Reserved on 23.05.2019

Delivered on 30.05.2019

Court No. - 33

AFR

Case :- CRIMINAL MISC. WRIT PETITION No. - 7303 of 2019

Petitioner :- Govind Enterprises
Respondent :- State Of U.P. And 4 Others
Counsel for Petitioner :- Anil Prakash Mathur
Counsel for Respondent :- G.A., C.B. Tripathi

Hon'ble Manoj Misra,J.
Hon'ble Suresh Kumar Gupta,J.

(Delivered by Hon'ble Manoj Misra, J)

Instant petition seeks quashing of first information report (for short FIR), dated 30.11.2018, lodged by Assistant Commissioner, Commercial Tax at police station Kosi Kalan, District Mathura, under Sections 420, 467, 468, 471, 34, 120-B IPC.

The impugned FIR alleges that M/s Govind Enterprises (the petitioner) applied for registration under the **U.P. Goods and Services Tax Act, 2017 (for short U.P. Act)** to conduct business in packing material, by showing its place of business on the First Floor, N.H.-2, in front of Gate No.1, Anaj Mandi, Kosi Kalan, District Mathura. Upon which, on 09.03.2018, GST No.09CBIPA0305H1Z7 was provided to it. At the time of obtaining registration, the applicant disclosed its e-mail ID as advocateonlyforgst@gmail.com and mobile No.8533952295. Further, while applying for registration, it was declared that the office space for the firm was obtained on rent from Mahaveer Singh son of Ramesh Chandra at Rs.1,000/- per month. The rent agreement and receipt of electricity connection, dated 17.02.2017, obtained from Dakshinanchal Vidyut Vitran Nigam Limited was also uploaded at the portal. It is alleged that on 27.09.2018, an inquiry about the dealer was conducted by Sri Narendra Kumar, Deputy Commissioner, Commercial Tax; Sri Gulab Chandra, Assistant Commissioner, Commercial Tax; and Ms. Isha

Gautam, Assistant Commissioner. It was found that at the disclosed place of business, there was no display board to show the name of the firm; the disclosed place was just a room measuring 18 feet x 20 feet; that, at the time of inspection, the landlord Mahaveer Singh was found, who disclosed that, on 01.03.2018, the room was let out to Govind Agrawal (proprietor of the petitioner-firm) on a rent of Rs.1,000/- per month; that he himself had applied for registration for the trader; and that he had been an Advocate for the firm. It is alleged that the room had no books of account relating to the firm; that only a computer and laptop with a printer was found, which, according to Mahaveer Singh, did not carry any data relating to the firm; that papers kept there were relating to his own legal practice; and that two persons found working on the computer, upon enquiry, disclosed that they were working for the Advocate in connection with his accountancy work. The inspection further revealed that there was no place or godown to maintain/ keep stock. It was also disclosed to the team that M/s Govind Enterprises conducted its entire business from Kanpur and that all books of account relating to the firm are maintained in its Kanpur Branch. Upon receipt of the above information, it is alleged, a survey/ inspection of the branch at Kanpur was also conducted by Sri Chandra Shekhar, Deputy Commissioner, Commercial Tax on 27.09.2018 itself. Upon inspection of the Kanpur branch, a labour contractor, namely, Mukesh Sharma son of Ram Kumar Sharma, was found. The team was informed by the landlord - Indrapal that the concerned shop had been provided to one Dharmendra Gurjar son of Kali Charan. Dharmendra Gurjar informed that the premises was taken on rent on the request of accountant Manish; that the shop was taken on rent on 15.09.2018 at the rate of Rs.7,000/- per month; that he is a Muneem in the firm on a salary of Rs.10,000/- per month; that he does not know Govind Agrawal; that he had been sent by Ram Niwas Gurjar, who runs business by the name of Pitambar Transport. The team found that the shop concerned was just about 10

feet x 20 feet in dimensions and it appeared that it had not been opened for last several days. The team was also informed that since the time the premises had been taken on rent, only a truck load of goods had been received in which there were bundles of plastic films (*Panni*). When account books etc. were demanded, the team was informed that bills etc. were with the accountant who is at Mathura. The owner of the building was also queried who denied existence of any written agreement and who denied that it was given on rent to Govind Enterprises. He stated that only one month's rent had been paid so far, which was by Dharmendra Gurjar. The impugned FIR also alleges that at the time of registration, the firm had disclosed its bank account No.04672121008171 in Oriental Bank of Commerce, Mathura. It was alleged that since the time of registration, the firm had shown an inward supply of laminated papers valued Rs.35,02,28,642/- whereas the outward supply was by two e-way bills of Rs.1,64,334/- and 14,94,774/-. It was alleged that as, despite such large quantity of inward supply, the outward supply was negligible, a deeper probe was made. Upon which, it was found that Govind Enterprises had obtained 295 e-way bills in respect of inward supply of goods worth Rs.35,02,28,642/- by showing its place of business at Kosi Kalan, Mathura and Kanpur. The probe revealed that the disclosed bank account of the firm, which was in operation since 27.08.2009, up to 26.11.2018, had a balance of mere Rs.6,448/-. It was further found that in between 27.08.2009 and 26.11.2018, the total amount deposited in the account was just Rs.3,73,389/- whereas total withdrawal therefrom was of Rs.4,00,017/-, which suggested that the firm's proprietor, namely, Govind Agrawal, had limited means to carry out such huge business as could be gathered from the inward e-way bills obtained by him. It is further alleged that upon inquiry another undisclosed bank account of Govind Enterprises came to light which was in Gwalior, Madhya Pradesh. The said bank account stood in the name of M/s Govind Enterprises with address New

Mahaveer Colony, Birla Nagar, Murar, Gwalior. It is alleged that upon going through the said bank account statement it was found that in between 11.07.2018 and 16.11.2018, on various dates, cash deposits were made totaling Rs.9,39,07,715/- suggesting that the goods obtained through 295 inward e-way bills were disposed off without invoicing to evade taxes. It has been alleged that having an undisclosed bank account of the firm in Gwalior, when the office of the firm is shown at Mathura disclosed the dishonest intention of the dealer. It has also been alleged that laminated paper is essentially used as packing material in various industrial applications and therefore the accused must have passed on the material to industries, which, in absence of documentation, is suggestive of a large scale economic fraud. By narrating the background facts noticed above, it has been alleged that there is reason to believe that Sri Govind Agrawal in collusion with some unknown firm or person, by acting as their agent, had committed an economic fraud.

In a nutshell, the thrust of the allegations made in the impugned FIR is that the dealer fraudulently, with a dishonest intention, by submitting false documents, with an intention to evade taxes, obtained registration, thereafter, took inward supply and passed on the goods to end users, without generating outward supply bills, received money in cash and deposited the same in bank account which was not declared at the time of seeking registration.

Sri A.P. Mathur, learned counsel for the petitioner, submitted that till date, no case has been registered under the provisions of the U.P. Act or under the **Central Goods and Services Tax Act, 2017 (for short Central Act)** and no recovery demand has been raised and, therefore, lodging of the first information report under the provisions of the Indian Penal Code is not legally sustainable. It was submitted that the Goods and Services Tax Act is a complete code in itself as it contemplates and deals with all kinds of situations and offences relating to registration of firms, tax evasion etc and it prescribes a specific procedure for arrest and

prosecution therefore lodging of the first information for offences punishable under the **Indian Penal Code (for short Penal Code)** by taking recourse to the provisions of the **Code of Criminal Procedure, 1973 (for short the Code)** is not legally justified.

By placing reliance on the provisions of Section 69 of the U.P. Act, Sri Mathur contended that the power to arrest is to be exercised only 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 of the U.P. Act, and, by order, has authorized any officer of Sales tax to arrest such person. He submitted that, under the circumstances, first a proceeding has to be drawn under the provisions of the U.P. Act and, only, thereafter there could be arrest, that too, after recording satisfaction. Hence, lodging of the first information report straightaway is not legally permissible.

In the alternative, Sri Mathur submitted that even assuming that a first information report can be registered, as no demand for recovery has yet been issued, there is no justification to effect arrest of the petitioner pending investigation.

Per contra, Sri C.B. Tripathi, learned Special Standing Counsel, representing Revenue, submitted that Section 131 of U.P. Act, which is pari materia Section 131 of Central Act, specifically provides that no confiscation made or penalty imposed under the provisions of the Act or the rules made thereunder shall prevent the infliction of any other punishment to which the person affected thereby is liable under the provisions of the Act or under any other law for the time being in force. It has been submitted by him that phraseology of Section 131 clearly suggests that the provisions of the Act are without prejudice to the provisions of the Code and, therefore, in respect of any offence punishable under the provisions of the Penal Code, the provisions of the Code can be invoked and a first information report can be registered.

Sri Tripathi submitted that as the allegations made in the

impugned first information report clearly disclose that a bogus firm, which had no significant business, was got registered, by submitting false documents and information, for making purchase and sale, without proper documentation, to evade taxes, and, thereafter, goods worth Rs.35 odd crores were purchased/ transported through self generated 295 inward e-way bills and, against them, sale of only few lacs was shown by generating just two outward e-way bills; and, upon inspection neither proper place of business nor godown with goods were found, rather cash deposits were discovered in undisclosed bank account, the dishonest intention of the petitioner is writ large. Hence, a case for registration of FIR in respect of commission of offences punishable under the Penal Code is made out. Therefore, neither the first information report nor investigation in pursuance thereof can be quashed.

By placing reliance on the averments made in paragraphs 14 and 15 of the counter affidavit, of which there is no denial in paragraph 11 of the rejoinder affidavit, Sri Tripathi submitted that after serving a show cause notice dated 04.10.2018, vide order dated 23.10.2018, the registration of the petitioner has been canceled. Thereafter, the petitioner had filed application which was rejected vide order dated 13.12.2018.

Sri Tripathi further submitted that in matters pertaining to economic fraud, it would not be appropriate for the Court to grant stay of arrest, particularly, where first information report discloses commission of cognizable offence, as such relief may thwart investigation and discovery of further information as to who all are involved in such activity. Sri Tripathi thus prayed that the writ petition be dismissed.

In support of his contention that there is no legal restriction placed on lodging of FIR and the same could be lodged even where proceedings could be undertaken for recovery of tax etc., Sri Tripathi placed reliance on a decision of the Apex Court in the case of ***State of West Bengal Vs. Narayan K. Patodia (2000) 4 SCC 447*** and on a division bench decision

of this Court in the case of ***Ashok Kumar Vs. State of U.P. and others reported in 2000 UPTC 916***.

As parties had exchanged their affidavits, after hearing the counsel for the parties at length, we have proceeded to decide the matter finally at the admission stage itself.

Before we proceed to address the rival submissions, it would be apposite for us to examine the relevant provisions of the U.P. Act cited by the learned counsel for the parties.

Learned counsel for the petitioner has cited the provisions of Sections 69, 122, 132 and 134 of the U.P. Act. **Section 122** of the U.P. Act is extracted below:-

> *"**122. Penalty for certain offences.**- (1) Where a taxable person who—*
>
> *(i) supplies any goods or services or both without issue of any invoice or issues an incorrect or false invoice with regard to any such supply;*
>
> *(ii) 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;*
>
> *(iii) 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;*
>
> *(iv) collects any tax in contravention of the provisions of this Act but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;*
>
> *(v) fails to deduct the tax in accordance with the provisions of sub-section (1) of section 51, or deducts an amount which is less than the amount required to be deducted under the said sub-section, or where he fails to pay to the Government under sub-section (2) thereof, the amount deducted as tax;*
>
> *(vi) fails to collect tax in accordance with the provisions of sub-section (1) of section 52, or collects an amount which is less than the amount required to be collected under the said sub-section or where he fails to pay to the Government the amount collected as tax under sub-section (3) of section 52;*
>
> *(vii) takes or utilizes input tax credit without actual receipt of goods or services or both either fully or partially, in contravention of the provisions of this Act or the rules made thereunder;*
>
> *(viii) fraudulently obtains refund of tax under this Act;*
>
> *(ix) takes or distributes input tax credit in contravention of section 20, or the rules made thereunder;*
>
> *(x) falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information or return with an intention to evade payment of tax due under this Act;*

(xi) is liable to be registered under this Act but fails to obtain registration;

(xii) furnishes any false information with regard to registration particulars, either at the time of applying for registration, or subsequently;

(xiii) obstructs or prevents any officer in discharge of his duties under this Act;

(xiv) transports any taxable goods without the cover of documents as may be specified in this behalf;

(xv) suppresses his turnover leading to evasion of tax under this Act;

(xvi) fails to keep, maintain or retain books of account and other documents in accordance with the provisions of this Act or the rules made thereunder;

(xvii) fails to furnish information or documents called for by an officer in accordance with the provisions of this Act or the rules made thereunder or furnishes false information or documents during any proceedings under this Act;

(xviii) supplies, transports or stores any goods which he has reasons to believe are liable to confiscation under this Act;

(xix) issues any invoice or document by using the registration number of another registered person;

(xx) tampers with, or destroys any material evidence or document;

(xxi) disposes off or tampers with any goods that have been detained, seized, or attached under this Act,

he shall be liable to pay a penalty of ten thousand rupees or an amount equivalent to the tax evaded or the tax not deducted under section 51 or short deducted or deducted but not paid to the Government or tax not collected under section 52 or short collected or collected but not paid to the Government or input tax credit availed of or passed on or distributed irregularly, or the refund claimed fraudulently, whichever is higher.

(2) Any registered person who supplies any goods or services or both on which any tax has not been paid or short-paid or erroneously refunded, or where the input tax credit has been wrongly availed or utilised,—

(a) for any reason, other than the reason of fraud or any willful misstatement or suppression of facts to evade tax, shall be liable to a penalty of ten thousand rupees or ten per cent of the tax due from such person, whichever is higher;

(b) for reason of fraud or any willful misstatement or suppression of facts to evade tax, shall be liable to a penalty equal to ten thousand rupees or the tax due from such person, whichever is higher.

(3) Any person who—

(a) aids or abets any of the offences specified in clauses (i) to (xxi) of sub-section (1);

(b) 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;

(c) 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;

(d) fails to appear before the officer of central tax, when issued with a summon for appearance to give evidence or produce a document in an inquiry;

(e) fails to issue invoice in accordance with the provisions of this Act or the rules made thereunder or fails to account for an invoice in his books of account, shall be liable to a penalty which may extend to twenty-five thousand rupees."

According to the learned counsel for the petitioner, the act of the petitioner for which the impugned FIR has been lodged is covered by various clauses of the provisions of Section 122 of U.P. Act and therefore at best a penalty could be imposed by taking recourse to the provisions of the U.P. Act.

Section 132 of the U.P. Act provides for certain offences. The same is reproduced below:-

*"**132. Punishment for certain offences.**- (1) Whoever commits 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 utilization 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 non cognizable and bailable.

(5) The offences specified in clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) and punishable under clause (i) of that sub-section shall be cognizable and non-bailable.

(6) A person shall not be prosecuted for any offence under this section except with the previous sanction of the Commissioner.

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."

By referring to Clauses (f) and (k) of sub-section (1) of Section 132, learned counsel for the petitioner submitted that the allegations in the impugned FIR, even if accepted as correct, may disclose offences specified in those clauses therefore, by virtue of the provisions of sub-section (4) read with sub-sections (5) and (6) of Section 132 of the U.P. Act, they would be non cognizable. Hence, lodging of the impugned FIR is not legally justified as proceeding could be initiated only under the provisions of the U.P. Act and in the manner prescribed therein.

Section 69 of the U.P. Act provides as follows:-

> *"**69. Power to arrest.**— (1) Where the Commissioner has reasons to believe that a person has committed any offence specified in clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) of Section 132 which is punishable under clause (i) or (ii) of sub-section (1), or sub-section (2) of the said section, he may, by order, authorise any officer of central tax to arrest such person.*
> *(2) Where a person is arrested under sub-section (1) for an offence specified under sub-section (5) of Section 132, the officer authorised to arrest the person shall inform such person of the grounds of arrest and produce him before a Magistrate within twenty-four hours.*
> *(3) Subject to the provisions of the Code of Criminal Procedure, 1973 (2 of 1974),—*
> *(a) where a person is arrested under sub-section (1) for any offence specified under sub-section (4) of Section 132, he shall be admitted to bail or in default of bail, forwarded to the custody of the Magistrate;*
> *(b) in the case of a non-cognizable and bailable offence, the Deputy Commissioner or the Assistant Commissioner shall, for the purpose of releasing an arrested person on bail or otherwise, have the same powers and be subject to the same provisions as an officer-in-charge of a police station."*

Section 134 of the U.P. Act provides as follows:

> *"**134. Cognizance of offences**.— No court shall take cognizance of any offence punishable under this Act or the rules made thereunder except with the previous sanction of the Commissioner, and no court inferior to that of the Magistrate of the First Class, shall try any such offence."*

By referring to the provisions of sections 69 and 134 of the U.P. Act, the learned counsel for the petitioner contended that as a special procedure has been provided for arrest as well as prosecution of a person for offences punishable under the U.P. Act, recourse to general law, namely, the provisions of the Penal Code and the Code, is excluded.

On the other hand, learned counsel for the Revenue, in addition to stating that offences punishable under clauses (a) and (d) of sub-section (1) of section 132 of the U.P. Act, which are cognizable under sub-section (5) of section 132 of the U.P. Act, are also made out, placed reliance on the provisions of **Sections 131 and 135** of the U.P. Act, which are extracted below:-

> *"**131. Confiscation or penalty not to interfere with other punishments.**- Without prejudice to the provisions contained in the Code of Criminal Procedure, 1973, no confiscation made or penalty imposed under the provisions of this Act or the rules made thereunder shall prevent the infliction of any other punishment to which the person affected thereby is liable under the provisions of this Act or under any other law for the time being in force."*

> *"**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 defense 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."*

Learned counsel for the Revenue submitted that the provisions of the U.P. Act do not in any manner override the provisions of the Penal Code or prohibit the applicability of the provisions of the Code in respect of offences punishable under the Penal Code. He submitted that offences punishable under the Penal Code are to be dealt with as per provisions of the Code whereas offences punishable under the U.P. Act are required to be dealt with in a manner which does not violate the procedure specified for them in the U.P. Act. It was submitted that for offences punishable under the U.P. Act, by virtue of Section 135 of the U.P. Act, there is a presumption of culpable mental state whereas for offences punishable under the Penal Code there is no such presumption available to the prosecution therefore the offences punishable under the Penal Code are qualitatively different from those punishable under the

U.P. Act even though an act may constitute an offence punishable under both the Acts, namely, Penal Code and U.P. Act.

Having noticed the submissions and the relevant provisions cited, before we proceed to weigh the rival submissions, it would be useful to refer to the provisions of Section 26 of the **General Clauses Act, 1897 (for short G.C. Act)** and few decisions of the Apex Court dealing with situations where an act may constitute offences punishable under separate statutes. **Section 26 of G.C. Act** provides as follows:

> ***"26. Provision as to offences punishable under two or more enactments***.— *Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."*

In ***State of Rajasthan v. Hat Singh, (2003) 2 SCC 152*****,** the apex court had the occasion to examine the provisions of section 26 of the G.C. Act with reference to the rule against double jeopardy enshrined under Article 20(2) of the Constitution of India and section 300 of the Code. The apex court in paragraphs 8 to 11 of its judgment, as reported held as follows:

> ***"8.*** *Article 20(2) of the Constitution provides that no person shall be prosecuted and punished for the same offence more than once. To attract applicability of Article 20(2) there must be a second prosecution and punishment for the same offence for which the accused has been prosecuted and punished previously. A subsequent trial or a prosecution and punishment are not barred if the ingredients of the two offences are distinct.*
>
> ***9.*** *The rule against double jeopardy is stated in the maxim nemo debet bis vexari pro una et eadem causa. It is a significant basic rule of criminal law that no man shall be put in jeopardy twice for one and the same offence. The rule provides foundation for the pleas of autrefois acquit and autrefois convict. The manifestation of this rule is to be found contained in Section 26 of the General Clauses Act, 1897, Section 300 of the Code of Criminal Procedure, 1973 and Section 71 of the Indian Penal Code. Section 26 of the General Clauses Act provides:*
>
> *"26. Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."*
>
> *(emphasis supplied)*
>
> *Section 300 CrPC provides, inter alia,—*
>
> *"300. (1) A person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to*

be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub-section (1) of Section 221, or for which he might have been convicted under sub-section (2) thereof."

(emphasis supplied)

Both the provisions employ the expression "same offence".

10. *Section 71 IPC provides—*

"71. Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such of his offences, unless it be so expressly provided.

Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or

where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence,

the offender shall not be punished with a more severe punishment than the court which tries him could award for any one of such offences."

11. *The leading Indian authority in which the rule against double jeopardy came to be dealt with and interpreted by reference to Article 20(2) of the Constitution is the Constitution Bench decision in Maqbool Hussain v. State of Bombay. If the offences are distinct, there is no question of the rule as to double jeopardy being extended and applied. In State of Bombay v. S.L. Apte the Constitution Bench held that the trial and conviction of the accused under Section 409 IPC did not bar the trial and conviction for an offence under Section 105 of the Insurance Act because the two were distinct offences constituted or made up of different ingredients though the allegations in the two complaints made against the accused may be substantially the same. In Om Parkash Gupta v. State of U.P. and State of M.P. v. Veereshwar Rao Agnihotri it was held that prosecution and conviction or acquittal under Section 409 IPC do not debar the accused being tried on a charge under Section 5(2) of the Prevention of Corruption Act, 1947 because the two offences are not identical in sense, import and content. In Roshan Lal v. State of Punjab the accused had caused disappearance of the evidence of two offences under Sections 330 and 348 IPC and, therefore, he was alleged to have committed two separate offences under Section 201 IPC. It was held that neither Section 71 IPC nor Section 26 of the General Clauses Act came to the rescue of the accused and the accused was liable to be convicted for two sets of offences under Section 201 IPC though it would be appropriate not to pass two separate sentences.*

(Emphasis Supplied)

In ***State (NCT of Delhi) v. Sanjay, (2014) 9 SCC 772,*** the principal question that arose for consideration before the apex court was whether the provisions contained in Sections 21, 22 and other sections of the Mines and Minerals (Development and Regulation) Act, 1957 operate as bar against prosecution of a person who has been charged

with allegation which constitutes offences under Section 379 and other provisions of the Penal Code, 1860. In other words, the question for consideration was whether the provisions of the Mines and Minerals Act explicitly or impliedly exclude the provisions of the Penal Code when the act of an accused is an offence both under the Penal Code and under the provisions of the Mines and Minerals (Development and Regulation) Act. Deciding the issue, the apex court held as follows:

> ***61.*** *Reading the provisions of the Act minutely and carefully, prima facie we are of the view that there is no complete and absolute bar in prosecuting persons under the Penal Code where the offences committed by persons are penal and cognizable offence.*
>
> ***62.*** *Sub-section (1-A) of Section 4 of the MMDR Act puts a restriction in transporting and storing any mineral otherwise than in accordance with the provisions of the Act and the Rules made thereunder. In other words no person will do mining activity without a valid lease or licence. Section 21 is a penal provision according to which if a person contravenes the provisions of sub-section (1-A) of Section 4, he shall be prosecuted and punished in the manner and procedure provided in the Act. Sub-section (6) has been inserted in Section 4 by amendment making the offence cognizable notwithstanding anything contained in the Code of Criminal Procedure, 1973. Section 22 of the Act puts a restriction on the court to take cognizance of any offence punishable under the Act or any Rule made thereunder except upon a complaint made by a person authorised in this behalf. It is very important to note that Section 21 does not begin with a non obstante clause. Instead of the words "notwithstanding anything contained in any law for the time being in force no court shall take cognizance….", the section begins with the words "no court shall take cognizance of any offence."*
>
> ***63 to 68…..***
>
> ***69.*** *Considering the principles of interpretation and the wordings used in Section 22, in our considered opinion, the provision is not a complete and absolute bar for taking action by the police for illegal and dishonestly committing theft of minerals including sand from the riverbed. The Court shall take judicial notice of the fact that over the years rivers in India have been affected by the alarming rate of unrestricted sand mining which is damaging the ecosystem of the rivers and safety of bridges. It also weakens riverbeds, fish breeding and destroys the natural habitat of many organisms. If these illegal activities are not stopped by the State and the police authorities of the State, it will cause serious repercussions as mentioned hereinabove. It will not only change the river hydrology but also will deplete the groundwater levels.*
>
> ***70.*** *There cannot be any dispute with regard to restrictions imposed under the MMDR Act and remedy provided therein. In any case, where there is a mining activity by any person in contravention of the provisions of Section 4 and other sections of the Act, the officer empowered and authorised under the Act shall exercise all the powers including making a complaint before the Jurisdictional Magistrate. It is also not in dispute that the Magistrate shall in such cases take cognizance on the basis of the complaint filed before it by a duly authorised officer. In case of breach*

and violation of Section 4 and other provisions of the Act, the police officer cannot insist the Magistrate for taking cognizance under the Act on the basis of the record submitted by the police alleging contravention of the said Act. In other words, the prohibition contained in Section 22 of the Act against prosecution of a person except on a complaint made by the officer is attracted only when such person is sought to be prosecuted for contravention of Section 4 of the Act and not for any act or omission which constitutes an offence under the Penal Code.

71. *However, there may be a situation where a person without any lease or licence or any authority enters into river and extracts sand, gravel and other minerals and remove or transport those minerals in a clandestine manner with an intent to remove dishonestly those minerals from the possession of the State, is liable to be punished for committing such offence under Sections 378 and 379 of the Penal Code.*

72. *From a close reading of the provisions of the MMDR Act and the offence defined under Section 378 IPC, it is manifest that the ingredients constituting the offence are different. The contravention of terms and conditions of mining lease or doing mining activity in violation of Section 4 of the Act is an offence punishable under Section 21 of the MMDR Act, whereas dishonestly removing sand, gravel and other minerals from the river, which is the property of the State, out of the State's possession without the consent, constitute an offence of theft. Hence, merely because initiation of proceeding for commission of an offence under the MMDR Act on the basis of complaint cannot and shall not debar the police from taking action against persons for committing theft of sand and minerals in the manner mentioned above by exercising power under the Code of Criminal Procedure and submit a report before the Magistrate for taking cognizance against such persons. In other words, in a case where there is a theft of sand and gravel from the government land, the police can register a case, investigate the same and submit a final report under Section 173 CrPC before a Magistrate having jurisdiction for the purpose of taking cognizance as provided in Section 190(1)(d) of the Code of Criminal Procedure.*

73. *After giving our thoughtful consideration in the matter, in the light of the relevant provisions of the Act vis-à-vis the Code of Criminal Procedure and the Penal Code, we are of the definite opinion that the ingredients constituting the offence under the MMDR Act and the ingredients of dishonestly removing sand and gravel from the riverbeds without consent, which is the property of the State, is a distinct offence under IPC. Hence, for the commission of offence under Section 378 IPC, on receipt of the police report, the Magistrate having jurisdiction can take cognizance of the said offence without awaiting the receipt of complaint that may be filed by the authorised officer for taking cognizance in respect of violation of various provisions of the MMDR Act. Consequently, the contrary view taken by the different High Courts cannot be sustained in law and, therefore, overruled. Consequently, these criminal appeals are disposed of with a direction to the Magistrates concerned to proceed accordingly."*

(Emphasis Supplied)

In a more recent decision of the apex court, rendered in ***Criminal Appeal No.1195 of 2018 arising out of Special Leave Petition (Criminal) No.4475 of 2016, decided on September 20, 2018 (State of***

Maharashtra and another Vs. Sayyed Hassan Sayyed Subhan and others), the issue that had arisen for consideration was whether an accused could be prosecuted for an offence punishable under the Penal Code for which a proceeding can also be drawn under the provisions of the Food Safety and Standards Act. By relying upon the decision of the Apex Court in ***State of Rajasthan Vs. Hat Singh (supra) and State of Delhi (NCT) Vs. Sanjay (supra)***, the apex court, in paragraphs 7 and 8 of the judgment, held as follows:-

> *"7. There is no bar to a trial or conviction of an offender under two different enactments, but the bar is only to the punishment of the offender twice for the offence. Where an act or an omission constitutes an offence under two enactments, the offender may be prosecuted and punished under either or both enactments but shall not be liable to be punished twice for the same offence. The same set of facts, in conceivable cases, can constitute offences under two different laws. An act or an omission can amount to and constitute an offence under the IPC and at the same time, an offence under any other law. The High Court ought to have taken note of Section 26 of the General Clauses Act, 1897 which reads as follows:*
>
> > *"**Provisions as to offences punishable under two or more enactments** – Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."*
>
> *8. In Hat Singh's case this Court discussed the doctrine of double jeopardy and Section 26 of the General Clauses Act to observe that prosecution under two different Acts is permissible if the ingredients of the provisions are satisfied on the same facts. While considering a dispute about the prosecution of the Respondent therein for offences under the Mines and Minerals (Development and Regulation) Act 1957 and Indian Penal Code, this Court in* **State (NCT of Delhi) v. Sanjay** *held that there is no bar in prosecuting persons under the Penal Code where the offences committed by persons are penal and cognizable offences. A perusal of the provisions of the FSS Act would make it clear that there is no bar for prosecution under the IPC merely because the provisions in the FSS Act prescribe penalties. We, therefore, set aside the finding of the High Court on the first point."*
>
> ***(Emphasis Supplied)***

At this stage, it would not be out of place for us to notice the decision of the Apex Court in the case of State of ***West Bengal Vs. Narayan K. Patodia (Supra)*** cited by the learned counsel for the

Revenue.

In that case, the High Court of Calcutta had quashed the first information report on the ground that the person who forwarded the complaint to the police had no authority to do so. The FIR was registered for offences under the Indian Penal Code and the West Bengal Sales Tax Act, 1994. The FIR contained allegation that the accused submitted two applications before the Assistant Commissioner, Commercial Tax, Burdwan impersonating himself as one Mohan Agrawal who was a fictitious person and the application was submitted by obtaining forged document. It was alleged that on the basis of the fabricated document, the accused obtained registration under the Sales Tax Act which entitled him to make purchases at concessional rate of sales tax, and also to receive permits for importing spices from outside the State. It was alleged that on the strength of the registration so obtained, the respondent applied for issuance of five permits to import spices. The Bureau of Investigation of Government of West Bengal conducted discreet investigation and found that the accused had committed forgery and impersonation to defraud sales tax amount. The complaint was presented by the Assistant Commissioner, Commercial Tax to the Deputy Superintendent of Police, who was attached to the Bureau of Investigation formed under the Sales Tax Act. The Deputy Superintendent, in turn, forwarded the complaint to the officer in-charge of police station with a request to investigate the matter for offences punishable under Sections 403, 409, 465, 468, 471, 419, 420 read with 120-B IPC and the provisions of the Sales Tax Act. Pursuant to the request, the first information report was registered. Upon registration of the first information report, the accused invoked the powers of the High Court for quashing the first information report.

The High Court quashed the first information report by expressing its opinion that under the Sales Tax Act only Bureau of Investigation constituted by the State Government can conduct the investigation or

hold inquiry into any case of alleged or suspected evasion of tax as well as malpractices kept therein and hence no police officer can investigate into offences under the Indian Penal Code or any other Act read with section committed under the provisions of the Sales Tax Act.

The Apex Court took notice of the provisions of Section 4 of the Code, which provided that all offences under the Penal Code are to be investigated, inquired into, tried and otherwise dealt according to the provisions contained in the Code, and came to the conclusion that, as there was no provision in the Sales Tax Act which inhibited the powers of the police as conferred by the Code for investigation and trial of offences under the Penal Code, the order passed by the High Court was liable to be set aside and, accordingly, permitted the registration as well as investigation on the first information report.

A similar view has also been taken by a Division Bench of this Court in the case of ***Ashok Kumar Vs. State of U.P. (Supra)***.

Upon careful consideration of the rival submissions, the decisions noticed above, the relevant provisions of the U.P. Act as also the Penal Code and the Code, we find that Sections 69, 134, and 135 of the U.P. Act are applicable in respect of offences punishable under the U.P. Act. They have no application on offences punishable under the Penal Code. Further, there is no provision in the U.P. Act, at least shown to us, which may suggest that the provisions of the U.P. Act overrides or expressly or impliedly repeals the provisions of the Penal Code. There is also no bar in the U.P. Act on lodging an FIR under the Code for offences punishable under the Penal Code even though, for the same act/ conduct, prosecution can be launched under the U.P. Act. Rather, section 131 of the U.P. Act impliedly saves the provisions of the Penal Code by providing that no confiscation made or penalty imposed under the provisions of the Act or the rules made thereunder shall prevent the infliction of any other punishment to which the person affected thereby is liable under the provisions of the U.P. Act or under any other law for

the time being in force.

The argument of the learned counsel for the petitioner that except for offences specified in sub-section (5) of section 132, sub-section (4) of section 132 of the U.P. Act renders all offences under the U.P. Act non cognizable, therefore no FIR can be lodged, is not acceptable, because sub-section (4) speaks of offences under the U.P. Act and not in respect of offences under the Penal Code. It is noteworthy that section 135 of the U.P. Act makes a significant departure from general law by providing that in any prosecution for an offence under the U.P. Act, which requires a cuplable mental state on the part of the accused, the court shall presume the existence of such mental state. The same does not hold true for offences punishable under the Penal Code. Hence, to prove *mensrea*, which is one of the necessary ingredients of an offence punishable under the Penal Code, the standard of proof would have to be higher to prove commission of an offence punishable under the Penal Code than what would be required to prove an offence punishable under the U.P. Act. As such, the offences punishable under the Penal Code are qualitatively different from an offence punishable under the U.P. Act.

In view of the reasons recorded above, and by keeping in mind the provisions of Section 26 of the General Clauses Act, 1897 as also the law laid down by the apex court in that regard, which we have noticed above, we are of the considered view that the contention of the learned counsel for the petitioner that no first information report can be lodged against the petitioner under the provisions of the Code of Criminal Procedure for offences punishable under the Indian Penal Code, as proceeding could only be drawn against him under the U.P. Goods and Services Tax Act, 2017, is liable to be rejected and is, accordingly, rejected.

Upon perusal of the impugned FIR, we find that, prima facie, necessary ingredients of an offence of cheating, by submitting false information and documents, are clearly spelt out. Because, according to

the allegations a bogus firm was got registered by showing false and bogus addresses of business; and, by taking advantage of such registration, inward e-way bills were generated to make purchase of goods worth Rs.35 odd crores and, thereafter, without generating outward supply bills, huge amount of money was deposited in cash in undisclosed bank account, suggesting that goods were sold without proper documentation, with a view to evade taxes. It cannot, therefore, be said that a bare reading of the impugned FIR does not disclose commission of cognizable offences punishable under the Penal Code. Hence, the impugned FIR is not liable to be quashed.

A Full Bench of this Court in **Ajit Singh @ Muraha v. State of U.P., 2006 (56) ACC 433** after considering various decisions has taken a view that where prayer to quash the FIR cannot be accepted there should not ordinarily be a stay on arrest. Although, in a few decisions of the apex court, it has been held that, in suitable cases, to ensure that a person's liberty is not jeopardized, on account of false implication, protection from arrest, pending investigation, may be granted by superior courts but that power is not ordinarily to be exercised in matters relating to economic fraud. As, in such matters, stay on arrest may become a hurdle in thorough investigation of the matter, particularly in tracing out the money trail.

Under the circumstances, we do not find this to be a fit case where any relief should be granted to the petitioner in the writ jurisdiction. The petition is, therefore, **dismissed.** There is no order as to costs.

Order Date :- 30.05.2019
AKShukla/-