrate.

(2) No police officer shall investigate a non- cognizable case without the order of a Magistrate having power to try such case or commit the case for trial.

(3) Any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case.

(4) Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non- cognizable.

Section 157. Procedure for investigation preliminary inquiry.

(1) If, from information received or

otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender; Provided that-

(a) when information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the officer in charge of a police station need not proceed in person or depute a subordinate officer to make an investigation on the spot;

(b) if it appears to the officer in charge of a police station that there is no sufficient ground for entering on an investigation, he shall not investigate the case.

(2) In each of the cases mentioned in clauses (a) and (b) of the proviso to sub-section (1), the officer in charge of the police station shall state in his report his reasons for not fully complying with the requirements of that sub- section, and, in the case mentioned in clause (b) of the said proviso, the officer shall also forthwith notify to the informant, if any, in such manner as may be prescribed by the State Government, the fact that he will not investigate the case or cause it to be investigated.

Section 172: Diary of proceedings in investigation.

(1) Every police officer making an investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.

(2) Any Criminal Court may send for the police diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial.

(3) Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court; but, if they are used by the police officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such police officer, the provisions of section 161 or section 145, as the case may be, of the Indian Evidence Act, 1872 (1 of 1872), shall apply,

- Section 83 of the Finance Act 1994 reads thus:

“83. Application of certain provisions of Act 1 of 1944.

The provisions of the following sections of the Central Excise and Salt Act, 1944, as in force from time to time. shall apply, so far as may be, in relation to service tax as

they apply in relation to a duty of excise:—
M1

M1. In This Principal act, for the figures and letters “9C, 9D,11B, 11BB, 11C, 12, 12A, 12B, 12C, 12D, 12E, 14, 14AA, 15, 33A, 34A, 35F”, the figures and letters “9A, 9AA, 9B, 9C, 9D, 9E,11B,11C,12,12A,12B,12C,12D,12E,14,14AA,15 ,33A,34A,35F” shall be substituted BY FINANC ACT, 1994, [Gaz. of India, Exty., Pt. II-Sec.1, No.10, dt.8.4.2011, p.1.]

[9AA, 9B, 9C, 9D, 9E, 11B, 11BB, 11C, 12, 12A, 12B, 12C, 12D, 12E, 14, 14AA, 15, 33AA, 34A, 35F] to 350 (both inclusive), 35Q,M2M2. In This Principal act, after the figures and letter “35Q”, the figures and letter “35R” shall be inserted and shall be deemed to have been inserted with effect from the 20th day of October, 2010 BY FINANCE ACT, 1994, [Gaz. of India, Exty., Pt. II-Sec.1, No.10, dt. 8.4.2011, p.1.][35R]36, 36A, 37A, 37B, 37C,37D,DP265[38A], and 40.”

- Section 9(c) of the Central Excise Act, 1944 reads thus:

Section 9(c) of the Central Excise Act, 1944

(1) In any prosecution for an offence under this Act which requires a culpable mental state on the part of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation.—In this section,“culpable mental state” includes intention, motive,

knowledge of a fact, and belief in, or reason to believe, a fact.

(2) For the purposes of this section, a fact is said to be proved only when the Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability."

50. From the above provisions of the law and considering the preliminary objections raised on behalf of the respondent that the petition is premature and not maintainable as the concerned respondent authority has merely exercised statutory power under the provisions of the section 70 of the CGST Act calling upon the petitioners to give evidence and to record their statement with respect to the ongoing investigation is concerned, it is true that the respondents have not exercised the powers conferred under section 69 of the CGST Act invoking the power to arrest. However, there is a strong apprehension on the part of the petitioners that the respondents would invoke the power to arrest as provided under section 69 of the CGST Act when the petitioners comply with the summons issued under section 70 of the CGST Act. On such facts emerging from the record, it cannot be said that the petitions are premature and not maintainable as held by the Telangana High Court in case of **P.V. Ramana**

Reddy (supra), more particularly, when the Apex Court has not interfered with the said decision.

51. We propose to first answer the question with respect to the reasonable belief of the Commissioner for the purpose of exercising the power to arrest. Section 69 talks about the opinion which is necessary to be formed for the purpose of effecting arrest of a person suspected of having committed any offence under section 132 of the Act. Any opinion of the authority to be formed is not subject to objective test. The language leaves no room for the relevance of an official examination as to the sufficiency of the ground on which the authority may act in forming its opinion. But at the same time, there must be material based on which alone, the authority could form its opinion that a person has committed any offence as specified under clause (a) to (d) of the section 132 of the CGST Act and it is necessary to arrest such person for the alleged offence. The existence of relevant material is a pre-condition to the formation of opinion. The use of word “may” indicates not only the discretion, but an obligation to consider that a necessity has arisen to arrest the person concerned alleged to have committed any offence

as specified under section 132 of the Act. Therefore, the opinion to be formed by the Commissioner cannot be on imaginary ground, wishful thinking, howsoever laudable that may be. Such a course is impermissible in law. At the cost of repetition, the formation of the opinion, though subjective, must be based on some credible material disclosing that is necessary to arrest the person concerned alleged to have committed the offence as specified under section 132 of the Act. The statutory requirement of reasonable belief is to safeguard the citizen from vexatious proceedings. “Belief” is a mental operation of accepting a fact as true, so, without any fact, no belief can be formed. It is equally true that it is not necessary for the authority under the Act to state reasons for its belief. But if it is challenged that he had no reasons to believe, in that case, he must disclose the materials upon which his belief was formed, as it has been held by the Supreme Court in case of **Sheonath Singh** [AIR 1971 SC 2451] that the Court can examine the materials to find out whether an honest and reasonable person can base his reasonable belief upon such materials although the sufficiency of the reasons for the belief cannot be investigated by the Court. The word ”necessary” means indispensable;

requisite; indispensably requisite; useful; incidental or conducive; essential; unavoidable; impossible to be otherwise; not to be avoided; inevitable.

52. In **Barium Chemicals Ltd. vs. Company Law Board** [AIR 1967 SC 295], the Supreme Court pointed out, on consideration of several English and Indian authorities that the expressions "is satisfied", "is of the opinion" and "has reason to believe" are indicative of subjective satisfaction, though it is true that the nature of the power has to be determined on a totality of consideration of all the relevant provisions. The Supreme Court while construing Section 237 of the Companies Act, 1956 held :

"64. The object of S. 237 is to safeguard the interests of those dealing with a company by providing for an investigation where the management is so conducted as to jeopardize those interests or where a company is floated for a fraudulent or an unlawful object. Clause (a) does not create any difficulty as investigation is instituted either at the wishes of the company itself expressed through a special resolution or through an order of the court where a judicial process intervenes. Clause (b), on the other hand, leaves directing an investigation to the subjective opinion of the government or the Board. Since the legislature enacted S. 637 (i) (a) it knew that government would entrust to the Board its power under S. 237 (b). Could the legislature have left without any restraints or

limitations the entire power of ordering an investigation to the subjective decision of the Government or the Board? There is no doubt that the formation of opinion by the Central Government is a purely subjective process. There can also be no doubt that since the legislature has provided for the opinion of the government and not of the court such an opinion is not subject to a challenge on the ground of propriety, reasonableness or sufficiency. But the Authority is required to arrive at such an opinion from circumstances suggesting what is set out in sub clauses (i), (ii) or (iii). If these circumstances were not to exist, can the government still say that in its opinion they exist or can the Government say the same thing where the circumstances relevant to the clause do not exist? The legislature no doubt has used the expression "circumstances suggesting". But that expression means that the circumstances need not be such as would conclusively establish an intent to defraud or a fraudulent or illegal purpose. The proof of such an intent or purpose is still to be adduced through an investigation. But the expression "circumstances suggesting" cannot support the construction that even the existence of circumstances is a matter of subjective opinion. That expression points out that there must exist circumstances from which the Authority forms an opinion that they are suggestive of the crucial matters set out in the three sub clauses. It is hard to contemplate that the legislature could have left to the subjective process both the formation of opinion and also the existence of circumstances on which it is to be founded. It is also not reasonable to say that the clause permitted the Authority to say that it has formed the opinion on circumstances which in its opinion exist and which in its opinion suggest an intent to defraud or a fraudulent or unlawful purpose. It is equally

unreasonable to think that the legislature could have abandoned even the small safeguard of requiring the opinion to be founded on existent circumstances which suggest the things for which an investigation can be ordered and left the opinion and even the existence of circumstances from which it is to be formed to a subjective process. These analysis finds support in Gower's Modern Company Law (2nd Ed.) p. 547 where the learned author, while dealing with S. 165(b) of the English Act observes that "the Board of Trade will always exercise its discretionary power in the light of specified grounds for an appointment on their own motion" and that "they may be trusted not to appoint unless the circumstances warrant it but they will test the need on the basis of public and commercial morality." There must therefore exist circumstances which in the opinion of the Authority suggest what has been set out in sub clauses (i), (ii) or (iii). If it is shown that the circumstances do not exist or that they are such that it is impossible for any one to form an opinion therefrom suggestive of the aforesaid things, the opinion is challengeable on the ground of non application of mind or perversity or on the ground that it was formed on collateral grounds and was beyond the scope of the statute.

53. The Supreme Court while expressly referring to the expressions such as "reason to believe", "in the opinion of" observed :

"Therefore, the words, "reason to believe" or "in the opinion of do not always lead to the construction that the process of entertaining "reason to believe" or "the opinion" is an altogether subjective to process not lending itself even to a limited scrutiny by the court that such "a reason to believe" or "opinion"

was not formed on relevant facts or within the limits or as Lord Radcliffe and Lord Reid called the restraints of the statute as an alternative safeguard to rules of natural justice where the function is administrative."

54. In the **Income-tax Officer, Calcutta and Ors. vs. Lakhmani Mewal Das** [AIR 1976 SC 1753], the Supreme Court construed the expression "reason to believe" employed in Section 147 of the Income-Tax Act, 1961 and observed: the reasons for the formation of the belief must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income-tax Officer and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully or truly all material facts. It is not any or every material, howsoever vague and indefinite or distant which would warrant the formation of the belief relating to the escapement of the income of the assessee from assessment. The reason for the formation of the belief must be held in good faith and should not be a mere pretence.

55. In **Bhikhubhai Vithalabhai Patel** (supra), the Supreme Court observed in paras 32 and 33 as under:

"32. We are of the view that the construction placed on the expression "reason to believe" will equally be applicable to the expression "is of opinion" employed in the proviso to Section 17 (1) (a) (ii) of the Act. The expression "is of opinion", that substantial modifications in the draft development plan and regulations, "are necessary", in our considered opinion, does not confer any unlimited discretion on the Government. The discretion, if any, conferred upon the State Government to make substantial modifications in the draft development plan is not unfettered. There is nothing like absolute or unfettered discretion and at any rate in the case of statutory powers. The basic principles in this regard are clearly expressed and explained by Prof. Sir William Wade in Administrative Law (Ninth Edn.) in the chapter entitled 'abuse of discretion' and under the general heading the principle of reasonableness' which read as under:

"The common theme of all the authorities so far mentioned is that the notion of absolute or unfettered discretion is rejected. Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms. The real question is whether the discretion is wide or narrow, and where the legal line is to be drawn. For this purpose everything depends upon the true intent

and meaning of the empowering Act.

The powers of public authorities are therefore essentially different from those of private persons. A man making his will may, subject to any rights of his dependents, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land, to release a debtor, or, where the law permits, to evict a tenant, regardless of his motives. This is unfettered discretion. But a public authority may do none of these things it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good. There is nothing paradoxical in the imposition of such legal limits. It would indeed be paradoxical if they were not imposed."

The Court is entitled to examine whether there has been any material available with the State Government and the reasons recorded, if any, in the formation of opinion and whether they have any rational connection with or relevant bearing on the formation of the opinion. The Court is entitled particularly, in the event, when the formation of the opinion is challenged to determine whether the formation of opinion is arbitrary, capricious or whimsical. It is always open to the court to examine the question whether reasons for formation of opinion have rational connection or relevant bearing to the formation of such opinion and are not extraneous to the purposes of the statute."

56. In the absence of any cogent or credible

material, if the subjective satisfaction is arrived at by the authority concerned for the purpose of arrest under Section 69 of the Act, then such action amounts to malice in law. Malice in its legal sense means such malice as may be assumed from the doing of a wrongful act intentionally but also without just cause or excuse or for want of reasonable or probable cause. Any use of discretionary power exercised for an unauthorized purpose amounts to malice in law. It is immaterial whether the authority acted in good faith or bad faith. In the aforesaid context, we may refer to and rely upon a decision of the Supreme Court in the case of **Smt. S.R. Venkatraman vs. Union of India** reported in (1979) ILLJ 25(SC) where it had been held :

"There will be an error of fact when a public body is prompted by a mistaken belief in the existence of a non existing fact or circumstances. This is so clearly unreasonable that what is done under such a mistaken belief might almost be said to have been done in bad faith; and in actual experience and as things go, they may well be said to run into one another. The influence of extraneous matters will be undoubtedly there where the authority making the order has admitted their influence. An administrative order which is based on reasons of fact which do not exist must be held to be infected with an abuse of power."

We may also refer to and rely upon a decision of the Supreme Court in the case of **ITO Calcutta**

vs. Lakhmani Mewal Das reported in [(1976) 103 ITR 437 (SC)] wherein it had been held as under:

> *"The reasons for the formation of the belief contemplated by Section 147(a) of the Income-tax Act, 1961, for the reopening of an assessment must have a rational connection or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the I.T.O. and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully and truly all material facts. It is no doubt true that the Court cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the I.T.O. on the point as to whether action should be initiated for reopening the assessment. At the same time we have to bear in mind that it is not any and every material, howsoever vague and indefinite or distant, remote and far-fetched, which would warrant the formation of the belief relating to escapement of the income of the assessee from assessment.*
>
> *The reason for the formation of the belief must be held in good faith and should not be a mere pretence."*

57. The stipulation of the Commissioner to have reason to believe is of utmost importance in section 69(1) of the CGST Act. Section 26 of the Indian Penal Code defines the term “reason to believe”. It means a person is said to have “reason to believe” a thing, if he has

sufficient cause to believe that thing but not otherwise. “Reason to believe” is a very subjective phrase and may vary in circumstances of each case. Section 147 of the Income Tax Act, 1961 also provides that reassessment can be made, if there is reason to believe by the Assessing Officer that there is escapement of income and failure on part of the assessee of true and full disclosures. “Reason to believe” consists of two words “reason” and “to believe”. The word “reason” means cause or justification and the word “believe” means to accept as true or to have faith in it. Therefore, there must be justification for it and belief is the result of the mental exercise based on information received. The words “reason to believe' contemplate an objective determination based on intelligence, care and deliberation involving judicial review as distinguished from a purely subjective consideration.

58. Therefore, reason to believe must have a rational connection or a relevant bearing to the formation of the belief and not extraneous or irrelevant to the purpose of the section. Therefore, the Commissioner has to form an opinion and to have reason to believe that the person has committed offences as specified in

the clauses (a), (b), (c) or (d) of sub-section(1) of section 132 of the CGST Act and depending upon the punishment prescribed in clause (i) and clause(ii) of sub-section(1) of section 132, provisions of sub-section (2) and sub-section(3) of section 69 would operate depending upon whether the offence is cognizable or non cognizable as per the provisions of sub-section(4) and sub-section(5) of section 132 of the CGST Act.

59. On the aforesaid issue, we summarise our conclusions :

i) The order authorising any officer to arrest may be justified if the Commissioner or any other authority empowered in law has reasons to believe that the person concerned has committed the offence under section 132 of the Act. However, the subjective satisfaction should be based on some credible materials or information and also should be supported by supervening factor. It is not any and every material, howsoever vague and indefinite or distant remote or far-fetching, which would warrant the formation of the belief.

ii) The power conferred upon the authority under Section 69 of the Act for arrest could be termed

as a very drastic and far-reaching power. Such power should be used sparingly and only on substantive weighty grounds and reasons.

iii) The power under Section 69 of the Act should neither be used as a tool to harass the assessee nor should it be used in a manner which may have an irreversible detrimental effect on the business of the assessee.

iv) The above are merely the incidents of personal liberty guaranteed under the Constitution of India. No arrest can be made because it is lawful for the police officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The Commissioner must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for the authority in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after

some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the authority effecting the arrest that such arrest is necessary and justified. (See **Joginder Kumar v. State of U.P.** [1994 AIR 1349]

60. We are not impressed by the submission vociferously canvassed on behalf of the petitioners that the respondent authorities cannot invoke the power to arrest under section 69 read with section 132 of the CGST Act prior to the completion of adjudication/assessment. It is required to be noted that section 69 falls under Chapter XIV of the CGST Act which provides for inspection, search, seizure and arrest whereas section 132 which provides for the punishment for certain offences falls under Chapter XIX for offences and penalties and both the provisions operate in separate fields as explained hereunder.

61. The bare perusal of the sub-section (1) of

the section 69 of the CGST Act indicates that it starts with the phrase “Where the Commissioner has reasons to believe that a person has committed any offence…..” which suggests that the power to arrest a person is conferred upon the Commissioner when he forms a reasonable belief that such person has committed any offence as specified in the four clauses i.e. the clauses (a), (b), (c) and (d) of the sub-section (1) of the section 132 of the CGST Act which is punishable under the clause(i) or (ii) of the sub-section(1) or the sub-section (2) of section 132 of the CGST Act. In other words, the reference to the section 132 in the section 69 of the CGST Act providing the power to arrest is only with regard to the nature of the offences specified in the clauses (a), (b), (c) and (d) of the sub-section (1) of the section 132 for which the punishment is provided in the clauses (i) and clause (ii) of the sub-section(1) and the sub-section (2) of section 132 of the CGST Act. Therefore, when a Commissioner forms an opinion and has reason to believe that a person has committed any offence as specified in the clauses (a), (b), (c) and (d) of the sub-section (1) which is punishable under the clauses(i) and (ii) of the sub-section(1) and the sub-section (2) of section 132 of the CGST Act, he may by order authorise

any officer of the central tax to arrest such person.

62. In the aforesaid context, section 69 is independent of the section 132 of the CGST Act which falls under Chapter XIX which prescribes for the offences and penalties. The plain perusal of section 132 of the CGST Act indicates that it only provides punishment for certain offences. In this context the sub-section(2) of section 69 of the CGST Act is also relevant as it provides that where a person is arrested under the sub-section (1) of section 69, for an offence specified under the sub-section(5) of the section 132 of the CGST Act which provides that the offences specified in the clauses (a), (b), (c) and (d) of the sub-section(1)of the section 132 and punishable under the clause (i) of the sub-section(1)of the section 132, shall be cognizable and non bailable, then 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. In other words, when a person is arrested pursuant to the order passed by the Commissioner who has reason to believe that such person has committed any offence specified in the clauses (a), (b), (c) or (d) of sub-section(1) of

section 132 of the CGST Act which is punishable under the clause(i) of that sub-section, then such offence being cognizable and non bailable as per sub-section (5) of the CGST Act, the officer authorised to arrest such person is duty bound to inform such person about the grounds of arrest and produce him before the Magistrate within twenty-four hours. Therefore, the reference to section 132(5) in sub-section(2) of section 69 of the CGST Act is made so as to differentiate between the person for whom the Commissioner has reason to believe that such person has committed cognizable and non bailable offences or non cognizable and bailable offences as provided in section 132 of the CGST Act.

63. At this juncture, it is relevant to refer to sub-section(3) of section 69 which in turn refers to the Code of Criminal Procedure, 1973 and provides that subject to the provisions of the Code where a person is arrested under sub-section(1) of the section 69 of the CGST Act for any offence specified under the sub-section(4) of the section 132 which provides that notwithstanding anything contained in the Code, all the offences under the CGST Act, except the offences referred to in the sub-section (5) shall be non-cognizable and

bailable, then such person shall be admitted to bail or in default of bail, forwarded to the custody of the Magistrate. In other words, the sub-section(3)(a) of section 69 of the CGST Act provides that when the Commissioner has reason to believe that a person has committed offence under the clauses(a),(b),(c) and (d) of the sub-section(1) of the section 132 of the CGST Act which is punishable under the clause (ii) of the sub-section(1) and the Sub-section(2) of the Section 132 then such person is covered by the sub-section(4) of section 132 of the CGST Act and as such offence would be non cognizable and bailable and in such circumstances, the officer who is authorised to arrest shall grant bail or in default of bail, forward such person to the custody of the Magistrate. It appears that with a view to give effect to the power to grant bail by the authorised officer under the clause (a) of the sub-section (3) of the section 69, sub-clause(b) of sub-section(3)of the section 69 of the CGST Act provides for method, of course subject to the provisions of the Code of Criminal Procedure that in case of a non-cognizable and bailable offence, Deputy Commissioner or the Assistant Commissioner shall for the purpose of releasing an arrested person on bail or otherwise, has the same powers and be subjected to the same

provisions as an officer-in-charge of a police station.

64. Thus the provisions of section 69 of the CGST Act are absolutely clear and unambiguous which provides that during the course of inspection, search and seizure when the Commissioner has reason to believe that the person has committed any offence as per the clauses (a), (b), (c) or (d) of the sub-section(1) of section 132 of the CGST Act, which is punishable under the clause(i) or clause (ii) of the sub-section (1) or the sub-section (2) of the section 132 of the CGST Act, then he may pass an order authorising an officer of the department to arrest such person. Thereafter, if the offence falls under the category of cognizable and non bailable offence as per the sub-section (5) of the section 132, then sub-section (2) of section 69 casts duty upon the officer authorised to arrest such person to inform such person of the grounds of arrest and produce him before the Magistrate within twenty-four hours; whereas if the offence is non-cognizable bailable as per the sub-section(4) of the section 132 then subject to provisions of the Code, the clauses (a) and (b) of the sub-section (3) of section 69 provides for enlarging such person on bail by the concerned

officer i.e. Deputy Commissioner or Assistant Commissioner exercising the same powers and be subjected to the same provisions as an officer-in-charge of a police station.

65. In view of the above discussion, the contention canvassed by the petitioners that the Commissioner would not be in a position to form his reasonable belief that a person has committed an offence unless and until there is final adjudication of the liability of the assessee as prescribed under the Chapter VIII of the CGST Act, is without any basis. It is necessary to keep in mind that the section 69 of the CGST Act falls under the Chapter XII which provides for inspection, search, seizure and arrest which are in nature of measures prescribed under the provisions of the CGST Act to find out the evasion of tax, if any, by any person. On the other hand, section 132 of the CGST Act prescribes punishment for certain offences falling under Chapter XIX which provides for the offences and penalties. Thus, Section 132 of the CGST Act is enacted by the legislature prescribing punishment for the offences committed by an assessee either upon adjudication and assessment proceedings having been completed or otherwise as per the clauses (a) to (l) of the sub-section (1) of the

section 132 of the CGST Act. Therefore, the section 69 and the section 132 of the CGST Act operates in totally different fields and the attempt on part of the petitioners to canvass that unless and until adjudication proceedings of the assessment determining the tax and penalty liability is completed by the department as provided under Chapter VIII of the CGST Act, the Commissioner cannot form at any opinion to reason to believe that the assessee has committed any offence, is contrary to the entire scheme of the CGST Act.

66. The Supreme Court in the case of **Radheshyam Kejriwal v. State of West Bengal and another** [(2011) 3 SCC 581] has culled out the various principles in the aforesaid context as under :

> "38. The ratio which can be culled out from these decisions can broadly be stated as follows:
>
> (i) Adjudication proceedings and criminal prosecution can be launched simultaneously;
>
> (ii) Decision in adjudication proceedings is not necessary before initiating criminal prosecution;
>
> (iii) Adjudication proceedings and criminal proceedings are independent in nature to each other;
>
> (iv) The finding against the person facing

prosecution in the adjudication proceedings is not binding on the proceeding for criminal prosecution;

(v) Adjudication proceedings by the Enforcement Directorate is not prosecution by a competent court of law to attract the provisions of Article 20(2) of the Constitution or Section 300 of the Code of Criminal Procedure;

(vi) The finding in the adjudication proceedings in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceedings is on technical ground and not on merit, prosecution may continue; and

(vii) In case of exoneration, however, on merits where the allegation is found to be not sustainable at all and the person held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue, the underlying principle being the higher standard of proof in criminal cases.

67. Thus, what is discernible from the above referred judgment of the Supreme Court and also other precedence is as under:

1) On the same violation alleged against a person, if adjudication proceedings as well as criminal proceedings are permissible, both can be initiated simultaneously. For initiating criminal proceedings one does not

have to wait for the outcome of the adjudication proceedings as the two proceedings are independent in nature.

2) The findings in the departmental proceedings would not amount to resjudicata and initiation of criminal proceedings in these circumstances can be treated as double jeopardy as they are not in the nature of "prosecution".

3). In case adjudication proceedings are decided against a person who is facing prosecution as well and the Tribunal has also upheld the findings of the adjudicators/assessing authority, that would have no bearing on the criminal proceedings and the criminal proceedings are to be determined on its own merits in accordance with law, uninhibited by the findings of the Tribunal. It is because of the reason that in so far as criminal action is concerned, it has to be proved as per the strict standards fixed for criminal cases before the criminal court by producing necessary evidence.

4) In case of converse situation namely where the accused persons are exonerated by

the competent authorities/Tribunal in adjudication proceedings, one will have to see the reasons for such exoneration to determine whether these criminal proceedings could still continue. If the exoneration in departmental adjudication is on technical ground or by giving benefit of doubt and not on merits or the adjudication proceedings were on different facts, it would have no bearing on criminal proceedings. If, on the other hand, the exoneration in the adjudication proceedings is on merits and it is found that allegations are not substantiated at all and the concerned person(s) is/are innocent, and the criminal prosecution is also on the same set of facts and circumstances, the criminal prosecution cannot be allowed to continue. The reason is obvious criminal complaint is filed by the departmental authorities alleging violation/contravention of the provisions of the Act on the part of the accused persons. However, if the departmental authorities themselves, in adjudication proceedings, record a categorical and unambiguous finding that there is no such contravention of the provisions of the Act, it would be unjust for such departmental authorities to continue with the criminal complaint and say that

there is sufficient evidence to foist the accused persons with criminal liability when it is stated in the departmental proceedings that ex-facie there is no such violation. The yardstick would, therefore, be to see as to whether charges in the departmental proceedings as well as criminal complaint are identical and the exoneration of the concerned person in the departmental proceedings is on merits holding that there is no contravention of the provisions of any Act.

68. We may now refer to and rely upon the decision of the Telangana High Court in case of **P.V. Ramana Reddy** (supra) wherein elaborate discussion of this issue is made as under :

> *"30. It can be seen from the language employed in sub-Sections (1), (2) and (3) of Section 69, that there are some incongruities. Under sub-Section (1) of Section 69, the power to order arrest is available only in cases where the Commissioner has reasons to believe that a person has committed any offence specified in clauses (a) to (d) of sub-Section (1) of Section 132 CGST Act, 2017. The offences specified in clauses (a) to (d) of sub-Section (1) of Section 132 CGST Act, 2017 are made cognizable and non- bailable under Section 132(5) of the CGST Act, 2017.*

31. Therefore, it is clear from sub-Section (1) of Section 69 of the CGST Act that the power of the Commissioner to order the arrest of a person, can be exercised only in cases where such a person is believed to have committed a cognizable and non- bailable offence. As we have pointed out elsewhere, Section 132(1) of CGST Act, 2017 lists out 12 different types of offences from clauses (a) to (l). The offences specified in clauses (a) to (d) of sub- Section (1) of Section 132 are declared cognizable and non-bailable under sub-Section (5) of Section 132 CGST Act, 2017. All the other offences specified in clauses (f) to (l) of sub-Section (1) of Section 132 of the CGST, 2017 Act are declared as non-cognizable and bailable under sub-Section (4) of Section 132 of CGST Act, 2017.

32. But the incongruity between Section 69(1) and sub-Sections (4) and (5) of Section 132 of CGST Act, 2017 is that when the very power to order arrest under Section 69(1) is confined only to congnizable and non-bailable offences, we do not know how an order for arrest can be passed under Section 69(1) in respect of offences which are declared non-cognizable and bailable under sub-Section (4) of Section 132 of CGST Act.

xxx

34. If CGST Act, 2017 is a complete code in itself in respect of (1) the acts that constitute offences, (2) the procedure for prosecution and (3) the punishment upon conviction, then the power of Commissioner, who is not a Police Officer, to order the arrest of a person should also emanate from

prescription contained in the Act itself. Section 69(1) of CGST Act, 2017 very clearly delineates the power of the Commissioner to order the arrest of a person whom he has reasons to believe, to have committed an offence which is cognizable and non-bailable. Therefore, we do not know how a person whom the Commissioner believes to have committed an offence specified in clauses (f) to (l) of sub-Section (1) of Section 132 of CGST Act, which are non-cognizable and bailable, could be arrested at all, since Section 69(1) of the CGST Act, 2017 does not confer power of arrest in such cases.

35. The fact that the power of arrest under Section 69(1) of the CGST Act, 2017 is confined only to cognizable and non-bailable offences, is also fortified by sub-Section (2) of Section 69 which obliges the Officer, who carries out the arrest to inform the arrested person of the grounds of arrest and to produce him before a Magistrate within 24 hours. The duty enjoined upon the Officer carrying out the arrest, to inform the arrested person of the grounds of arrest and to produce him before a Magistrate within 24 hours, is co-relatable under sub-Section (2) of Section 69 of the CGST Act, 2017 to Section 132(5) of the CGST Act, 2017 that deals only with cognizable and non-bailable offences.

36. But, interestingly, clauses (a) and (b) of sub-Section (3) of Section 69 of the CGST Act, 2017 deal in entirety only with cases of persons arrested for the offences which are indicated as non-cognizable and bailable. The phrase

"subject to the provisions of the Code of Criminal Procedure" is used only in sub-Section (3), which deals in entirety only with the procedure to be followed after the arrest of a person who is believed to have committed a non-cognizable and bailable offence. While clause (a) of sub-Section (3) gives two options to the Officer carrying out the arrest, namely, to grant bail by himself or to forward the arrested person to the custody of the Magistrate, clause (b) confers the powers of an Officer in charge of a police station, upon the Deputy Commissioner or the Assistant Commissioner (GST), for the purpose of releasing an arrested person on bail, in the case of non-cognizable and bailable offences.

37. In other words, even though Section 69(1) of the CGST Act, 2017 does not confer any power upon the Commissioner to order the arrest of a person, who has committed an offence which is non-cognizable and bailable, sub-Section (3) of Section 69 of the CGST Act, 2017 deals with the grant of bail, remand to custody and the procedure for grant of bail to a person accused of the commission of non-cognizable and bailable offences. Thus, there is some incongruity between sub-Sections (1) and (3) of Section 69 read with section 132 of the CGST Act, 2017.

38. Another difficulty with Section 69 of the CGST Act, 2017 is that sub-Sections (1) and (2) of Section 69 which deal with the power of arrest and production before the Magistrate in the case of cognizable and non-bailable

offences, do not use the phrase "subject to the provisions of Cr.P.C." This phrase is used only in sub-Section (3) of Section 69 in relation to the arrest and grant of bail for offences which are non-cognizable and bailable, though no power of arrest is expressly conferred in relation to non-cognizable and bailable offences.

39. It is important to note that under sub-Section (4) of Section 132 of the CGST Act, 2017, all offences under the Act except those under clauses (a) to (d) of Section 132 (1), are made non-cognizable and bailable, notwithstanding anything contained in Cr.P.C. In addition, Section 67(10) of the CGST Act, 2017 makes the provisions of Cr.P.C. relating to search and seizure, apply to searches and seizures under this Act, subject to the modification that the word "Commissioner" shall substitute the word "Magistrate" appearing in Section 165 (5) of Cr.P.C., in its application to CGST Act, 2017.

40. Therefore, (1) in the light of the fact that Section 69(1) of the CGST Act, 2017 authorizes the arrest only of persons who are believed to have committed cognizable and non-bailable offences, but Section 69(3) of the CGST Act, 2017 deals with the grant of bail and the procedure for grant of bail even to persons who are arrested in connection with non-cognizable and bailable offences and (2) in the light of the fact that the Commissioner of GST is conferred with the powers of search and seizure under Section 67(10) of the CGST Act, 2017, in the same manner as

provided in Section 165 of the Cr.P.C., 1973, the contention of the Additional Solicitor General that the petitioners cannot take umbrage under Sections41 and 41A of Cr.P.C. may not be correct.

41. Though for the purpose of summoning of witnesses and for summoning the production of documents, the Proper Officer holding the enquiry under the CGST Act, 2017 is treated like a Civil Court, there are four other places in the Act, where a reference is made, directly or indirectly, to the Cr.P.C. They are (1) the reference to Cr.P.C. in relation to search and seizure under Section 67(10) of CGST Act, 2017, (2) the reference to Cr.P.C. under sub-Section (3) of Section 69 in relation to the grant of bail for a person arrested in connection to a non-cognizable and bailable offence, (3) the reference to Cr.P.C. in Section 132 (4) while making all offences under the CGST Act, 2017 except those specified in clauses (a) to (d) of Section 132 (1) of CGST Act, 2017 as non-cognizable and bailable and (4) the reference to Sections 193 and 228 of IPC in Section 70(2) of the CGST Act, 2017. Therefore, the contention of learned Additional Solicitor General that in view of Section 69(3) of the CGST Act, 2017, the petitioners cannot fall back upon the limited protection against arrest, found in Sections 41 and 41A of Cr.P.C., may not be correct. As pointed out earlier, Section 41-A was inserted in Cr.P.C. by Section 6 of the Code of Criminal Procedure (Amendment) Act, 2008. Under sub-Section (3) of Section 41A Cr.P.C., a person who complies with a notice for appearance and who continues to comply with the

notice for appearance before the Summoning Officer, shall not be arrested. In fact, the duty imposed upon a Police Officer under Section 41A(1) Cr.P.C., to summon a person for enquiry in relation to a cognizable offence, is what is substantially ingrained in Section 70(1) of the CGST Act. Though Section 69(1) which confers powers upon the Commissioner to order the arrest of a person does not contain the safeguards that are incorporated in Section 41 and 41A of Cr.P.C., we think Section 70(1) of the CGST Act takes care of the contingency.

42. In any case, the moment the Commissioner has reasons to believe that a person has committed a cognizable and non-bailable offence warranting his arrest, then we think that the safeguards before arresting a person, as provided in Sections 41 and 41A of Cr.P.C., may have to be kept in mind.

43. But, it may be remembered that Section 41A(3) of Cr.P.C., does not provide an absolute irrevocable guarantee against arrest. Despite the compliance with the notices of appearance, a Police Officer himself is entitled under Section 41A(3) Cr.P.C., for reasons to be recorded, arrest a person. At this stage, we may notice the difference in language between Section 41A(3) of Cr.P.C. and 69(1) of CGST Act, 2017. Under Section 41A(3) of Cr.P.C., "reasons are to be recorded", once the Police Officer is of the opinion that the persons concerned ought to be arrested. In contrast, Section 69(1) uses the phrase "reasons to believe".

There is a vast difference between "reasons to be recorded" and "reasons to believe."

44. It was contended by Mr. Niranjan Reddy, learned Senior Counsel for the petitioners that under Section 26 IPC, a person is said to have "reason to believe", if he has sufficient cause to believe. Therefore, he contended that an authorization for arrest issued under Section 69(1) of the CGST Act, 2017 should contain reasons in writing. But in one of the cases on hand, the authorization for arrest does not contain reasons. Therefore, it was contended that the authorization was bad.

45. But, as we have pointed, the requirement under Section 41A(3) of Cr.P.C. is the "recording of a reason", while the requirement under Section 69(1) of CGST Act, 2017 is the "reason to believe". In fact, on the question as to whether or not, reasons to believe should be recorded in the authorization for arrest, the learned Additional Solicitor General submitted that reasons are recorded in files. The learned Additional Solicitor General also produced the files.

46. If reasons to believe are recorded in the files, we do not think it is necessary to record those reasons in the authorization for arrest under Section 69(1) of the CGST Act. Since Section 69(1) of the CGST Act, 2017 specifically uses the words "reasons to believe", in contrast to the words "reasons to be recorded" appearing in Section 41A(3) of

Cr.P.C., we think that it is enough if the reasons are found in the file, though not disclosed in the order authorizing the arrest.

47. Once it is found that Article 226 of the Constitution of India can be invoked even in cases where Section 438 Cr.P.C. has no application (in contrast to cases such as those under the SC/ST Act where it stands expressly excluded) and once it is found that the limited protection against arrest available under Sections 41 and 41A Cr.P.C. may be available even to a person sought to be arrested under Section 69(1) of the CGST Act, 2017 (though the necessity to record reasons in the authorization for arrest may not be there), it should follow as a corollary that the writ petitions cannot be said to be not maintainable.

48. That takes us to the next question as to whether the petitioners are entitled to protection against arrest, in the facts and circumstances of the case. We have already indicated on the basis of the ratio laid down by the Constitution Bench in Kartar Singh and the ratio laid down in Km. Hema Mishra that the jurisdiction under Article 226 of the Constitution of India to grant protection against arrest, should be sparingly used. Therefore, let us see prima facie, the nature of the allegations against the petitioners and the circumstances prevailing in the case, for deciding whether the petitioners are entitled to protection against the arrest. We have already extracted in brief, the contents of the counter affidavits. We have summarized

the contents of the counter affidavits very cautiously with a view to avoid the colouring of our vision. Therefore, what we will now take into account on the facts, will only be a superficial examination of facts.

49. In essence, the main allegation of the Department against the petitioners is that they are guilty of circular trading by claiming input tax credit on materials never purchased and passing on such input tax credit to companies to whom they never sold any goods. The Department has estimated that fake GST invoices were issued to the total value of about Rs.1,289 crores and the benefit of wrongful ITC passed on by the petitioners is to the tune of about Rs.225 crores.

50. The contention of the petitioners is that the CGST Act, 2017 prescribes a procedure for assessment even in cases where the information furnished in the returns is found to have discrepancies and that unless a summary assessment or special audit is conducted determining the liability, no offence can be made out under the Act. Therefore, it is their contention that even a prosecution cannot be launched without an assessment and that therefore, there is no question of any arrest.

51. It is true that CGST Act, 2017 provides for (i) self assessment, under Section 59, (ii) provisional assessment, under Section 60, (iii) scrutiny of returns, under Section 61, (iv) assessment of persons who do not file

returns, under Section 62, (v) assessment of unregistered persons, under Section 63, (vi) summary assessment in special cases, under Section 64 and (vii) audit under Sections 65 and 66.

52. But, to say that a prosecution can be launched only after the completion of the assessment, goes contrary to Section 132 of the CGST Act, 2017. The list of offences included in sub-Section (1) of Section 132 of CGST Act, 2017 have no co-relation to assessment. Issue of invoices or bills without supply of goods and the availing of ITC by using such invoices or bills, are made offences under clauses (b) and (c) of sub-Section (1) of Section 132 of the CGST Act. The prosecutions for these offences do not depend upon the completion of assessment. Therefore, the argument that there cannot be an arrest even before adjudication or assessment, does not appeal to us.

53. An argument was advanced by Mr. Raghunandan Rao, learned Senior Counsel for the petitioners that all the offences under the Act are compoundable under sub-Section (1) of Section 138 of the CGST Act, 2017, subject to the restrictions contained in the proviso thereto and that therefore, there is no necessity to arrest a person for the alleged commission of an offence which is compoundable.

54. On the surface of it, the said argument of Mr. Raghunandan Rao, learned Senior Counsel for the petitioners is

quite appealing. But, on a deeper scrutiny, it can be found that the argument is not sustainable for two reasons:

(1) Any offence under CGST Act, 2017 is compoundable both before and after the institution of prosecution. This is in view of the substantial part of sub-section (1) of Section 138 of the CGST Act, 2017. But, the petitioners have not offered to compound the offence, though compounding is permissible even before the institution of prosecution.

(2) Under the third proviso to sub-Section (1) of 138, compounding can be allowed only after making payment of tax, interest and penalty involved in such cases. Today, the wrongful ITC allegedly passed on by the petitioners, according to the Department is to the tune of Rs.225 Crores. Therefore, we do not think that even if we allow the Batch petitioners to apply for compounding, they may have a meeting point with the Department as the liability arising out of the alleged actions on the part of the petitioners is so huge. Therefore, the argument that there cannot be any arrest as long as the offences are compoundable, is an argument of convenience and cannot be accepted in cases of this nature.

55. Another argument advanced by the learned Senior Counsel for the petitioners is that since the Proper Officer under the CGST Act, 2017, even according to the respondents is not a Police Officer, he cannot and he does not seek custody of the arrested person, for completing the investigation/enquiry. Section 69(2)

obliges the Officer authorized to arrest the person, to produce the arrested person before a Magistrate within 24 hours. Immediately, upon production, the Magistrate may either remand him to judicial custody or admit the arrested person to bail, in accordance with the procedure prescribed under the Code of Criminal Procedure. There is no question of police custody or custody to the Proper Officer in cases of this nature. Therefore, it is contended by Mr. Raghunandan Rao, learned Senior Counsel for the petitioners that the arrest under Section 69, does not advance the cause of investigation/enquiry, but only provides a satisfaction to the respondents that they have punished the arrested person even before trial. According to the learned Senior Counsel, the arrest of a person which will not facilitate further investigation, has to be discouraged, since the same has the potential to punish a person before trial.

56. But, the aforesaid contention proceeds on the premise as though the only object of arresting a person pending investigation is just to facilitate further investigation. However, it is not so. The objects of pre-trial arrest and detention to custody pending trial, are manifold as indicated in section 41 of the Code. They are:

(a) to prevent such person from committing any further offence;

(b) proper investigation of the offence;

(c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any

manner;

(d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer;

Therefore, it is not correct to say that the object of arrest is only to proceed with further investigation with the arrested person.

57. It is true that in some cases arising out of similar provisions for arrest under the Customs Act and other fiscal laws, the Supreme Court indicated that the object of arrest is to further the process of enquiry. But, it does not mean that the furthering of enquiry/ investigation is the only object of arrest.

58. Therefore, all the technical objections raised by the petitioners, to the entitlement as well as the necessity for the respondents to arrest them are liable to rejected. Once this is done, we will have to examine whether, in the facts and circumstances of these cases, the petitioners are entitled to protection against arrest. It must be remembered that the petitioners cannot be placed in a higher pedestal than those seeking anticipatory bail. On the other hand, the jurisdiction under Article 226 has to be sparingly used, as cautioned by the Supreme Court in Km.Hema Misra (cited supra).

59. We have very broadly indicated, without going deep, that the petitioners

have allegedly involved in circular trading with a turnover on paper to the tune of about Rs.1,289.00 crores and a benefit of ITC to the tune of Rs.225.00 crores. The GST regime is at its nascent stage. The law is yet to reach its second anniversary. There were lot of technical glitches in the matter of furnishing of returns, making ITC claims etc. Any number of circulars had to be issued by the Government of India for removing these technical glitches.

60. If, even before the GST regime is put on tracks, someone can exploit the law, without the actual purchase or sale of goods or hiring or rendering of services, projecting a huge turnover that remained only on paper, giving rise to a claim for input tax credit to the tune of about Rs.225.00 crores, there is nothing wrong in the respondents thinking that persons involved should be arrested. Generally, in all other fiscal laws, the offences that we have traditionally known revolve around evasion of liability. In such cases, the Government is only deprived of what is due to them. But in fraudulent ITC claims, of the nature allegedly made by the petitioners, a huge liability is created for the Government. Therefore, the acts complained of against the petitioners constitute a threat to the very implementation of a law within a short duration of its inception.

61. In view of the above, despite our finding that the writ petitions are maintainable and despite our finding that the protection under Sections 41 and 41-A of Cr.P.C., may be available to

persons said to have committed cognizable and non-bailable offences under this Act and despite our finding that there are incongruities within Section 69 and between Sections 69 and 132 of the CGST Act, 2017, we do not wish to grant relief to the petitioners against arrest, in view of the special circumstances which we have indicated above."

69. We are in complete agreement with the above dictum of law except with regard to the findings of the Telangana High Court that there is incongruity within section 69(1) and section 69(3) of the Act. We reiterate that the Section 69(1) of the CGST Act provides for the power to arrest for both types of the offences i.e. cognizable and non bailable offences as well non-cognizable and bailable offences as per the provisions of the sub-section(5) and the sub-section(4) of the section 132 of the CGST Act. We again make it clear that in sub-section(5) of the section 132 reference is made to the offences specified in the clauses (a) to (d) of the subsection (1) of the section 132 for which punishment is prescribed in the clause (i) of the sub-section (1) of the section 132 which are to be treated as cognizable and non bailable offence whereas the sub-section(4) of the section 132 starts with a non obstante clause that "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" which means that all types of offence as per the Clauses (a) to (l) of sub-section (1)) of the section 132 shall be non cognizable and bailable offences which are not punishable under clause(i) of sub-section (1) of section 132 of the CGST Act. It is pertinent to observe that the Clause(i) of the sub-section (1) of the section 132 prescribes punishment in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilized or the amount of refund wrongly taken exceeds rupees five hundred lakh with imprisonment for a term which may extend to five years and with fine. Therefore, any other offence where the amount of tax evaded or the amount of input tax credit wrongly availed or utilized or the amount of refund wrongly taken does not exceed rupees five hundred lakh, such offence would be non cognizable and bailable. Hence, sub-section(3) of section 69 of the CGST Act which is subject to the provisions of the Code provides for conferring the powers upon the Deputy Commissioner and the Assistant Commissioner to grant bail to the person who is arrested for non-cognizable and bailable

offence as punishable as per clause(ii) of sub-section(1) or sub-section(2) of section 132 read with sub-section(1) of section 69 and subsection (4) of the section 132 of the CGST Act.

70. A lot was argued on the power of the authorised officer to arrest a person without a valid warrant insofar as the non cognizable and bailable offences under the Act is concerned. This argument is based on the use of the phrase "officer in charge of a police station" as appearing in section 69(3)(b) of the Act. We do not find any substance in this submission canvassed by the learned counsel appearing for the petitioners. It is true that there is a reference to an "officer in charge of a police station" in section 69(3)(b) of the Act referred to above, but the question is what powers of the police officer have been conferred to the GST officers. The provision does not confer upon the GST officers, the powers of the officer in charge of a police station in respect of the investigation and report. Instead of defining the power to grant bail in detail, saying as to what they should do or what should not do, the short and expedient way of referring to the powers of another officer when placed in somewhat similar

circumstances, has been adopted. By its language, the sub-section does not equate the officers of the GST with an officer in charge of a police station, nor does it make him one by implication. It only, therefore, means that he has got the powers as defined in the Code of Criminal Procedure for the purpose of releasing such person on bail or otherwise. This does not necessarily mean that a person alleged to have committed a non cognizable and bailable offence cannot be arrested without a warrant issued by the Magistrate.

71. We also do not subscribe to the view expressed in the decision of learned Single Judge of Madras High Court in case of **Jaychandran Alloys P. Ltd.** (supra) wherein it is held in the facts of that case that the officials cannot be seen to be acting in excess of the authority vested in them under the statute and provisions of section 132 of the CGST Act would stand triggered only once it is established that an assessee has committed an offence that has to necessarily be post-determination of the demand due from an assessee that itself has to necessarily follow the process of an assessment. However, as discussed above, the provisions of section 69 and section 132 of the CGST Act, operate in

different fields. The reference to section 132 is made in section 69 only with regard to the offences which are specified in section 132 of the CGST Act so as to confer the power of arrest only in certain cases. By invoking the power to arrest under section 69, no punishment prescribed under section 132 is inflicted upon the assessee. The power to arrest as provided under section 69 of the CGST Act is a measure taken during the course of inspection, investigation, search or seizure as explained in detail by the Telangana High Court and therefore, it cannot be said that by invoking the power under section 69 of the CGST Act punishment prescribed under the section 132 is inflicted. Therefore, there is a basic fallacy in the argument of the petitioners that unless and until there is completion of adjudication process by the determination of the demand, as per the provisions of the CGST Act, the power to arrest as provided under sub-section (1) of section 69 of the CGST Act cannot be invoked. We, therefore, reject such argument.

72. Similarly the reliance placed on the decision of Punjab and Haryana High Court in case of **Akhil Krishan Maggu** (supra) is also of no help to the petitioners as the same is also based upon the facts of its case. We do not subscribe

to the view of the Punjab and Haryana High Court that the Commissioner has no power to arrest in every case during the investigation and that too without determination of the tax evaded as well as finding that the accused has committed an offence described under section 132 of the CGST Act as explained herein above.

73. As discussed earlier, sub-section(1) of section 69 of the CGST Act clearly provides that a person can be arrested only if the Commissioner has reason to believe that he has committed offences specified in the clauses (a), (b), (c) or (d) of sub-section (1) of section 132 of the CGST Act, which is punishable under the clause (i) or clause (ii) of sub-section(1) or sub-section(2) of section 132 of the CGST Act only and if the Commissioner has reason to believe that person has committed offences other than the aforesaid clauses, such person cannot be arrested. It is required to be made clear that “arrest” and “bail” both are different parallels of law and cannot be mixed together. Clause (a) of sub-section(3) of section 69 of the CGST Act provides for provision of default bail if a person is arrested for any offence specified under sub-section(4) of section 132 of the CGST Act which means offences under the clauses

(a)to (d) punishable under the clause(ii) of the sub-section (1) or sub-section (2) of the section 132 of the CGST Act. Therefore, except the offences referred to in sub-section(5) which are cognizable and non bailable, all other offences are bailable and non-cognizable. In order to understand the provisions of section 69, conferring powers to arrest, the same can be summarized as under:

OFFENCE AND PUNISHMENT UNDER SECTION 132 OF THE CGST ACT

Sr. No.	Offence	Punishment under clause (i) or (ii) of sub-section (1) or sub-section (2)	Bailable or non-bailable under sub-section(4) or (5)
1.	Any offence specified in clause (a) to (d) sub-section (1) of section 132.	(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;	Cognizable and non-bailable as per sub section (5)of section 132
2.	any offence	(ii) in cases where	Bailable

	specified in clause (a) to (d) of sub-section (1) of section 132	the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds <u>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.</u>	and non-cognizable as per sub section (4)of section 132

74. Thus, a person can be arrested only in aforesaid two situations. The offence is cognizable and non bailable only in case of serial no. 1 of the aforesaid table and offence at serial no.2 of the aforesaid table is non-cognizable and bailable and in that case person can be arrested but is entitled for default bail as mandated in section 69(3)(a) of the CGST Act.

75. Now, the questions with regard to exercise of the power of arrest as provided under section 69 of the CGST Act and applicability of the provisions of the Code of Criminal Procedure,1973 and whether the concerned respondent authority can be considered as the police officer as per the provision of the Code or not, are concerned, the same are not res

integra in view of the recent pronouncement by the co-ordinate bench of this court where one of us (Coram : J.B. Pardiwala, J.) is the author of the decision in the case of **Sundeep Mahendrakumar Sangahavi Versus Union Of India** in the Special Civil Application No. 8669 of 2020 rendered on 4th August,2020. It is held in the said judgment in the context of the provisions of the section 104 of the Customs Act,1962 which is *pari materia* to section 69 of the CGST Act that the officer in charge is not a police officer and as such the provisions of the Code are not required to be adhered to while exercising the power of arrest as under:

> *"41. We may also quickly answer the question as the same is no longer res integra, whether the Customs/DRI officers are police officers and whether they are required to register FIR in respect of an offence under Sections 133 to 135 of the Customs Act, 1962.*
>
> *42. In Lalitha Kumari v. Government of Uttar Pradesh and others, (2014) 2 SCC 1), the issue which arose for consideration was, whether a police officer was bound to register a First Information Report upon receiving any information relating to commission of a cognizable offence under Section 154 of the Code of Criminal Procedure, 1973, and the police officer has the power to conduct a preliminary enquiry in order*

to test the veracity of such information before registering the same. The decision in Lalitha Kumari's case does not, as such, apply to the present case.

43. In Soni Vallabhdas Liladhar and another v. The Assistant Collector of Customs, Jamnagar, AIR 1965 SC 481, a Constitution Bench of the Supreme Court held that the Customs Officers are not police officers and the statements made to them were not inadmissible under Section 25 of the Indian Evidence Act. In Ramesh Chandra Mehta v. The State of West Bengal, AIR 1970 SC 940…….

44. In Illias v. The Collector of Customs, Madras, AIR 1970 SC 1065, a constitution bench of the Supreme Court held:

> *"12. ..... After examining the various provisions of the Central Excise Act and in particular Section 21 it was observed that a police officer for the purpose of clause (b) of Section 190 of the Code of Criminal Procedure could only be one properly so called. A Central Excise Officer had to make a complaint under Cl.(1) of Section 190 of the Code to a magistrate to enable him to take cognizance of an offence committed under the special statute. The argument that a Central Excise Officer under Section 21(2) of the Central Excise Act had all the powers of an officer-in-charge of a police station under Chapter XIV of*

the Code and therefore he must be considered to be a police officer within the meaning of those words in Sec. 25 of the Evidence Act was repelled for the reason that though such officer had the power of an officer-in-charge of a police station he did not have the power to submit a charge-sheet under Section 173 of the Code ”

45. In Badaku Joti Savant v. State of Mysore, AIR 1966 SC 1746, a Constitution Bench of the Supreme Court held that a Central Excise Officer under the Central Excise and Salt Act, 1944, has no power to submit a charge sheet under Section 173 of the Code of Criminal Procedure. It was held that a police officer for the purposes of clause (b) of Section 190 of the Code can only be a police officer properly so-called. A Central Excise officer will have to make a complaint under clause (a) of Section 190 of the Code.

46. In Superintendent of Customs v. Ummerkutty & others, 1984 K.L.T. 1, it was held that an officer acting under the provisions of the Customs Act is not a police officer or an officer- in-charge of a police station as contemplated in the Code of Criminal Procedure. Therefore, he cannot initiate action under Section 190(1)(b) of the Code. He is entitled to submit a complaint under Section 190(1)(a) of the Code.

47. In Percy Rustomji Basta v. The State of Maharashtra, AIR 1971 SC 1087, following the decision in Ramesh Chandra Mehta v. The State of West Bengal, AIR 1970 SC 940, the Supreme Court held that a Customs Officer conducting an inquiry under Section 107 or Section 108 of the Customs Act is not a police officer and the person against whom inquiry is made is not an accused and the statement made by such person in that inquiry "is not a statement made by a person accused of an offence". The decision in Illias v. The Collector of Customs, Madras, AIR 1970 SC 1065, was also followed in the decision in Percy Rustomji Basta v. The State of Maharashtra, AIR 1971 SC 1087.

48. In Veera Ibrahim v. The State of Maharashtra, (1976) 2 SCC 302), the Customs authorities called the appellant and his companion to the Customs house, took them into custody, and after due compliance with the requirements of law, the Inspector of Customs questioned the appellant and recorded his statement under Section 108 of the Customs Act. The Supreme Court held that under the circumstances it was manifest that at the time when the Customs Officer recorded the statement of the appellant, he was not formally "accused of any offence" and therefore, his statement is not hit by Article 20(3) of the Constitution of India.

49. In Directorate of Enforcement v. Deepak Mahajan and another, (1994)3 SCC 440, the question of law raised for consideration by the Supreme Court was the following:

> *"Whether a Magistrate before whom a person arrested under sub-section (1) of Section 35 of the Foreign Exchange Regulation Act of 1973 which is in pari materia with sub-section (1) of Section 104 of the Customs Act of 1962, is produced under sub-section (2) of Section 35 of the Foreign Exchange Regulation Act, has jurisdiction to authorise detention of that person under Section 167(2) of the Code of Criminal Procedure?"*

50. Answering the above question, the Supreme Court in Deepak Mahajan's case held thus:

> *"116. It should not be lost sight of the fact that a police officer making an investigation of an offence representing the State files a report under Section 173 of the Code and becomes the complaint whereas the prosecuting agency under the special Acts files a complaint as a complainant i.e. under Section 61(ii) in the case of FERA and under Section 137 of the Customs Act. To say differently, the police officer after consummation of the investigation files a report under Section 173 of the Code upon which the Magistrate may take cognizance*

of any offence disclosed in the report under Section 190(1)(b) of the Code whereas the empowered or authorised officer of the special Acts has to file only a complaint of facts constituting any offence under the provisions of the Act on the receipt of which the Magistrate may take cognizance of the said offence under Section 190(1)(a) of the Code. After taking cognizance of the offence either upon a police report or upon receiving a complaint of facts, the Magistrate has to proceed with the case as per the procedure prescribed under the Code or under the special procedure, if any, prescribed under the special Acts. Therefore, the word 'investigation' cannot be limited only to police investigation but on the other hand, the said word is with wider connotation and flexible so as to include the investigation carried on by any agency whether he be a police officer or empowered or authorised officer or a person not being a police officer under the direction of a Magistrate to make an investigation vested with the power of investigation.

.....

120. From the above discussion it cannot be said that either the Officer of Enforcement or the Customs Officer is not empowered with the power of investigation

though not with the power of filing a final report as in the case of a police officer.

.....

132. For the aforementioned reasons, we hold that the operation of Section 4(2) of the Code is straightaway attracted to the area of investigation, inquiry and trial of the offences under the special laws including the FERA and Customs Act and consequently Section 167 of the Code can be made applicable during the investigation or inquiry of an offence under the special Acts also inasmuch as there is no specific provision contrary to that excluding the operation of Section 167.

.....

136. In the result, we hold that sub-sections (1) and (2) of Section 167 are squarely applicable with regard to the production and detention of a person arrested under the provisions of Section 35 of FERA and Section 104 of Customs Act and that the Magistrate has jurisdiction under Section 167(2) to authorise detention of a person arrested by any authorised officer of the Enforcement under FERA and taken to the Magistrate in compliance of Section 35(2) of FERA."

51. In Union of India v. Padam Narain Aggarwal, AIR 2009 SC 254), it was held that the power to arrest a person by a Customs Officer is statutory in character and cannot be interfered with. Referring to Section 108 of the Customs Act, it was held that Section 108 does not contemplate magisterial intervention. The power is exercised by a Gazetted Officer of the Department. It obliges the person summoned to state truth upon any subject respecting which he is examined. He is not absolved from speaking truth on the ground that such statement is admissible in evidence and could be used against him. Section 108 of the Customs Act enables the officer to elicit truth from the person examined. The underlying object of Section 108 is to ensure that the officer questioning the person gets all the truth concerning the incident. It was also held that the statements recorded under Section 108 of the Customs Act are distinct and different from the statements recorded by police officers during the course of investigation under the Code. The Supreme Court followed the decisions in Ramesh Chandra Mehta v, The State of West Bengal, AIR 1970 SC 940, and Assistant Collector of Central Excise, Rajamundry v. Duncan Agro Industries Ltd., (2000)7 SCC 53).

52. This Court, in Bhavin Impex Pvt. Ltd. v. State of Gujarat, 2010 (260) E.L.T. 526 (Guj.), considered the

question whether the authorities under the Central Excise Act, 1944, have the power to arrest a person under Section 13 of the said Act without a warrant and without filing an FIR or lodging a complaint before a court of competent jurisdiction. This Court held that mere conferment of powers of investigation into criminal offences under the Central Excise Act does not make the Central Excise officer a police officer. It was further held:

> *"26, From the decisions referred to hereinabove, the following principles emerge:- .....*
>
> > *(v) Where a Customs Officer arrests a person and informs that person of the grounds of his arrest (which he is bound to do under Article 22(1) of the Constitution) for the purposes of holding an enquiry into the infringement of the provisions of the Customs Act which he has reason to believe has taken place, there is no formal accusation of an offence. In case of an offence by infringement of the Customs Act and punishable at the trial before a Magistrate there is an accusation when a complaint is lodged by an officer competent in that behalf before the Magistrate.*

(vi)Arrest and detention are only for the purpose of holding effectively an inquiry under Sections 107 and 108 of the Customs Act with a view to adjudging confiscation of dutiable or prohibited goods and imposing penalty. At that stage there is no question of the offender against the Customs Act being charged before a Magistrate. Ordinarily, after adjudging penalty and confiscation of goods or without doing so, if the Customs Officer forms an opinion that the offender should be prosecuted, he may prefer a complaint in the manner provided under Section 137 with the sanction of the Collector of Customs and until a complaint is so filed, the person against whom an inquiry is commenced under the Customs Act does not stand in the character of a person accused of an offence under Section 135.

(vii) The Customs Officer is a revenue officer primarily concerned with the detection of smuggling and enforcement and levy of proper duties and prevention of entry into India of dutiable goods without payment of duty and of goods of which the entry is prohibited."

53. In Bhavin Impex Pvt. Ltd.'s case, this Court further held that:

> *"31. The above discussion leads to the inevitable conclusion that Section 13 of the Central Excise Act empowers the Central Excise Officers to arrest a person whom he has reason to believe to be liable to punishment under the Act without issuance of warrant and without registration of an FIR or a complaint before the Magistrate."*
>
> *xxx*

55. Thus, the above referred case-law makes it abundantly clear that the Customs/DRI officers are not police officers. A Customs officer conducting an inquiry under Section 107 or Section 108 of the Customs Act is not a police officer and the person against whom such inquiry is made is not an accused. The power to arrest a person by a Customs officer is statutory in character and ordinarily should not be interfered with by the court unless compelling circumstances are made out. The statements recorded under Section 108 of the Customs Act are distinct and different from the statements recorded by the police officers under Section 161 of the Code of Criminal Procedure during the course of investigation under the Code.

xxxx

60. We are not satisfied that under the Act of 1962 such powers have been vested in the Customs officers that they must be regarded as police officers. A close reading of the provisions shows that the powers that are conferred upon them do not make them police officers or bring them to the level of police officers and are merely intended to avoid certain inconveniences in the discharge of their duties. When we say inconveniences; inconveniences both to the citizen and to the department. The powers of search, seizure and arrest are contained in Chapter 13 of the Act of 1962.

61. Much reliance is, however, placed by Mr. Pandya on the provisions of Section 104 of the Customs Act, 1962 which contains the power of arrest. Section 104 is equivalent to Sections 173 to 175 of the old Act. Under those sections if a reasonable suspicion existed against any person that he was guilty of an offence under that Act, he could be arrested in any place by any officer of the Customs or other person duly employed for the prevention of smuggling. Under Section 174 of the old Act every person arrested had forthwith to be taken before the nearest Magistrate or Customs Collector. If he was taken to a Magistrate, then the Magistrate under Section 175 could direct him to be committed to jail or to be kept in the custody of a Police for such time as was necessary to enable the Magistrate to communicate with the

proper officers of the Customs and it provided that the Magistrate should release any such person on his giving satisfactory security. Section 104 of the Customs Act, 1962 restricts the exercise of the power of arrest to officers who are either generally or specially authorised by the Collector of Customs only if they have reason to believe that an offence has been committed. The marked difference between Section 173 of the old Act and Section 104 of the Act, 1962 is that, under the old Act he could arrest on a reasonable suspicion, while under the new section he must have reasonable belief that the person has been guilty of an offence. Certainly, the provision is for the benefit of the citizen and it is not intended to invest the Customs officers with larger powers. Sub- section (2) of Section 104 of the Act, 1962, is practically similar to Section 174 of the old Act except that the word 'forthwith' has been substituted with the words 'without unnecessary delay'. This, however, means the same thing. It is intended to meet an inconvenience of a temporary duration. Sub-section (3), however, is very much relied for it provides:

> *"Where an officer of Customs has arrested any person under sub-section (1), he shall, for the purpose of releasing such person on bail or otherwise, have the same powers and be subject to the same provisions as the officer-in-charge*

of a police station has and is subject to under the Code of Criminal Procedure, 1898."

62/ Now, it is true that there is a reference to an 'officer-in- charge of a police station' in this sub-section. But then the question is what powers of the police officer are given to the Customs officers. The provision does not give the Customs officers the powers of the officer-in-charge of a police station in respect of the investigation and report. Instead of defining power to grant bail in detail saying as to what they should do or should not do, the short and expedient way of referring to the powers of another officer when placed in somewhat similar circumstances has been adopted. By its language the sub-section does not equate the officers of the Customs with an officer-in-charge of a police station, nor does it make him one by implication. It only, therefore, means that he has got powers as defined in the Code of Criminal Procedure for the purpose of releasing such person on bail or otherwise.

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67. From the above, the following is discernible:

(i) The main purpose of the provisions of the Customs Act is levy and collection of duty on

imports and exports, import export procedures, prohibitions on imports and exports of goods, penalties, offences, etc. and the customs officers have been appointed thereunder for this main purpose. In order that they may carry out their duties in this behalf, powers have been conferred on them to see that duty is not evaded and persons guilty of evasion of duty are brought to book.

(ii) A Customs Officer is not a member of the police force. He is not entrusted with the duty of maintaining law and order. He is entrusted with powers that specifically relate to the collection of customs duty and prevention of smuggling. The power to arrest, the power to detain, the power to search or obtain a search warrant and the power to collect evidence are vested in the Customs Officer for enforcing compliance of the provisions of the Sea Customs Act. The Customs Officer does not exercise, when enquiring into a suspected infringement of the Sea Customs Act, powers of investigation which a police officer may in investing the commission of an offence. He is invested with the power to enquire into infringements of the Act primarily for the purpose of adjudicating forfeiture and penalty. He has no power to

investigate an offence triable by a Magistrate, nor has he the power to submit a report under Section 173 of the Code of Criminal Procedure. He can only make a complaint in writing before the competent Magistrate.

(iii) The expression 'any person' includes a person who is suspected or believed to be concerned in the smuggling of goods. But a person arrested by a Customs Officer because he is found in possession of smuggled goods or on suspicion that he is concerned in smuggling goods is not when called upon by the Customs Officer to make a statement or to produce a document or thing, a person accused of an offence within the meaning of Article 20 (3) of the Constitution. The steps taken by the Customs Officer are for the purpose of holding an enquiry under the Customs Act and for adjudging confiscation of goods dutiable or prohibited and imposing penalties. The Customs Officer does not at that stage accuse the person suspected of infringing the provision of the Customs Act with the commission of any offence. His primary duty is to prevent smuggling and to recover duties of customs: when collecting evidence in respect of smuggling against a person suspected of infringing the

provisions of the Customs Act, he is not accusing the person of any offence punishable at a trial before a Magistrate.

(iv) Where a Customs Officer arrests a person and informs that person of the grounds of his arrest (which he is bound to do under Article 22(1) of the Constitution) for the purposes of holding an enquiry into infringement of the provisions of the Customs Act which he has reason to believe has taken place, there is no formal accusation of an offence. In case of an offence by infringement of the Customs Act and punishable at the trial before a Magistrate there is an accusation when a complaint is lodged by an officer competent in that behalf before the Magistrate.

(v)Arrest and detention are only for the purpose of holding effectively an inquiry under Sections 107 and 108 of the Customs Act with a view to adjudging confiscation of dutiable or prohibited goods and imposing penalty. At that stage there is no question of the offender against the Customs Act being charged before a Magistrate. Ordinarily, after adjudging penalty and confiscation of goods or without doing so, if the Customs Officer forms an opinion that offender

should be prosecuted, he may prefer complaint in the manner provided under Section 137 with the sanction of the Collector of Customs and until a complaint is so filed, the person against whom an inquiry is commenced under the Customs Act does not stand in the character of a person accused of an offence under Section 135.

(vi) The Customs Officer is a revenue officer primarily concerned with the detection of smuggling an enforcement and levy of proper duties and prevention of entry into India of dutiable goods without payment of duty and of goods of which the entry is prohibited.

(vii) A person arrested under Section 104 (1) of Customs Act would fall within the ambit of the expression 'suspected of the commission of any non-bailable offence'. A person arrested by a Customs Officer under Section 104 would be a person suspected of the commission of such an offence inasmuch as the arrest itself is made when the officer of customs has reason to believe that such person has been guilty of an offence punishable under Section 135 of the Customs Act.

(viii) The police is the instrument for the prevention and detection of crime which can be said to be the main object of having the police.

The powers of the customs officers are really not for such purpose and are meant for checking the smuggling of goods and due realization of customs duties and determining the action to be taken in the interest of the revenue of the country by way of confiscation of goods of which no duty has been paid and by imposing penalties and fine.

OM PRAKASH'S CASE *:*

68. We shall now look into the decision of the Supreme Court in the case of Om Prakash (supra). A three Judge Bench of the Supreme Court, considering the distinction between the offences punishable under the Indian Penal Code and that under the Central Excise Act, 1944, and the Customs Act, 1962, held as under:

"16. As has been indicated hereinbefore in this judgment, Section 2(a) of the Code defines 'bailable offence' to be an offence shown as bailable in the First Schedule to the Code or which is made bailable by any other law for the time being in force. The First Schedule to the Code which deals with classification of offences is in two parts. The first part deals with offences under the Penal Code, while the second part deals with classification of offences in respect of other laws. Inasmuch as,

the offences relate to the offences under the 1944 Act, it is the second part of the First Schedule which will have application to the cases in hand. The last item in the list of offences provides that if the offence is punishable with imprisonment for less than three years or with fine only, the offence will be non-cognizable and bailable. Accordingly, if the offences come under the said category, they would be both non-cognizable as well as bailable offences. However, in the case of the 1944 Act, in view of Section 9-A, all offences under the Act have been made non-cognizable and having regard to the provisions of Section 155, neither could any investigation be commenced in such cases, nor could a person be arrested in respect of such offence, without a warrant for such arrest.

34. Mr. Parasaran's next submission was with regard to the provisions of Part II of the First Schedule to the Code of Criminal Procedure and it was submitted that the same has to be given a meaningful interpretation. It was urged that merely because a discretion had been given to the Magistrate to award punishment of less than three years, it must fall under the third head of the said Schedule and, therefore, be non-cognizable and bailable. On the

other hand, as long as the Magistrate had the power to sentence a person for imprisonment of three years or more, notwithstanding the fact that he has discretion to provide a sentence of less than three years, the same will make the offence fall under the second head thereby making such offence non-bailable. It was submitted that in essence it is the maximum punishment which has to determine the head under which the offence falls in Part II of the First Schedule to the Code and not the use of discretion by the Magistrate to award a lesser sentence.

35. In support of his submissions, Mr. Parasaran referred to the decisions of this Court in CBI v. Tapan Kumar Singh [(2003) 6 SCC 175 : 2003 SCC (Cri) 1305] and Bhupinder Singh v. Jarnail Singh [(2006) 6 SCC 277 : (2006) 3 SCC (Cri) 101] , to which reference will be made, if necessary.

36. As we have indicated in the first paragraph of this judgment, the question which we are required to answer in this batch of matters relating to the Central Excise Act, 1944, is whether all offences under the said Act are non- cognizable and, if so, whether such offences are bailable ? In order to answer the said question, it would be

necessary to first of all look into the provisions of the said Act on the said question.

37. Sub-section (1) of Section 9-A, which has been extracted hereinbefore, states in completely unambiguous terms that notwithstanding anything contained in the Code of Criminal Procedure, offences under Section 9 shall be deemed to be non- cognizable within the meaning of that Code. There is, therefore, no scope to hold otherwise. It is in the said context that we will have to consider the submissions made by Mr.Rohatgi that since all offences under Section 9 are to be deemed to be non-cognizable within the meaning of the Code of Criminal Procedure, such offences must also be held to be bailable.

38.The expression "bailable offence" has been defined in Section 2(a) of the Code and set out hereinabove in para 6 of the judgment, to mean an offence which is either shown to be bailable in the First Schedule to the Code or which is made bailable by any other law for the time being in force. As noticed earlier, the First Schedule to the Code consists of Part I and Part II. While Part I deals with offences under the Penal Code, Part II deals with offences under other laws. Accordingly, if the provisions of Part II of the

First Schedule are to be applied, an offence in order to be cognizable (sic non-cognizable) and bailable would have to be an offence which is punishable with imprisonment for less than three years or with fine only, being the third item under the category of offences indicated in the said Part. An offence punishable with imprisonment for three years and upwards, but not more than seven years, has been shown to be cognizable and non-bailable. If, however, all offences under Section 9 of the 1944 Act are deemed to be non-cognizable, then, in such event, even the second item of offences in Part II could be attracted for the purpose of granting bail since, as indicated above, all offences under Section 9 of the 1944 Act are deemed to be non-cognizable."

69. It is, thus, evident from the above that the main thrust of the Om Prakash decision to ascertain whether the offence was bailable or non-bailable, was on the point that the offence being non-cognizable, it had to be bailable.

70. In Om Prakash (supra), the question arose, with respect to the investigation in the cases relating to the Central Excise Act, 1944, and the Customs Act, 1962, as to whether the officers under the said Act could arrest without a warrant in connection with those offences which were non-cognizable and

bailable. The powers of the officers of the Excise or the Customs to initiate investigation and to arrest without warrant has been discussed and whether the officers have the powers akin to that of a Police Officer was also looked into. It was held that an offence, in order to be cognizable and bailable, would have to be an offence which is punishable with imprisonment for less than three years. Further, for all those offences which are punishable for a period of three to seven years can be considered as cognizable and non-bailable. The Supreme Court held that the offences under the Indian Penal Code cannot be equated with those listed in the Central Excise Act to draw a conclusion as to which of those offences are non-cognizable and non-bailable. It was held that in view of the Central Excise Act, 1944, the non-cognizable offences are bailable in nature and if a person is arrested, he shall be released on bail. The Supreme Court held that the offences under the Customs Act are bailable and the officers have the same powers as that of a Police Officer.

71. We take notice of the various decisions of different High Courts explaining the true purport of the ratio of Om Prakash (supra).

72. We have to our advantage a very exhaustive judgment delivered by a Division Bench of the Bombay High Court in the case of Chhagan Chandrakant

Bhujbal v. Union of india and others, reported in 2016 SCC Online Bom 9938. The Division Bench of the Bombay High Court was dealing with a matter under the PMLA Act. The Bombay High Court considered the decision of Om Prakash (supra) and also the question whether the arresting authority under the PMLA Act was required to follow the procedure laid down under Section 155(1) of the Code of Criminal Procedure, 1973……..

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77. The only idea with which we have referred to a Division Bench decision of the Bombay High Court drawing a fine distinction between the scheme of Section 108 of the Customs Act and Section 67 of the NDPS Act is to meet with the vociferous submissions of Mr.Pandya as regards the admissibility of such statements in evidence. Mr.Pandya, in the course of his submissions, has referred to Noor Aga (supra), Nirmal Singh Pehalwan @ Nimma (supra) and Vinod Solanki (supra) to make good his submissions that the statements recorded by the Customs Officer while the person is in custody of such officer is inadmissible in evidence and is hit by Section 25 of the Evidence Act, 1872. In all the above referred cases of the Supreme Court, the subject matter was Section 67 of the NDPS Act.

78. In any view of the matter, the issue is at large before the Supreme Court. A

constitution bench of the Supreme Court would be deciding this issue.

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84. This Court had the occasion to deal with the term 'proper officer' in the case of Swati Menthol & Allied Chemicals Ltd. v. Joint Director - Directorate of Revenue Intelligence (Special Civil Application No.2894 of 2013, decided on 8th January 2014). The issue involved in the said matter pertained to the exercise of powers by the 'proper officers' vis-a-vis Sections 17, 18 and 28 of the Act. Reliance was placed on the case of Sayed Ali (supra)…..

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FINAL CONCLUSION :

92. We sum-up our final conclusions as under:

(1) Any person can be arrested for any offence under the Customs Act, 1962, by the Customs Officer, if such officer has reasons to believe that such person has committed an offence punishable under Section 132 or Section 133 or Section 135 or Section 135A or Section 136 of the Customs Act, 1962, and in such circumstances, the Customs Officer is not obliged to follow the dictum of the Supreme Court as laid in the case of Lalitha Kumari (supra).

(2) When any person is arrested by an officer of the Customs, in exercise of his powers under Section 104 of the Customs Act, 1962, the officer effecting the arrest is not obliged in law to comply with the provisions of Sections 154 to 157 of the Code of Criminal Procedure, 1973. The officer of the Customs, after arresting such person, has to inform that person of the grounds for such arrest, and the person arrested will have to be taken to a Magistrate without unnecessary delay. However, the provisions of Sections 154 to 157 of the Code will have no application at that point of time.

(3) The Customs/DRI Officers are not the Police Officers and, therefore, are not obliged in law to register FIR against the person arrested in respect of an offence under Sections 133 to 135 of the Customs Act, 1962.

(4) The decision of the Supreme Court in the case of Om Prakash (supra) has no bearing in the case on hand.

(5) A DRI Officer is a 'proper officer' for the purposes of the Customs Act, 1962. As the Customs/DRI Officers are not the Police Officers, the statements made to them are not inadmissible under Section 25 of the Evidence Act.

(6) A Police Officer, making an investigation of an offence, representing the State, files a report

under Section 173 of the Code, becomes the complainant, whereas, the prosecuting agency under the special Acts files a complaint as a complainant, i.e. under Section 137 of the Customs Act.

(7) The power to arrest a person by a Customs Officer is statutory in character and should not be interfered with. Section 108 of the Act does not contemplate any Magisterial intervention. The statements recorded under Section 108 of the Customs Act are distinct and different from the statements recorded by the Police Officers during the course of investigation under the Code.

(8)The expression 'any person' in Section 104 of the Customs Act includes a person who is suspected or believed to be concerned in the smuggling of goods. However, a person arrested by a Customs Officer because he is found to be in possession of smuggled goods or on suspicion that he is concerned in smuggling goods is not, when called upon by the Customs Officer to make a statement or to produce a document or thing, a person is accused of an offence within the meaning of Article 20(3) of the Constitution of India. Where a Customs Officer arrests a person and informs that person of the grounds of his arrest, for the purposes of holding an inquiry into the infringement of the provisions of the Customs Act which he

has reason to believe has taken place, there is no formal accusation of an offence. The accusation could be said to have been made when a complaint is lodged by an officer competent in that behalf before the Magistrate. The arrest and detention are only for the purpose of holding effective inquiry under Sections 107 and 108 of the Customs Act with a view to adjudging confiscation of dutiable or prohibited goods and imposing penalty.

(9)The main thrust of the decision in the case of Om Prakash (supra) to ascertain whether the offence was bailable or non-bailable, was on the point that the offence being non-cognizable, it had to be bailable. In other words, Om Prakash (supra) deals with the question, "whether the offences under the Customs Act, 1962, and the Central Excise Act, 1944, are bailable or not ?" At the time when the decision in Om Prakash (supra) was rendered, an offence under the Customs Act was not cognizable. So also, the categorization of cases which are non-bailable and cases which are bailable was not there before the amendment of Section 104 by Act No.23 of 2012 and Act No.17 of 2013 respectively.

(10) The Notification dated 7th July 1997 issued by the Central Board of Central Excise makes it clear that all the officers of the Directorate of Revenue Intelligence are appointed as the officers of the Customs. Under the

Notification dated 7th March 2002, the officers of the DRI have been given the jurisdiction over the whole of India. In such circumstances, the submissions of the learned counsel appearing for the writ-applicant as regards the territorial jurisdiction of the DRI office at Vapi to summon the writ-applicant under Section 108 of the Customs Act, 1962, pales into insignificance.

(11)Although the allegations of harassment at the end of the DRI officials at Vapi are not substantiated by any credible material on record, yet there should not be any unnecessary harassment to a person summoned for the purpose of interrogation under Section 108 of the Customs Act, 1962.

93. In view of the aforesaid discussion, this writ-application stands disposed of accordingly."

76. Therefore, the question as to whether the provisions of Code would be applicable while invoking the power to arrest under section 69 of the CGST Act or not is now answered in the above judgment as the provisions of the section 69 of the CGST Act is pari materia with that of the section 104 of the Customs Act,1962.

CONCLUSION :

77. In view of foregoing reasons and conspectus of law and the analysis of provisions of the section 69 read with section 132 of the CGST Act and provisions of the Code, we may sum up our Final conclusion to answer the questions arising in these petitions as under:

(1) **Q.** whether the power to arrest as provided under section 69 read with section 132 of the CGST Act can be invoked by the Commissioner only upon completion of the adjudication process of finalising the assessment and determination of the liability as per the provisions of the CGST Act?

A. we are of the opinion that the power to arrest as provided under section 69 of the CGST Act can be invoked if the Commissioner has reason to believe that the person has committed offences as provided under the clauses (a), (b), (c) or (d) of sub-section(1) of section 132 of the CGST Act, which are punishable under the clause (i) or clause (ii) of sub-section (1) or sub-section (2) of the section 132 of the CGST Act without

there being any adjudication for the assessment as provided under the provisions of the Chapter VIII of the CGST Act. The reference to section 132 in section 69 of the CGST Act is only for the purpose of indicating the nature of the offences on the basis of the same the reasonable belief is formed and recorded by the Commissioner for the purpose of passing an order of arrest.

(2) Q. whether the provisions of section 69 of the CGST Act envisages that the Commissioner is obliged to record his reasons of belief and furnish the same to the person who is sought to be arrested?

A. (i) The Commissioner is required to record reasons of belief to arrest a person as per sub-section (1) of Section 69 of the CGST Act. However sub-section (2) and sub-section (3) of section 69 with reference to the provisions of sub-section(4) and sub-section (5) of section 132 of the CGST Act, differentiates between the cognizable and non cognizable offences. The sub-

section (2) of section 69 provides for informing such a person about grounds of arrest if he is alleged to have committed a cognizable and non bailable offence and sub-section (3) authorises the Deputy Commissioner or Assistant Commissioner subject to the provisions of the Code for releasing the arrested person on bail if he is alleged to have committed non cognizable and bailable offences by exercising the power as an officer in charge of the police station. Therefore, it is not necessary for the Commissioner to provide a copy of the reasons recorded by him for his belief if he has reason to believe that any person has committed offences which are cognizable and non bailable. Sub-section (2) of section 69 of the CGST Act provides statutory duty upon the office`er authorised to arrest to inform such person about grounds of his arrest and in case if the person is ordered to be arrested for offences which are non-cognizable and bailable , he would be released on bail as per provision of sub-section (3) of section 69 of the CGST Act.

(ii) The Commissioner while recording his reasons to believe that a person has committed any offence has only to form a prima facie opinion based on cogent materials and credible information. The words “reason to believe” contemplate an objective determination based on intelligence, care and deliberation involving judicial review as distinguished from a purely subjective consideration and hence he is not required to conclude that the person sought to be arrested is guilty of any offence. The expression 'any person' in Section 69 of the CGST Act includes a person who is suspected or believed to be concerned in the evasion of tax or availing illegal input tax credit. However, a person arrested by an authorised Officer because he is found to be evading tax or availing input tax credit as specified in the clauses (a) to (d) of the sub-section (1) of the section 132 of the CGST Act is not, when called upon by the authorised Officer to make a statement or to produce a document or thing, accused of an offence within the meaning of Article 20(3) of the Constitution of India. Where an

authorised Officer arrests a person and informs that person of the grounds of his arrest, for the purposes of holding an inquiry into the infringement of the provisions of the CGST Act which he has reason to believe has taken place, there is no formal accusation of an offence. The accusation could be said to have been made when a complaint is lodged by an officer competent in that behalf before the Magistrate. The arrest and detention are only for the purpose of holding effective inquiry under the provisions of the CGST Act with a view to adjudging the evasion of GST and availing illegal input tax credit and imposing penalty.

(iii) The order authorising any officer to arrest may be justified if the Commissioner or any other authority empowered in law has reasons to believe that the person concerned has committed the offence under section 132 of the Act. However, the subjective satisfaction should be based on some credible materials or information and also should be supported by supervening factor. It is not any and every

material, howsoever vague and indefinite or distant remote or far-fetching, which would warrant the formation of the belief.

(iv) The power conferred upon the authority under Section 69 of the Act for arrest could be termed as a very drastic and far-reaching power. Such power should be used sparingly and only on substantive weighty grounds and reasons.

(v) The power under Section 69 of the Act should neither be used as a tool to harass the assessee nor should it be used in a manner which may have an irreversible detrimental effect on the business of the assessee.

(vi) The above are merely the incidents of personal liberty guaranteed under the Constitution of India. No arrest can be made because it is lawful for the police officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The Commissioner must be

able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for the authority in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. A person is not liable to be arrested merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the authority effecting the arrest that such arrest is necessary and justified.

(3) Q. (i) Whether the provisions of

sections 154, 155(1), 155(2), 155(3), 157, 172 of the Code of Criminal Procedure, 1973 are applicable or should be made applicable for the purpose of invoking the power to arrest under section 69 of the CGST Act? In other words, whether the authorised officer can arrest a person alleged to have committed non cognizable and bailable offences without a warrant of arrest issued by the Magistrate under the provisions of the Code of Criminal Procedure, 1973?

(ii)For the purpose of section 69(3) of the CGST Act, whether the officers of the GST department could be said to be a "police officer in charge of a police station" as defined under section 2(o) of the Code of Criminal Procedure, 1973?

A. (i) Any person can be arrested for any offence under the section 69 of the CGST Act, 1962, by the authorised officer to whom authority to arrest is given by the Commissioner if the Commissioner has reasons to believe that such person has committed an offence punishable under

the clauses (a) to (d) of the subsection (1) which is punishable under the clause(i) or Clause (ii) of the sub-section (1) or sub-section(2) of the Section 132 of CGST Act and in such circumstances, the authorised Officer is not obliged to follow the dictum of the Supreme Court as laid in the case of Lalitha Kumari (supra).

(ii)When any person is arrested by the authorised officer, in exercise of his powers under Section 69 of the CGST Act, the authorised officer effecting the arrest is not obliged in law to comply with the provisions of Sections 154 to 157 of the Code of Criminal Procedure, 1973. The authorised officer, after arresting such person, has to inform that person of the grounds for such arrest, and the person arrested will have to be taken to a Magistrate without unnecessary delay, if the offences are cognizable and non bailable. However, the provisions of Sections 154 to 157 of the Code will have no application at that point of time. Otherwise, sub-section (3) of section 69 provides for granting bail as the provision does not confer upon the GST

officers, the powers of the officer in charge of a police station in respect of the investigation and report. Instead of defining the power to grant bail in detail, saying as to what they should do or what they should not do, the short and expedient way of referring to the powers of another officer when placed in somewhat similar circumstances, has been adopted. By its language, the sub-section (3) does not equate the officers of the GST with an officer in charge of a police station, nor does it make him one by implication. It only, therefore, means that he has got the powers as defined in the Code of Criminal Procedure for the purpose of releasing such person on bail or otherwise. This does not necessarily mean that a person alleged to have committed a non cognizable and bailable offence cannot be arrested without a warrant issued by the Magistrate.

(iii)The authorised officer exercising power to arrest under section 69 of the CGST Act, is not a Police Officer and, therefore, is not obliged in law to register FIR against the person arrested

in respect of an offence under Sections 132 of the CGST Act.

(iv) The decision of the Supreme Court in the case of Om Prakash (supra) has no bearing in the case on hand.

(v) An authorised Officer is a 'proper officer' for the purposes of the CGST Act. As the authorised Officers are not Police Officers, the statements made before them in the course of inquiry are not inadmissible under Section 25 of the Evidence Act.

(vi)The power to arrest a person by an authorised Officer is statutory in character and should not be interfered with. Section 69 of the CGST Act does not contemplate any Magisterial intervention.

(vii) The main thrust of the decision in the case of Om Prakash (supra) to ascertain whether the offence was bailable or non-bailable, was on the point that the offence being non-cognizable, it had to be bailable. In other words, Om Prakash (supra) deals

with the question, “whether the offences under the Customs Act, 1962, and the Central Excise Act, 1944, are bailable or not?” However, provisions of the sub-sections (2) and (3) of the Section 69 of the CGST Act, provides in built mechanism and procedure in case of arrest for non-bailable offences and bailable offences.

(4) Q. Whether the constitutional safeguards laid out by the Supreme Court in **D.K. Basu's** case [1997 (1) SCC 416] in the context of the powers of the police officers under the Code of Criminal Procedure, 1973 and of officers of the Central Excise, Customs and Enforcement Directorate are applicable to the exercise of powers under the provisions of section 69 of the GST Act in equal measure?

A. We may now address ourselves on the last question as regards the applicability of the safeguards pertaining to arrest as explained by the Supreme Court in case of **D.K. Basu** (supra), referred to above. It is significant to note that in D.K. Basu

(supra), the Supreme Court did not confine itself to the actions of police officers taken in terms of powers vested in them under the Code but also of the officers of the Enforcement Directorate including the Directorate of Revenue Intelligence ('DRI'). This also included officers exercising powers under the Customs Act, 1962 the Central Excise Act, 1944 and the Foreign Exchange Regulation Act, 1973 (FERA') now replaced by the Foreign Exchange Management Act, 1999 ('FEMA') as well. It observed:

> *"30. Apart from the police, there are several other governmental authorities also like Directorate of Revenue Intelligence, Directorate of Enforcement, Costal Guard, Central Reserve Police Force (CRPF), Border Security Force (BSF), the Central Industrial Security Force (CISF), the State Armed Police, Intelligence Agencies like the Intelligence Bureau, R.A.W, Central Bureau of Investigation (CBI) , CID, Tariff Police, Mounted Police and ITBP which have the power to detain a person and to interrogated him in connection with the investigation of economic offences, offences under the Essential Commodities Act, Excise and Customs Act. Foreign Exchange Regulation Act etc. There are instances of torture and death*

in custody of these authorities as well, In re Death of Sawinder Singh Grover [1995 Supp (4) SCC 450], (to which Kuldip Singh, J. was a party) this Court took suo moto notice of the death of Sawinder Singh Grover during his custody with the Directorate of Enforcement. After getting an enquiry conducted by the additional District Judge, which disclosed a prima facie case for investigation and prosecution, this Court directed the CBI to lodge a FIR and initiate criminal proceeding against all persons named in the report of the Additional District Judge and proceed against them. The Union of India/Directorate of Enforcement was also directed to pay sum of Rs. 2 lacs to the widow of the deceased by was of the relevant provisions of law to protect the interest of arrested persons in such cases too is a genuine need.
.....

33. There can be no gainsaying that freedom of an individual must yield to the security of the State. The right of preventive detention of individuals in the interest of security of the State in various situations prescribed under different statures has been upheld by the Courts. The right to interrogate the detenues, culprits or arrestees in the interest of the nation, must take precedence over an individual's right to personal liberty. The latin maxim salus populi est suprema lex (the safety of the people is the supreme law) and salus republicae est suprema lex (safety of the state is the supreme

law) co-exist and are not only important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of the community. The action of the State, however must be "right, just and fair". Using any form of torture for extracting any kind of information would neither be 'right nor just nor fair' and, therefore, would be impermissible, being offensive to Article 21. Such a crime-suspect must be interrogated - indeed subjected to sustained and scientific interrogation determined in accordance with the provisions of law. He cannot, however, be tortured or subjected to third degree methods or eliminated with a view to elicit information, extract confession or drive knowledge about his accomplices, weapons etc. His Constitutional right cannot be abridged except in the manner permitted by law, though in the very nature of things there would be qualitative difference in the methods of interrogation of such a person as compared to an ordinary criminal...."

These constitutional safeguards emphasised in the context of the powers of police officers under the Code of Criminal Procedure and of officers of central excise, customs and enforcement directorates, are applicable to the exercise of powers under the GST Act in equal measure. An officer whether of the Central Excise department or another

agency like the DGCEI, authorised to exercise powers under the Central Excise Act and/or the FA will have to be conscious of the constitutional limitations on the exercise of such power.

However, in context of **D.K.Basu**(supra), we would like to clarify that the law laid down by the Supreme Court in case of **Poolpandi and others v. Superintendent, Central Excise and others** reported in (1992) 3 SCC 259 has either been set aside or has been deviated from. It appears in paragraph no. 38 of the said judgment itself, it has been stated that the requirements referred to above (i.e. in paragraph no. 33) are for Articles 21 and 22 respectively of the Constitution of India and not to be strictly followed. We may give a simple illustration. Take a case in which writ application is filed seeking direction for giving an opportunity to the person who is sought to be interrogated by the police officer for any offence punishable under the Indian Penal Code to consult his lawyer. Such a direction may perhaps be issued in case of an accused because of his

right under Article 22 of the Constitution of India but the same cannot be made applicable to a person who is interrogated under section 70 of the GST Act or section 108 of the Customs Act where no right under Article 22 of the Constitution is affected as held by the Supreme Court in case of **Poolpandi**(supra). This Court, however, is quite conscious of the fact that pronouncement of Supreme Court in case of **Poolpandi**(supra) as also in another case, pointing out that the right of investigating authority should not be interfered with, as given to them under the provisions of the Act, does not give them an uncharted liberty to proceed in whatsoever manner they like in the matter of such inquiry or to extract statements from the person concerned by perpetuating torture or by applying third degree methods. That, no doubt, will be in clear violation of the right guaranteed under Article 21 of the Constitution of India which is available to all the citizens including a person who will be interrogated under section 70 of the GST Act or section 108 of the Customs Act as held by the Supreme Court

in case of **D.K. Basu** (supra).

78. The petitioners have expressed apprehension of harassment at the end of the respondent authority. Though, such apprehension is not substantiated by any credible material on record, the same would be taken care of by the above observations made in answer to the question no.4. We also clarify that in none of the petitions, any case is made out for grant of any relief having regard to the facts narrated by the petitioners in their respective petitions. What has been observed and discussed by us are general propositions of law keeping in mind the subject matter.

79. We also in this context emphasise the mode of exercise powers of arrest under the GST Law as the power of arrest specified in Section 69 of the CGST Act undoubtedly displeases the corresponding powers of arrest vested in a police officer under the Code of Criminal Procedure. Section 69 of the CGST Act requires certain preconditions to be fulfilled prior to the arrest. In particular, the reasons to believe have to be recorded in writing in the file. The second aspect of Section 69 of the GST Act is the communication of the grounds of arrest. Although, Section 69 uses the word

"inform" in the context in which it appears, yet a mere communication of the grounds would not be sufficient. Merely reading out the grounds of arrest to the detenu would defeat the very object of requiring the reasons to believe to be recorded in writing and communicated to the detenu.

80. In the aforesaid context, we may refer to and rely upon the Constitution Bench decision of the Supreme Court in the case of **C.B.Gautam v. Union of India & ors**. reported in 1993 (1) SCC 78. The said decision is in the context of the Income Tax Act. The judgment explains the importance and the obligation to record reasons and convey the same to the party concerned. The judgment explains that such a course would operate as a deterrent against the possible arbitrary action by the quasi-judicial or the executive authority invested with judicial powers. We quote the relevant observations as under:

> **"31.** The recording of reasons which lead to the passing of the order is basically intended to serve a two-fold purpose:
>
> (1) that the "party aggrieved" in the proceeding before acquires knowledge of the reasons and, in a proceeding before the High court or the Supreme

court (since there is no right of appeal or revision), it has an opportunity to demonstrate that the reasons which persuaded the authority to pass an order adverse to his interest were erroneous, irrational or irrelevant, and (2) that the obligation to record reasons and convey the same to the party concerned operates as a deterrent against possible arbitrary action by the quasi-judicial or the executive authority invested with judicial powers.

32. Section 269UD(1), in express terminology, provides that the appropriate authority may make an order for the purchase of the property "for reasons to be recorded in writing". Section 269UD(2) casts an obligation on the authority that it "shall cause a copy of its order under Ss. (1) in respect of any immovable property to be served on the transferor". It is, therefore, inconceivable that the order which is required to be served by the appropriate authority under Ss. (2) would be the one which does not contain the reasons for the passing of the order or is not accompanied by the reasons recorded in writing. It may be permissible to record reasons separately but the order would be an incomplete order unless either the reasons are incorporated therein or are served separately along with the order on the affected party. We are, of the view, that reasons for the order must be communicated to the affected party."

81. We have already indicated in our judgment that

the guidelines as laid by the Supreme Court in **D.K. Basu** (supra) shall apply even to the officers of the GST department. Before being codified in the Code, the specific requirement to draft an arrest memo at the time of arrest was first laid down as a guideline by the Supreme Court in **D.K. Basu** (supra). In **D.K. Basu** (supra), the Supreme Court laid down 11 guidelines to be followed in all cases of arrest and detention. As one of these guidelines, the requirement to draw up an arrest memo was first articulated as:

> "36 (2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest."

While producing the person arrested under Section 69 of the CGST Act, the importance of valid, proper and exhaustive arrest memo should not be undermined. Every authorized officer under the Act, 2017 carrying out arrest must be clear that the preparation of an arrest memo is mandatory. At this stage, we may state the guidelines issued by the Supreme Court in **D.K. Basu** (supra):

"(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or and through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any, present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory, Director, Health Services should prepare such a panel for all Tehsils and Districts as well.

(9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the Illaqa Magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

> (11) A police control room should be provided at all district and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board."

The safeguards mandated through the above-referred guidelines, particularly the requirement to prepare an arrest memo, are directed towards "transparency and accountability" in the powers to arrest and detain. These safeguards flow from the fundamental rights guaranteed in Articles 21 and 22 respectively of the Constitution of India. The life and liberty of a person is secured under Article 21 and supplemented by Article 22 that provides key protection against the arbitrary arrest or detention to every arrested person.

82. Unlike the powers of the police to lodge and register F.I.R. at the police station, the authorized officer under the GST can only lodge a complaint in writing before the Court concerned. Again the cognizance of such complaint has to be taken by the Court concerned only in accordance with Section 134 of the Act 2017. We are laying emphasis on this mandatory procedure to be adopted because

many times the complaint is not lodged immediately. In most of the cases when arrest is affected under Section 69 of the Act, a person arrested would be produced before the Magistrate and the Magistrate may thereafter remand the arrested person to judicial custody after looking into the arrest memo. At the time of production of the accused and also at the time when the person arrested is remanded to the judicial custody, the Magistrate may not have any idea as to on what basis and what type of allegations, the person has been arrested by the authorized officers of the GST and has been produced before him. The production of a person accused should not be accepted by the Magistrate without being convinced that the arrest is on lawful grounds and on prima-facie materials indicating the complicity of the accused in the alleged offence. It is at that stage that the arrest memo assumes importance. It is not just sufficient to state in the arrest memo that the person arrested and produced has committed offences under Section 132 of the Act, 2017. The arrest memo should contain some details or information on the basis of which the Magistrate can arrive at a subjective satisfaction that the person has been arrested on lawful grounds. It is necessary, therefore,

to incorporate some prima-facie material against the accused showing his complicity in the alleged offence.

83. There is no doubt that the arrest memo is a key safeguard against illegal arrest and a crucial component of the legal procedure of arrest. Full and consistent compliance is a responsibility of both, the officers of the GST as well as the Magistrate. It is high time that the GST department prescribes a standardized format for the arrest memo. The format must contain all the mandatory requirements and necessary additions. The gist of the offence alleged to have been committed must be incorporated in the arrest memo. It would be the duty of the concerned Magistrate to check that an arrest memo has been prepared and duly filled. In a given case, if the Magistrate finds that the arrest memo is absent or improperly filled or bereft of necessary particulars, then the Magistrate should decline the production of the arrested person. At this stage, we may refer to a very recent pronouncement of the Supreme Court in the case of **Union of India v. Ashok Kumar Sharma & Ors.** reported in 2020 SCC OnLine SC 683. The issue in the said judgment was as under:

> "What is the interplay between the provisions of the Code of Criminal Procedure (hereinafter referred to as "CrPC" for short) and the Drugs and Cosmetics Act, 1940 (hereinafter referred to as "the Act" for short)? Whether in respect of offences falling under chapter IV of the Act,a FIR can be registered under Section 154 of the CrPC and the case investigated or whether Section 32 of the Act supplants the procedure for investigation of offences under CrPC and the taking of cognizance of an offence under Section 190 of the CrPC? Still further, can the Inspector under the Act, arrest a person in connection with an offence under Chapter IV of the Act."

What is important to note are the observations made by the Supreme Court in para-92 which reads thus:

> "92. The person arrested is not to be subjected to more restraint than is necessary to prevent his escape, declares Section 49 of the CrPC. Every Police Officer or other person, arresting a person without a warrant, is bound forthwith to communicate to him all particulars of the offence for which he is arrested or other grounds for such arrest. This is provided for in Section 50 of the CrPC. A Police Officer, when he arrests a person without warrant and he is not accused of committing a non-bailable offence, is duty-bound to inform him of his entitlement to be released on Bail. The Police Officer is also under an obligation to inform, under Section 50A of the CrPC, a nominated person about the factum of arrest. This came into force on 23.06.2006. Section 51 deals with search of the arrested person."

84. We have quoted the decision of the Supreme

Court referred to above to highlight the importance of the communication of the grounds of arrest to the accused and the mode and manner of the preparation of arrest memo.

85. In view of the foregoing reasons, observations and directions, the petitions are accordingly ordered to be rejected. Ad interim relief granted earlier stands vacated. Rule is discharged with no order as to costs. Civil Applications, if any, stand disposed off.

86. The Registry is directed to circulate this judgment in all the sub-ordinate Courts across the State of Gujarat. One copy of this judgment shall also be forwarded to the Commissioner of State Tax, State of Gujarat.

(J. B. PARDIWALA, J)

(BHARGAV D. KARIA, J)

RAGHUNATH R NAIR