

IN THE HIGH COURT OF ORISSA AT CUTTACK
BLAPL No.776 of 2021
((In the matters of applications under Section 439, Criminal
Procedure Code, 1973)

Smruti Ranjan Mohanty *Petitioner*
-versus-
State of Odisha *Opp. Party*

Advocates appeared in both the cases through Hybrid Mode:

For Petitioner : *Ajaya Kumar Moharana, Adv.*
-versus-

For Opp. Party : *Mr. Sunil Mishra, ASC*
(*CT & GST*)

And

BLAPL No.6687 of 2021

Rajeev Mishra *Petitioner*
-versus-
State of Odisha *Opp. Party*

Advocates appeared in both the cases through Hybrid Mode:

For Petitioner : *Mr. Gouri Mohan Rath*
-versus-

For Opp. Party : *Mr. Sunil Mishra, ASC*
(*CT & GST*)

CORAM:

JUSTICE S.K. PANIGRAHI

DATE OF HEARING:-24.12.2021

DATE OF JUDGMENT:-18.02.2022

S.K. Panigrahi, J.

1. The present Petitioners, who are in custody since 21.12.2020,
have filed the instant bail application under Section 439 of Cr.P.C.
corresponding to 2(C)CC Case No.03 of 2020 pending in the court

of the Learned J.M.F.C(R), Cuttack for commission of offences under Sections 132(1) (c), 132(1)(b) and 132(1)(i) of the OGST Act, 2017. Prior to the instant application, the Petitioners had approached the learned District and Sessions Judge, Cuttack, vide Bail Application No. 11023 of 2020 which was rejected on 25.01.2021.

2. Shorn of unnecessary details, the prosecution's case is that both the Petitioners alongwith other accused, were involved in the creation and operation of 12 fictitious/ bogus firms in the name of unconnected persons by misutilizing their identity proof. The same was done behind their back, in order to avail and utilize bogus input tax credit of an amount of Rs. 20.45 crores on the strength of fraudulent purchase invoices without any physical receipt or actual purchase of goods. As such both of them are alleged to be part of a collusion to evade taxes to the tune of approximately Rs. 42.00 crores and therefore are liable for the payment of the same under Section 132 of the OGST Act, 2017.

3. Per contra, the Ld. Counsel for the Petitioners earnestly submitted that the allegations made against the Petitioners in the prosecution report are bald allegations which are completely false and baseless. It was contended that the Petitioner No. 1 was a mere

employee who has dutifully followed the directions and orders of his superiors. Similarly, Petitioner No. 2 was in no way connected to the case as he is a mere paan shop owner and has no nexus to the alleged fraud in any way whatsoever and has been embroiled in the matter merely because he is the brother of Petitioner No. 1. It has been submitted that the alleged fraud has been perpetrated by someone else and the present Petitioners who are mere pawns, have unduly been made scapegoats despite having no involvement in the alleged fraudulent activities. It is further submitted that the Petitioners have been duly cooperating with the authorities and have on multiple occasions appeared in the OGST offices to assist the authorities with the investigation, but despite their bonafide actions, they were forwarded into custody on 21.12.2020 and have remained in custody ever since. The Petitioners have wives, young children and a widowed mother who are completely dependent on the Petitioners and are on the brink of starvation due to the absence of the only two earning members in the family especially given the pandemic situation. The Ld. Counsel for the Petitioners finally urged that given that there is no risk of the Petitioners fleeing given that they reside locally and that they shall not tamper with

evidence, they should be released on bail as even trial has not commenced and they have been in custody for over a year.

4. Heard learned counsel for both parties and perused the records.

The core concept and philosophy of bail was discussed by the Hon'ble Supreme Court in *Vaman Narain Ghiya v. State of Rajasthan*¹, wherein it was observed that:

“6. ‘Bail’ remains an undefined term in CrPC. Nowhere else has the term been statutorily defined. Conceptually, it continues to be understood as a right for assertion of freedom against the State imposing restraints. Since the UN Declaration of Human Rights of 1948, to which India is a signatory, the concept of bail has found a place within the scope of human rights. The dictionary meaning of the expression ‘bail’ denotes a security for appearance of a prisoner for his release. Etymologically, the word is derived from an old French verb ‘bailer’ which means to ‘give’ or ‘to deliver’, although another view is that its derivation is from the Latin term ‘baiulare’, meaning ‘to bear a burden’. Bail is a conditional liberty. Stroud’s Judicial Dictionary (4th Edn., 1971) spells out certain other details. It states:

‘... when a man is taken or arrested for felony, suspicion of felony, indicted of felony, or any such case, so that he is restrained of his liberty. And, being by lawailable, offereth surety to those which have authority to bail him, which sureties are bound for him to the King’s use in a certain sums of money, or body for body, that he shall appear before the justices of goal delivery at the next sessions, etc. Then upon the bonds of these sureties, as is aforesaid, he is bailed—that is to say, set at liberty until the day appointed for his appearance.’

¹(2009) 2 SCC 281

Bail may thus be regarded as a mechanism whereby the State devolutes upon the community the function of securing the presence of the prisoners, and at the same time involves participation of the community in administration of justice.

7. Personal liberty is fundamental and can be circumscribed only by some process sanctioned by law. Liberty of a citizen is undoubtedly important but this is to balance with the security of the community. A balance is required to be maintained between the personal liberty of the accused and the investigational right of the police. It must result in minimum interference with the personal liberty of the accused and the right of the police to investigate the case. It has to dovetail two conflicting demands, namely, on the one hand the requirements of the society for being shielded from the hazards of being exposed to the misadventures of a person alleged to have committed a crime; and on the other, the fundamental canon of criminal jurisprudence viz. the presumption of innocence of an accused till he is found guilty. Liberty exists in proportion to wholesome restraint, the more restraint on others to keep off from us, the more liberty we have. (See A.K. Gopalan v. State of Madras [AIR 1950 SC 27].

8. The law of bail, like any other branch of law, has its own philosophy, and occupies an important place in the administration of justice and the concept of bail emerges from the conflict between the police power to restrict liberty of a man who is alleged to have committed a crime, and presumption of innocence in favour of the alleged criminal. An accused is not detained in custody with the object of punishing him on the assumption of his guilt.”

5. In *Moti Ram v. State of M.P.*² the Hon’ble Supreme Court, while discussing pretrial detention, held:

²(1978) 4 SCC 47

“14. The consequences of pretrial detention are grave. Defendants presumed innocent are subjected to the psychological and physical deprivations of jail life, usually under more onerous conditions than are imposed on convicted defendants. The jailed defendant loses his job if he has one and is prevented from contributing to the preparation of his defence. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family.”

Furthermore, the Hon’ble Supreme Court in *Sanjay Chandra v. CBI*³, dealing with a case involving an economic offence of formidable magnitude, touching upon the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is jurisprudentially neither punitive nor preventive. Although the Hon’ble Supreme Court sounded a caveat that any imprisonment before conviction does have a substantial punitive content. It was elucidated therein that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or

³(2012) 1 SCC 40

denial of such privilege is regulated to a large extent by the facts and circumstances of each particular case. It was also held that detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted.

6. It would also be apposite at this juncture to reproduce the Hon'ble Delhi High Court's succinct elucidation of the legal position in matters pertaining to bail as laid down in *Anil Mahajan v. Commissioner of Customs*⁴ and *H.B. Chaturvedi v. CBI*⁵, wherein the Hon'ble High Court after considering the judgments, *inter alia*, in *Gurcharan Singh v. State (Delhi Administration)*⁶ and *Gudikanti Narasimhulu v. Public Prosecutor*⁷, observed as follows:

“14. The legal position emerging from the above discussion can be summarised as follows:

(a) Personal liberty is too precious a value of our Constitutional System recognised under Article 21 that the crucial power to negate it is a great trust exercisable not casually but judicially, with lively concern for the cost to the individual and the community. Deprivation of personal freedom must be founded on the most serious considerations relevant to the welfare objectives of society specified in the Constitution.

⁴84 (2000) DLT 854

⁵CRL.M (BAIL) 459/2010

⁶(1978) 1 SCC 118

⁷(1978) 1 SCC 240

(b) As a presumably innocent person the accused person is entitled to freedom and every opportunity to look after his own case and to establish his innocence. A man on bail has a better chance to prepare and present his case than one remanded in custody. An accused person who enjoys freedom is in a much better position to look after his case and properly defend himself than if he were in custody. Hence grant of bail is the rule and refusal is the exception.

(c) The object of bail is to secure the attendance of the accused at the trial. The principal rule to guide release on bail should be to secure the presence of the applicant to take judgment and serve sentence in the event of the Court punishing him with imprisonment.

(d) Bail is not to be withheld as a punishment. Even assuming that the accused is prima facie guilty of a grave offence, bail cannot be refused in an indirect process of punishing the accused person before he is convicted.

(e) Judges have to consider applications for bail keeping passions and prejudices out of their decisions.

(f) In which case bail should be granted and in which case it should be refused is a matter of discretion subject only to the restrictions contained in Section 437(1) of the Criminal Procedure Code. But the said discretion should be exercised judiciously.

(g) The powers of the Court of Session or the High Court to grant bail under Section 439(1) of Criminal Procedure Code are very wide and unrestricted. The restrictions mentioned in Section 437(1) do not apply to the special powers of the High Court or the Court of Session to grant bail under Section 439(1). Unlike under Section 437(1), there is no ban imposed under Section 439(1) against granting of bail by the High Court or the Court of Session to persons accused of an offence punishable with death or imprisonment for life. However while considering an application for bail under Section 439(1), the High Court or the Court of Sessions will have to exercise its judicial

discretion also bearing in mind, among other things, the rationale behind the ban imposed under Section 437(1) against granting bail to persons accused of offences punishable with death or imprisonment for life.

(h) There is no hard and fast rule and no inflexible principle governing the exercise of such discretion by the Courts. There cannot be an inexorable formula in the matter of granting bail. The facts and circumstances of each case will govern the exercise of judicial discretion in granting or refusing bail. The answer to the question whether to grant bail or not depends upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail.

(i) While exercising the discretion to grant or refuse bail the Court will have to take into account various considerations like the nature and seriousness of the offence; the circumstances in which the offence was committed; the character of the evidence; the circumstances which are peculiar to the accused; a reasonable apprehension of witnesses being influenced and evidence being tampered with; the larger interest of the public or the State; the position and status of the accused with reference to the victim and the witness; the likelihood of the accused fleeing from justice; the likelihood of the accused repeating the offence; the history of the case as well as the stage of investigation, etc. In view of so many variable factors the considerations which should weigh with the Court cannot be exhaustively set out. However, the two paramount considerations are: (i) the likelihood of the accused fleeing from justice and (ii) the likelihood of the accused tampering with prosecution evidence. These two considerations in fact relate to ensuring a fair trial of the case in a Court of justice and hence it is essential that due and proper weight should be bestowed on these two factors.

(j) While exercising the power under Section 437 of the Criminal Procedure Code in cases involving non-bailable offences except cases relating to offences punishable with death or imprisonment for life, judicial discretion would always be exercised by the Court in favor of granting bail subject to Sub-section (3) of Section 437 with regard to imposition of conditions, if necessary. Unless exceptional circumstances are brought to the notice of the Court which might defeat proper investigation and a fair trial, the Court will not decline to grant bail to a person who is not accused of an offence punishable with death or imprisonment for life.

(k) If investigation has not been completed and if the release of the accused on bail is likely to hamper the investigation, bail can be refused in order to ensure a proper and fair investigation.

(l) If there are sufficient reasons to have a reasonable apprehension that the accused will flee from justice or will tamper with prosecution evidence he can be refused bail in order to ensure a fair trial of the case.

(m) The Court may refuse bail if there are sufficient reasons to apprehend that the accused will repeat a serious offence if he is released on bail.

(n) For the purpose of granting or refusing bail there is no classification of the offences except the ban under Section 437(1) of the Criminal Procedure Code against grant of bail in the case of offences punishable with death or life imprisonment. Hence there is no statutory support or justification for classifying offences into different categories such as economic offences and for refusing bail on the ground that the offence involved belongs to a particular category. When the Court has been granted discretion in the matter of granting bail and when there is no statute prescribing a special treatment in the case of a particular offence the Court cannot classify the cases and say that in particular classes bail may be granted but not in others. Not only in the case of economic offences but also in the case of other offences the Court will have

to consider the larger interest of the public or the State. Hence only the considerations which should normally weigh with the Court in the case of other non-bailable offences should apply in the case of economic offences also. It cannot be said that bail should invariably be refused in cases involving serious economic offences.

(o) Law does not authorise or permit any discrimination between a foreign National and an Indian National in the matter of granting bail. What is permissible is that, considering the facts and circumstances of each case, the Court can impose different conditions which are necessary to ensure that the accused will be available for facing trial. It cannot be said that an accused will not be granted bail because he is a foreign national.”

7. This court has also had the prior occasion of dealing with a similar application for grant of bail in a case relating to prosecution under the provisions of the OGST Act, 2017 the case of *Pramod Kumar Sahoo v State of Odisha*⁸ wherein this court had the occasion to elaborately deal with the view taken by various other High Courts in such matters.

8. Bail, as it has been held in a catena of decisions, is not to be withheld as a punishment. Bail cannot be refused as an indirect method of punishing the accused person before he is convicted. Furthermore, it has to be borne in mind that there is as such no justification for classifying offences into different categories such as economic offences and for refusing bail on the ground that the

⁸BLAPL No. 4125 of 2020

offence involved belongs to a particular category. It cannot, therefore, be said that bail should invariably be refused in cases involving serious economic offences. It is not in the interest of justice that the Petitioners should be in jail for an indefinite period. No doubt, the offence alleged against the Petitioners is a serious one in terms of alleged huge loss to the State exchequer, that, by itself, however, should not deter this Court from enlarging the Petitioners on bail when there is no serious contention of the Respondent that the Petitioners, if released on bail, would interfere with the trial or tamper with evidence.

9. Having regard to the entire facts and circumstances of the case, especially the fact that both the bread earning sons of a family have been in custody for over a year now I do not find any justification for detaining the Petitioners in custody for any longer. As a side note it observed that more and more such cases are brought to the fore where the mere pawns who have been used as a part of larger conspiracy of tax fraud have been brought under the dragnet by the prosecution. It is perhaps time that the prosecution will do well to follow the trail upstream and bring the “upstream” parties who are the ultimate beneficiaries who are the gainers in these evil machinations.

10. In view of the above discussion, it is directed that the Petitioners in both the BLAPLs be released on bail by the court in *seisin* over the matter in the aforesaid case on such terms and conditions as deemed fit and proper by him/ her with the following conditions:

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

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

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

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

(v) Any involvement in similar offences of under the GST Act will entail cancellation of the bail.

11. With the above directions the instant bail applications are allowed. However, expression of any opinion hereinbefore may not be treated as a view on the merits of the case and that the assessment of the tax liability of the Petitioners shall be carried out strictly in accordance with the applicable provisions of applicable law.

12. The bail applications are, accordingly, disposed of along with any pending applications (if any).

(*S.K. Panigrahi*)
Judge

*Orissa High Court, Cuttack,
Dated the 18th Feb., 2022/B. Jhankar*

