(2019) 03 BOM CK 0024

In the Bombay High Court

Case No : Criminal Appeal No. 376 Of 2017

Amol Vitthal Vahile And Ors — APPELLANT

Vs

State Of Maharashtra — RESPONDENT

Date of Decision : 11-03-2019

Acts Referred:

Maharashtra Control Of Organised Crimes Act, 1999 — Section 2(1)(d), 2(1)(e), 2(1)(f), 3(1)(i), 3(2), 3(4), 12, 23(1)(a), 23(2)
Indian Penal Code, 1860 — Section 34, 143, 147, 148, 149, 302, 307, 323, 324, 341, 353, 427, 452, 504, 506, 506(2)
Arms Act, 1959 — Section 3(25), 4(25)
Bombay Police Act, 1951 — Section 37(1), 135
Code Of Criminal Procedure, 1973 — Section 227

Citation : (2019) 03 BOM CK 0024

Hon'ble Judges : Indrajit Mahanty, J;Sarang V. Kotwal, J

Bench : Division Bench

Advocate : P.K. Dhakephalkar, Nilesh Kadam, Somnath Thengal, Sachin Dhakephalkar, S.V. Sonawane

Final Decision : Disposed Off

Judgement

Sarang V. Kotwal, J

1. This is an Appeal under Section 12 of The Maharashtra Control of Organised Crimes Act, 1999 (hereinafter referred to as the 'MCOC Act') preferred by the Appellants who are the original accused nos.1 to 6 in MCOC Special Case No.5 of 2016 pending before the learned Special Judge (under the MCOC Act), Pune. Vide his order dated 16/03/2017 passed below Exh.16 in the said case, the learned Judge rejected the application preferred by the present Appellants under Section 227 of the Cr.P.C. for their discharge. The application for discharge was limited for their discharge from the offences punishable under Sections 3(1)(i), 3(2) and 3(4) of the MCOC Act. The said order is impugned before us in the present Appeal.

2. The relevant facts in brief are as follows :

It is the prosecution case that the Appellant No.1 Amol Vahile was the head of an organised crime syndicate. His father had contested municipal council elections in the year 2007 against one Avinash Tekawade (the deceased in the present case). In the said election, an independent candidate namely Maruti Bhapkar was elected. The Appellant No.1 was of the belief that because of the division of votes between his father and Avinash Tekawade, a third person had won the election. The Appellant No.1 was also aggrieved by a notice issued by the Pimpri-Chinchwad Corporation in respect of demolition of a cattle shed. He was harbouring the suspicion that the notice was issued at the instance of Avinash Tekawade. Thus, he was holding strong grudge against Avinash Tekawade. It is further prosecution case that the Appellant No.1 wanted to develop supremacy over Avinash Tekawade in his local area and therefore, he entered into a conspiracy with other accused to commit murder of Avinash Tekawade. In furtherance of this conspiracy, on 03/09/2015 at about 1.45 p.m., the Appellant No.1 Amol Wahile, the Appellant No.2 Kishor Bhigwankar and the Appellant No.3 Balaji Shinde committed murder of Avinash Tekawade near his house. The FIR was lodged by Avinash's wife Sujata on 03/09/2015 at Pimpri Police Station vide C. R. No.500 of 2015 under Sections 302 read with 34 of the IPC and under Sections 3(25) of the Arms Act and Section 37(1) read with Section 135 of the Bombay Police Act. The FIR was lodged against two unknown persons. These two unknown persons had used a revolver and a knife. The deceased was assaulted with knife. During investigation, the Appellant No.5 Akash Potghan and the Appellant No.6 Omkar Chaudhari were arrested on 17/11/2015 and 30/11/2015 respectively. These two were employees of the Appellant No.1. The allegations against them are that they had kept watch on the movements of the deceased and informed the Appellant Nos.2 and 3 who were allegedly the actual assailants. The allegation against the Appellant No.4 Naresh Sharma was that he provided two pistols to the Appellant No.1. The Appellant Nos.1 to 3 were arrested on 04/09/2015 and the Appellant No.4 was arrested on 07/09/2015.

3. On 29/01/2016, an order under Section 23(1)(a) was issued by the Additional Commissioner of Police, Pune City. Thereafter, the charge-sheet was filed on 01/03/2016. The investigatin papers show the antecedents of these Appellants. All these offences are registered at Pimpri Police Station. Against the Appellant No.1, there are 3 offences (i) C.R.No.241 of 2007, registered under Sections 452, 504, 506(2) and 427 read with 34 of the IPC and (ii) C.R.No.169 of 2011 registered under Sections 307, 353, 143, 147, 148 and 149 of the IPC and under Section 4(25) of the Indian Arms Act and under Section 37(1) read with 135 of the Bombay Police Act. The Appellant No.1 was acquitted from C.R.No. 241 of 2007.

Against the Appellant No.3, there was one offence registered vide C.R.No.77 of 2015 under Sections 143, 147, 149, 324, 506, 323 and 341 of the IPC and under Sections 37(1) read with 135 of the Bombay Police Act. He was acquitted in the said case.

Against rest of the Appellants, including the Appellant Nos.1 and 3, the present C.R.No.500 of 2016 was shown pending.

4. On 16/03/2017, the Appellants preferred application for discharge from the offences under the MCOC Act. The said application was rejected by the learned Special Judge as mentioned earlier. Though the application for discharge from the MCOC Act was made on several grounds, main thrust was to demonstrate as to how the offences under the MCOC Act were not made out in the background of the definition of the organised crime given under the MCOC Act. The prosecution opposed the said application by filing say at Exh.17. It was contended by the prosecution that the accused were history-sheeters and the accused no.1 was the leader of the organised crime syndicate which had created tension in the area by committing various serious offences. It was also contended that against the accused no.1, there were number charge-sheets filed in the concerned Courts of which the cognizance was taken. The learned Judge considered only one question and that was as to whether at that stage, the accused could claim discharge from the offences under the MCOC Act when the competent authorities had accorded approval and sanction under Section 23(1)(a) and 23(2) of the MCOC Act. The learned Judge relied on the Judgment of a Division Bench of this Court in the case of Farman Imran Shah & Karu Vs. State of Maharashtra, reported in (2014) ALL MR (Cri) 1571. The learned Judge went on to observe that this Court had observed that when the competent authorities had recorded the subjective satisfaction while granting prior approval and had accorded sanction, the question of validity of approval or sanction could not be decided unless the prosecution was afforded an opportunity to lead evidence in that regard and according to the learned Judge, the said Judgment observed that the accused could not insist for discharge unless objection regarding defects in such approval or sanction related to inherent lack of jurisdiction of authority granting it. Based on these observations, the discharge application was rejected. However, there was absolutely no discussion on the merits of the case. There was no discussion as to whether the provisions of the MCOC Act were attracted from the material produced.

5. We have heard Mr. P. K. Dhakephalkar, learned Senior for the Appellants and Mrs. S. V. Sonawane, learned APP for State.

6. Mr. Dhakephalkar, learned Senior Advocate, submitted that the approach of the learned Special Judge was erroneous. It was his duty to consider the entire material before him and reach a prima facie satisfaction regarding applicability of the provisions of the MCOC Act. The learned Judge completely misconstrued the case of Farman Shah (supra) and therefore, there was miscarriage of justice. The Appellants' discharge application was practically not considered at all. Mr. Dhakephalkar submitted that the ingredients of the definition of the organised crime are not made out. The allegations, at the highest, show that the Appellant No.1 was holding grudge against the deceased which could amount only to personal enmity. There was no common thread between the past activities and

the present crime and therefore, the offence under the MCOC Act was not made out.

7. On the other hand, Mrs. S. V. Sonawane, learned APP for State, submitted that there was nothing wrong with the approach of the learned Special Judge as he had rightly considered that the validity of sanction and the approval could only be decided during trial and not at the stage of consideration of the discharge application.

8. We have considered both these submissions. We have perused the impugned order. We are of the view that the learned Special Judge has completely misconstrued the Judgment of this Court in the case of Farman Shah (supra). The said Judgment itself shows that the Division Bench of this Court had considered the material against the accused on merits while deciding whether the accused should be discharged from the offences under the MCOC Act. In that context, the Division Bench also observed that insofar as the attack on the approval or sanction was concerned, it could only be taken to its logical end during trial and not at the discharge stage. By no stretch of imagination, this Judgment rules that at the time of deciding the discharge application, the merits of the case cannot be taken into consideration and only limited scope available to the accused is to challenge the application of MCOC Act on the competency of according sanction or approval. The Judgment itself demonstrates that the entire material has to be considered to arrive at a prima facie finding that the offence under the MCOC Act is made out. Section 2(1)(d), 2(1)(e) and 2(1)(f) define continuing unlawful activity, organised crime and organised crime syndicate respectively. Even at the stage of framing of the charge, the Court is obliged to consider the entire material for recording its satisfaction that there was sufficient material to frame charges under the provisions of the MCOC Act. Section 2(1)(d), 2(1)(e) and 2(1)(f) read thus :

"2(1) In this Act, unless the context otherwise requires,-

(a) .....

(b) .....

(c) .....

(d) "continuing unlawful activity" means an activity prohibited by law for the time being in force, which is a cognizable offence punishable with imprisonment of three years or more, undertaken either singly or jointly, as a member of an organised crime syndicate or on behalf of such syndicate in respect of which more than one charge-sheets have been filed before a competent Court within the preceding period of ten years and that Court has taken cognizance of such offence;

(e) "organised crime" means any continuing unlawful activity by an individual, singly or jointly, either as a member of an organised crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means, with the objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any other person or promoting insurgency;

(f) "organised crime syndicate" means a group of two or more persons who, acting either singly or collectivly, as a syndicate or gang indulge in activities or organised crime;

(g) ....."

The Court has to be satisfied that ingredients of each of these definitions are at least prima facie made out against the accused before charge can be framed against them under the provisions of the MCOC Act. The grant of approval and according sanction are important procedural steps. Order under Section 23(1)(a) enables the investigating agency to invoke the provisions of the MCOC Act and also enjoins the duty on the competent authority to nominate a superior police officer to investigate the case whereas sanction under Section 23(2) enables the Special Court to take cognizance of the offence. The question of framing of charges arises only after cognizance is taken by the Special Court. Importantly, framing of the charge is a distinct and subsequent step after taking cognizance of the offence under the MCOC Act. Taking cognizance under the MCOC Act does not automatically enable the Special Court to frame charges against the accused under the MCOC Act. For that purpose, the Special Court has to apply all the settled legal principles in framing charges against the accused. In the instant case before us, this exercise was not undertaken by the learned Special Judge. Therefore, we are in agreement with the submissions made by learned Senior Advocate Mr. Dhakephalkar that this is a fit case wherein the matter has to be remanded back to the trial Court for fresh consideration of merits of the case for deciding framing of the charges for the offences punishable under the provisions of the MCOC Act. The present Appeal is pending before this Court since 2017 and some of the Appellants are still in custody. Therefore, it is necessary that the discharge application is decided afresh by the trial Court expeditiously. Hence, the following order.

ORDER

(i) The order dated 16/03/2017 passed by the learned Special Judge (under the MCOC Act), Pune, below Exh.16 in MCOC Special Case No.5 of 2016, is quashed and set aside.

(ii) The learned Special Judge (under the MCOC Act) is directed to consider afresh the discharge application of the present Appellants filed vide Exh.16 in MCOC Special Case No.5 of 2016 on his file.

(iii) The learned Special Judge is requested to decide the said application as expeditiously as possible and in any case, not later than three months from the date of receipt of this order.

(iv) The Appeal is disposed of in the aforesaid terms.

