

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD R/SPECIAL CIVIL

APPLICATION NO. 13679 of 2019

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VIMAL YASHWANTGIRI GOSWAMI
Versus STATE
OF GUJARAT

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Appearance:

MR CHETAN K PANDYA(1973) for the Petitioner(s) No. 1 for the
Respondent(s) No. 2

ADVANCE COPY SERVED TO GOVERNMENT PLEADER/PP(99) for
the Respondent(s) No. 1

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Date : 07/08/2019

ORAL ORDER

(PER : HONOURABLE MR.JUSTICE J.B.PARDIWALA)

1. One of the main reliefs prayed for by the writ applicant in the present writ application reads as follows :

“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.”

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.**

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 by- pass 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.

(J. B. PARDIWALA, J)

(A. C. RAO, J)

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