

## Power to Arrest under GST - A Labyrinth in Itself

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**Karthik Sundaram**

Founder, Karthik Law Chambers



**Athman Khilji**

Karthik Law Chambers

### Introduction

The recent Supreme Court decision in *Radhika Agarwal vs. UOI*<sup>[1]</sup> represents an authoritative pronouncement on the validity and exercise of arrest powers under both the Customs Act and GST laws. However, rather than providing clear and comprehensive guidelines, the decision merely establishes certain legal principles—judicial signposts that officers authorizing or exercising arrest powers must follow. This judicial navigation through arrest provisions reflects the inherent tension between efficient tax administration and protection of fundamental rights in our constitutional democracy—a tension that this landmark judgment attempts to resolve but perhaps inadvertently complexifies.

### Constitutional Context and Fundamental Rights

Any critical analysis of arrest powers must begin by acknowledging that arrest deprives individuals of personal liberty—a fundamental right guaranteed under Article 21 of the Constitution of India. The Supreme Court's classification of customs/GST officers as 'non-police officers' (*solely because they lack the power to file police reports under Section 173 of the CrPC or Section 193 of the Bharatiya Nagarik Suraksha Sanhita, 2023*) raises significant concerns. This classification persists despite these officers exercising powers remarkably similar to police officers, including (i) issuing summons; (ii) conducting investigations; (iii) recording statements; and (iv) making arrests. The Supreme Court itself recognizes<sup>[2]</sup> that customs officers enjoy "analogous powers" to police officers, including investigation, arrest, seizure, and interrogation under the Customs Act. The impact of this will be on the applicability of Section 25 of the Evidence Act<sup>[3]</sup>, which is an evidentiary bar

against confessions made to police officers. In the context of tax investigations, not only has the protective shield of Section 25 of the Evidence Act been removed, but the tax department stands further armed with the sword of Section 136 of the CGST Act - which specifically makes 'relevant', statements recorded during inquiry or proceedings for the purposes of prosecution of offences under the Act.

### **Ambiguity on scope of constitutional protection under Article 20(3)**

The decision merely holds that a person summoned under Section 70 of the CGST Act is *per se* not an accused and consequently not entitled to the protection under Article 20(3) of the Constitution<sup>[4]</sup>. It does not engage with the more serious issue as to whether such constitutional protection would get triggered at a later stage, if statements are sought to be recorded post making of an arrest under Section 69 of the CGST Act. Given that the decision categorically holds that an arrest cannot be made merely to investigate whether arrest conditions are being met<sup>[5]</sup>, one can only proceed on the basis that the intent is not to permit recording of statements post making of an arrest. However, in the absence of any categorical finding that statements cannot be recorded post arrest, it is imperative that the Court should have engaged with the issue of whether Article 20(3) becomes applicable at such a stage.

While the Court has judicially incorporated certain CrPC safeguards into GST/Customs arrest powers, these fall short of the robust constitutional protection against self-incrimination. The practical implications are concerning—statements from taxpayers are frequently obtained in circumstances bordering on coercion, with the threat of arrest looming like a sword of Damocles. This reality is acknowledged in the judgment itself, which records<sup>[6]</sup> empirical evidence that taxpayers are often compelled to pay tax to avoid arrest, despite Section 74(5) of the GST Act conferring no right on authorities to extract tax through arrest threats. While that be so, the judgment also takes a position that the constitutional protection under Article 20(3) of the Constitution will not be applicable at this stage, nor will the protection under Section 25 of the Evidence Act be available. This judicial compromise represents a concerning erosion of constitutional safeguards in the fiscal realm—a domain where state power is already disproportionately weighted against individual citizens/individual assesses.

### **Safeguards Imported from PMLA Jurisprudence**

The Court has imported jurisprudential principles from *Arvind Kejriwal vs. Directorate of Enforcement*<sup>[7]</sup> (regarding arrest powers under the Prevention of Money Laundering Act, 2002) into its interpretation of Section 104(1) of the Customs Act and Section 69 of the GST Act. This importation stems from the common classification of both Enforcement Directorate officers and GST/Customs officers as non-police officers, necessitating additional safeguards.

These prescribed safeguards include:

- Authorized officers must form an opinion based on available material and record in writing their "reasons to believe" that the person arrested was "guilty" of an offense.
- These "reasons to believe" must be clearly documented in writing and include justification based on underlying factors that support a conclusion of guilt.
- Officers must inform arrestees about their grounds of arrest and maintain comprehensive records of their statutory functions, including informant names, accused names, arrest times, seizure details, and statements recorded during offense detection.

While these safeguards are valuable, they must be viewed critically—as the greater safeguards under Article 20(3) of the Constitution and/or Section 25 of the Evidence Act are not available.

## Navigating the Labyrinth: Key Legal Principles

The title of this article—describing arrest powers as a "labyrinth"—reflects the complex web of legal principles that officers must navigate harmoniously before making arrest related decisions. Beyond the safeguards imported from the CrPC, the Supreme Court's decision establishes additional crucial principles:

- 1. Prohibition on Investigative Arrests:** An arrest cannot be made merely to investigate whether arrest conditions are being met<sup>[8]</sup>. This principle represents a significant constraint on the historical practice of "arrest first, investigate later" that has plagued many enforcement agencies.
- 2. Limits on Timing:** Arrest powers cannot be invoked during search, inquiry, or investigation stages, nor as an "extortionary tactic" to compel tax recovery<sup>[9]</sup>. This limitation acknowledges the coercive potential of arrest and attempts to prevent its weaponization for non-punitive purposes.
- 3. Doctrine of Proportionality:** This doctrine, previously applied by the Supreme Court to balance public interest with individual fundamental rights, must be applied to arrest decisions<sup>[10]</sup>. The doctrine comprises four elements:
  - Examination of whether the fundamental rights restriction serves a legitimate purpose
  - Assessment of whether the restriction has a rational connection to that aim
  - Minimal impairment/necessity test (whether less restrictive alternatives exist)
  - Balancing stage—striking an appropriate balance between fundamental rights and public purpose

The proportionality doctrine which has also been read in from the decision in *Arvind Kejriwal (supra)* represents perhaps the most significant conceptual contribution of the judgment, introducing a structured rights-balancing framework that goes beyond mere procedural requirements.

**4. Explicit Reasoning Requirement:** The "reasons to believe" must explicitly reference underlying material and evidence, with the principle of "benefit of doubt" applying[11]. This requirement emphasizes that arrest is exceptional rather than routine—a last resort requiring specific justification rather than a first-line enforcement tool.

Commissioners must apply all these tests before authorizing officers to arrest individuals under Section 69 of the CGST/SGST Act. Importantly, many of these tests are judicially developed rather than statutorily prescribed. The term "labyrinth" emphasizes that officers must navigate various discretionary guidelines, often before formal adjudication has occurred. The absence of statutorily defined parameters for exercising arrest powers adds to this complexity.

The multi-layered threshold created by these interconnected principles appears designed to ensure that arrest remains exceptional, yet paradoxically may create opacity by introducing subjective elements into what should be objective determinations. The labyrinth, in essence, may provide shelter for both conscientious officers and those seeking pretextual justifications—depending entirely on the integrity with which these principles are applied.

### **Conflict with Makemytrip Precedent**

The Court's treatment of the Delhi High Court's decision in *Makemytrip (India) Private Limited and Another v. UOI and Others*[12] (affirmed when the Supreme Court dismissed an SLP after granting leave to appeal, triggering the doctrine of merger) creates additional ambiguity.

In *Makemytrip*, the court interpreted arrest powers under Section 91 of the Finance Act, 1994, establishing that:

- Arrest powers should be used with "great circumspection" and not for investigation purposes or based on mere apprehension.
- Arrest powers should generally not be invoked until the tax liability determination process (adjudication) is complete, except in cases relating to habitual offenders.

The *Radhika Agarwal* judgment creates confusion by acknowledging the principle of using arrest powers with "great circumspection" while simultaneously rejecting the contention that arrest powers should await completion of assessment/adjudication proceedings. Instead, it holds that pre-adjudication arrest is permissible when the Commissioner has sufficient certainty about the commission of a non-bailable offense under Section 132 of the CGST Act.

However, this position lacks detailed reasoning for departing from the principles laid down in *Makemytrip*, which had received the Supreme Court's approval when the SLP was

dismissed at the Civil Appeal stage. More significantly, a careful application of the guidelines in *Radhika Agarwal*—particularly the doctrine of proportionality and the prohibition on investigative arrests—suggests that pre-adjudication arrests should remain exceptional rather than routine, except for habitual offenders. Thus, while *Radhika Agarwal* does in part appear to diverge from the principles set out in *Makemytrip*, its comprehensive application leads to similar conclusions: pre-adjudication arrests should be exceptional, not standard practice, though the scope of the same may be a bit wider than that set out in *Makemytrip*.

This apparent contradiction highlights a deeper jurisprudential problem—the tension between maintaining judicial continuity and adapting to evolving legislative contexts. The Court's reluctance to explicitly overrule *Makemytrip* while effectively modifying its application creates interpretive uncertainty for both taxpayers and authorities. When precedential landmarks shift without clear acknowledgment, navigating the labyrinth becomes exponentially more difficult for all stakeholders.

## **Unresolved Issues and Future Considerations**

### **Constitutional Challenges Beyond Legislative Competence**

Although the challenge to legislative competence regarding Sections 69 and 70 of the CGST Act was dismissed, the Court did not address a potential challenge based on "manifest arbitrariness" under Article 14 of the Constitution. While the judgment reflects that only a challenge basis the principle of legislative competence was raised, a question which lingers is whether the doctrine of proportionality can be viewed as an aspect of anti-arbitrariness? Could Section 69 itself be challenged as manifestly arbitrary if it fails the four-pronged proportionality test? Currently, the doctrine of proportionality applies case-by-case while exercising powers of arrest under Section 69 rather than as a constitutional test of Section 69's constitutional validity.

### **Harmonization of Tax Enforcement Frameworks**

Is it time to harmonize arrest powers across direct and indirect tax laws? Under the Income Tax Act, 1961, prosecution powers become available only after assessment proceedings conclude—once tax evasion has been formally determined. Court judgments on indirect taxes distinguish between single-point assessment levies (like Customs) and periodic return-based assessments when determining whether arrest can precede adjudication. However, all tax legislations follow a common framework where initial notices represent contestable allegations, with final determinations made only after respecting natural justice principles.

Further supporting harmonization is the CBIC's recognition that arrest is inappropriate for technical matters involving legal interpretation differences. Additionally, Section 132 of the CGST Act now requires both offense commission and benefit retention—if benefits are foregone, the provision doesn't apply.

Given tax law frameworks and liability determination processes that respect natural justice, legislative reform providing that arrest powers generally be exercised only post-adjudication (with specific exceptions for cases involving habitual offenders or such similar circumstances) would harmonize practices across tax legislations and ensure compliance with proportionality principles. Building proportionality into legislation would provide case-by-case guidance while checking discretionary arrest powers that impinge on personal liberty.

## **Conclusion: Towards A Balanced Approach**

The *Radhika Agarwal* judgment, while providing important interpretive guidance on arrest powers under GST laws, ultimately leaves us with a complex jurisprudential mosaic requiring careful navigation. The labyrinthine structure of safeguards, principles, and tests established by the Court reflects the inherent tension between effective enforcement and protection of constitutional liberties.

The Court's reluctance to categorize tax officials as police officers—despite acknowledging their "analogous powers"—creates a constitutional anomaly that diminishes protections conferred under the Evidence Act. Similarly, the Court's attempt to reconcile precedents like *Makemytrip* with evolving legislative frameworks produces interpretive uncertainty rather than clear guidance.

Looking forward, a more coherent approach would involve legislative intervention to:

1. Clearly define the threshold for arrest, preferably restricting pre-adjudication arrests to exceptional circumstances explicitly enumerated in legislation
2. Harmonize arrest powers across tax regimes, recognizing their common underlying principles and purposes
3. Codify proportionality requirements to provide objective standards for exercising discretion
4. Explicitly address the relationship between arrest powers and confessional statements in tax proceedings

Until such legislative clarity emerges, taxpayers and tax authorities alike must navigate the labyrinth with caution, treating arrest as a last resort rather than a routine enforcement tool. The doctrine of proportionality offers the most promising path through this maze—requiring officers to continually question whether less restrictive alternatives might achieve legitimate enforcement objectives without impinging on fundamental liberties.

The path toward a balanced approach requires recognizing that coercive powers in tax administration must be proportionate not only to immediate enforcement needs but also to the broader constitutional values that underpin our legal system. Only then can the labyrinth of arrest powers be navigated in a manner that serves both justice and efficiency.

*With inputs from Advocate Sabari Rajan*

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[\[1\]](#) 2025 INSC 272

[\[2\]](#) Para 24

[\[3\]](#) Which now corresponds to Section 23 of the Bharatiya Sakshya- Adhinyam, 2023 ('BSA')

[\[4\]](#) Para 69

[\[5\]](#) Para 57

[\[6\]](#) Para 67

[\[7\]](#) (2025) 2 SCC 248

[\[8\]](#) Para 57

[\[9\]](#) Paras 67 & 68

[\[10\]](#) Para 38

[\[11\]](#) Para 59

[\[12\]](#) 2016 SCCOnline Del 4951