(2021) 08 BOM CK 0001

In the Bombay High Court

Case No : Criminal Appeal No.901 Of 2018, Appln No. 430 Of 2021 In Appel No.901 Of 2018

Darasing @ Maruti Vakilya, Bhosale And Others — APPELLANT

Vs

State Of Maharashtra — RESPONDENT

Date of Decision : 03-08-2021

Acts Referred:

Constitution Of India, 1950 — Article 14
Maharashtra Control Of Organized Crime Act, 1999 — Section 2, 2(1)(d), 2(1)(e), 3, 3(1), 3(1)(i), 3(1)(ii), 3(4), 7, 12, 18, 19, 23
Indian Penal Code, 1860 — Section 345, 354, 376(2)(g), 395, 506(2)

Citation : (2021) 08 BOM CK 0001

Hon'ble Judges : Mangesh S. Patil, J

Bench : Single Bench

Advocate : N.S. Ghanekar, R.B. Bagul

Final Decision : Disposed Of

Judgement

Mangesh S. Patil, J

1. This is an appeal under Section 12 of the Maharashtra Control of Organized Crime Act, 1999 (hereinafter the MCOC Act) being aggrieved and

dissatisfied by judgment and order returned by the learned Special Judge, MCOC, Aurangabad convicting the appellants under Section 3(1)(ii) and

Section 3(4) of the MCOC Act and sentencing them to suffer rigorous imprisonment for 12 years under Section 3(1)(ii) and rigorous imprisonment for

10 years under Section 3(4) and in addition imposing a fine of Rs.5,00,000/- on each, count in default sentencing them to further rigorous imprisonment

of two years on each count.

2. The facts which lead to the Appeal may be summarized as under:

In the night intervening 16.01.2001 and 17.01.2001 the appellants committed dacoity in village Kothewadi Tq. Pathardi, District Ahmednagar and even

committed rape on few women for which Crime No.08/2001 was registered for the offences punishable under Section 395, 342, 376(2)(g), 354, 506(2)

of the Indian Penal Code. During the investigation of that crime it transpired that the appellants were involved in organized crime wherein charge

sheets were filed and the courts had taken cognizance. Accordingly the approval was sought under Section 23 and the present crime was registered.

The prosecution examined in all 11 witnesses mostly on the point and concerning the earlier crimes. By the impugned judgment the appellants have

been convicted and sentenced as mentioned herein above.

3. The learned advocate Mr. Ghanekar vehemently submitted that bearing in mind the fact that Section 3 of the MCOC Act prescribes for punishment

for â??organized crimeâ?? as defined under Section 2(1)(e) and not for being involved in â??continuing unlawful activityâ?? as defined under

Section 2(1)(d), the appellants could not have been convicted under that provision without being charged for any substantive offence. He would submit

that though continuing unlawful activity is an ingredient for constituting an organized crime, in order to constitute an organized crime, the offender must

be involved in some crime of the kind described in the definition of organized crime. He would therefore submit that mere proof regarding involvement

of the appellants in continuing unlawful activity was not sufficient to convict them. He would submit that admittedly, the appellants have not been

charged for any substantive offence in the present crime and have been convicted merely for engaging in continuing unlawful activity during previous

years.

4. The learned advocate would point out that the witnesses examined by the prosecution are mostly relating to the previous crimes registered against

the appellants and do not make out any new substantive offence. He would further submit that the appellants have been duly tried for the previous

crimes and consequently could not have been again tried for commission of those crimes. He would submit that even though the appellants have been

involved in several crimes, they have been duly tried for all those crimes and irrespective of the decisions, all these previous crimes would merely

demonstrate as to how they have been engaged in continuing unlawful activity as defined under Section 2 (1)(d). However, over and above, the

prosecution will have to establish that they have engaged in organized crime as defined under Section 2(1)(e) which is punishable under Section 3.

5. In support of his submission the learned advocate Mr. Ghanekar would place reliance on the Division Bench decision of this Court in Criminal

Appeal No.308/2002, Madan S/o. Ramkisan Gangwani Vs. State of Maharashtra and connected Appeals dated 26.03.2009 and Single Bench

Decision of this Court in Criminal Appeal No.184/2015, Pundlik S/o. Ukla Pawar and Ors. Vs. State of Maharashtra with connected Appeals dated

14.07.2020.

6. Per contra, the learned APP would submit that there is enough evidence to demonstrate as to how the appellants have been engaged in continuing

unlawful activity. They were involved in number of cases. As is held in the case of Bharat Shantilal Shah Vs. State of Maharashtra ; 2003 ALL MR

(Cri) 1061 conviction or otherwise is inconsequential. There is no error or illegality committed by the trial court appreciating the evidence and

concluding that appellants have engaged in organized crimes.

7. The learned APP would also refer to the decision of this Court in the case of Govind Sakharam Ubhe Vs. State of Maharashtra ; 2009 ALL MR

(Cri) 1903 and the order passed in Kishor S/o. Changdev Dandwate Vs. The State of Maharashtra ; Criminal Appeal No.222/2019 and Suryakant @

Suresh S/o. Shriram Mule Vs. The State of Maharashtra and Anr. ; Criminal Appeal No.34/2019.

8. I have considered the rival submissions and perused the record. There is no dispute about the fact that as the matter stands, the appellants have

been charged, tried and convicted only for the offences punishable under Section 3(1)(ii) and 3(4) of the MCOC Act and have not been

simultaneously charged and tried for any substantive crime. The issue therefore which arises for determination and which in fact is no longer res

integra is as to if a person can be convicted for the offence of organized crime without there being a substantive offence. A similar argument was

canvassed before the Division Bench in the case of Madan Ramkisan Gangwani (supra). Referring to the separate views taken by the esteemed

members of the Division Bench sitting single on earlier occasion. The Division Bench referred to the following observations from the case of Bharat

Shantilal Shah (supra):

â??19. Dealing with the next definition in section 2(1)(d) of â??continuing unlawful activityâ?? it was submitted that it suffers from

violation of Article 14 as it treats unequals as equals. It makes an activity continuing unlawful activity if more than one charges of

cognizable offence punishable with imprisonment of three years or more are filed in competent Court, it does not touch an activity as

continuing unlawful activity if undertaken by a person who is known to be a criminal but more than one charge-sheets have not been filed

against him. A person charged ten times of an offence though acquitted on every occasion may yet be roped in as a person engaged in

continuing unlawful activity. Whereas a person who is convicted for an offence for three years punishment cannot be touched by this

definition if he is not charged with more than two of such offences. The definition therefore treats as equal persons who are hopelessly

unequal â?¦ The arguments appear to be attractive at the first blush, but deeper scrutiny reveals the hollowness of the argument.

25. In our opinion, there is no violation of Article 14 by this definition. If we read the definition again, what has been defined as continuing

unlawful activity is a member of organized crime syndicate in respect of which any activity prohibited by law and done repeatedly i.e. more

than once for which charge-sheet has been filed in the Court of competent jurisdiction in the past ten years. The purpose of definition is to

define what continuing unlawful activity is and it is for the purposes of defining what is continued unlawful activity that those charges are

to be taken into consideration. Mere taking into consideration of such charges cannot result in discrimination of the kind alleged by Shri

Manohar. The activity must be continuing unlawful activity and to define it with clarity it is provided that any person who in the past was

charge-sheeted for more than one charge of such activity or crime the cognizance of which has been taken and imprisonment for which is

more than three years should be taken into account. The fact of the person having been charge-sheeted in such cognizable offences in the

past makes the unlawful activity, continuing unlawful activity. This section only defines what the activity is. It does not itself provide for any punishment for that activity. Had punishment been provided the submission that it treats while punishing unequals as equals may carry

weightage. That being not the case in the challenge to section 2(1)(d) of the Act we see no vagueness or violation of Article 14 by the

definition. We find that the provision treats all those covered by it in a like manner and does not suffer from the vice of class legislation.

27. We also do not find substance in the challenge that the equality clause in the Constitution is violated because the definition ropes in

anyone charged more than once, irrespective of whether the charge resulted in an acquittal or conviction. The circumstances that followed

the charge are not material. The provision only defines what is continued unlawful activities and refers to whether a person has been

charged over a period of ten years for the purpose of seeing whether the person is charged for the first time or has been charged often. The

circumstance of conviction or acquittal that followed the charge are not material. The limited purpose is to see antecedents of the person.

Not to convict.â?? (emphasis supplied)

The Division Bench concluded in paragraph Nos.105 to 108 as under :

â??105. Since in the present case, the question raised is about the definition of ""organised crime"", in view of these observations of the

Supreme Court, it may be permissible to conclude that the findings of this Court in Bharat Shah's case in this regard which have been

quoted earlier would have to be followed.

106. This Court had specifically held that had punishment been provided for continuing unlawful activity, the submission that while

punishing, it treats unequals as equals may carry weight. The Court upheld the validity of the provision defining ""continuing unlawful

activity"" only because the Act did not provide any punishment for that activity. In para 27 it was made clear that the limited purpose of

continuing unlawful activity was to see antecedents of the person and not the convict.

107. It was contended that the observations in Bharat Shah's case by this Court have to be read in context of the fact that Section 2 is a

definition clause which just defines the offence and, therefore, could not have prescribed punishment, which Section 3 prescribes. It is truly said that Section 2 merely defines, not only the offence of ""organised crime"" but also other terms used in the Act. What is material is the

definition of offence of ""organised crime"" and not the definitions of other terms included in Section 2. Had the term ""continuing unlawful

activity"" been synonymous with ""organised crime"", it would not have been necessary for the Legislature to include two definitions. It would

have been sufficient to provide for only one definition of continuing unlawful activity and make that activity punishable. The definitions in

clauses (d) and (e) clearly show that one of the components of organised crime is continuing unlawful activity and, therefore, organised

crime is something more than mere continuing unlawful activity.

108. Thus the fact of more than one chargesheet having been filed in competent Court in preceding period of ten years and such Court

having taken cognizance of such offence, is merely one of the ingredients of the offence of organised crime. Therefore, it cannot be

contended that the offence of organised crime is completed by collection of previous criminal activities. (emphasis supplied)

Again in paragraph No.109 the observations of the Division Bench in the case of Jaisingh Ashrfilal Yadav and Ors Vs. State of Maharashtra and

Anr.; 2003 ALL MR (Cri) 1506 where quoted with a conclusion that even these observations would substantiate the submission that for establishing

offence of organized crime something more than mere continuing unlawful activity is necessary. It is pertinent to note that even the observation and

conclusion of a Single Judge in the case of Dinesh Mahadev Bhondwe Vs. State of Maharashtra; 2007 (2) Mh.L.J. (Cri) 718 to the contrary was held

to be incorrect.

Summarizing the conclusion in paragraph No.115 it has been observed as under:

â??115. If the provisions of the Act are read in entirety, in the light of foregoing discussion, they will show that offence of ""organised

crime"" is constituted by atleast one instance of continuation, apart from continuing unlawful activity evidenced by more than one

chargesheets in preceding ten years : This is so because :

(a) If ""organised crime"" was synonymous with ""continuing unlawful activity"", two separate definitions were not necessary.

(b) The definitions themselves show that ingredients of use of violence in such activity with the objective of gaining pecuniary benefit are

not included in definition of ""continuing unlawful activity"", but find place only in definition of ""organised crime"".

(c) What is made punishable under Section 3 is ""organised crime"" and not ""continuing unlawful activity"".

(d) If ""organised crime"" were to refer to only more than one chargesheet filed, the classification of crime in Section 3(1)(i) and 3(1)(ii) on

the basis of consequence of resulting in death or otherwise would have been phrased differently, namely, by providing that ""if any one of

such offence has resulted in the death"", since continuing unlawful activity requires more than one offence. Reference to ""such offence"" in

Section 3(1) implies a specific act or omission.

(e) If the offence of organised crime itself is comprised of previous offences in respect of which chargesheets have been filed, or in other

words such chargesheets are a component of the offence of organised crime, all such offences referred to in such chargesheets could be

tried at one trial, and the rider in Section 7 about triability of the accused under the Code at the same trial would be redundant.

(f) Entire Section 18 of the Act would become redundant if ""continuing unlawful activity"" evidenced by proof of filing of two chargesheets

is equal to organised crime, since question of recording confessions would not arise. Certified copies of chargesheets, with certified copy of

order thereon by the Court taking cognizance, would be admissible without formal proof and if this itself was enough to constitute offence,

no other evidence would be required to be tendered.

(g) For the same reason, there may be no need to examine any witnesses and consequently Section 19 would be redundant.

(h) If proof of filing two chargesheets is enough to establish offence of organised crime, there may be no occasion to carry out any

investigation, other than collecting copies of charge sheets. Consequently, it would be unnecessary for high ranking police officers to wield

the power to allow recording information or to sanction prosecution after such chargsheets are collected.

9. Recently the learned Judge of this Court in the matter of Pundlik Ukla Pawar (supra) has taken a similar view albeit without reference to the

Division Bench judgment in the case of Madan Ramkisan Gangwani (supra).

The decision in the case of Govind Sakharam Ubhe (supra) with utmost respect does not directly deal with and decide the issue as to if a person can

be tried and convicted for the offences punishable under Section 3 without simultaneously implicating him for some substantive crime. Even Kishor

Changdev Dandwate and Suryakant @ Suresh S/o. Shriram Mule (supra) do not specifically deal with this issue. Besides in all these three matters the

Division Benches were merely called upon to consider the request of the accused for discharge. Even the decision in the case of Madan Ramkisan

Gangwani (supra) which is earlier decision has not been cited before any of the Division Benches which decided the matters in Govind Sakharam

Ubhe, Kishor Changdev Dandwate and Suryakant @ Suresh Shriram Mule (supra).

10. The upshot of the above discussion is that the appellants were merely charged and tried for the offence punishable under Section 3(1)(ii) and 3(4)

without any substantive crime. Merely being involved in several crimes without being involved in any other crime to elevate the continuing unlawful

activity to the case of organized crime as defined under Section 2(1)(e) would not be sufficient. Therefore the appellants could not have been

convicted and sentence only for the offence punishable under Section 3(1)(ii) and 3(4) in the absence of any substantive crime so as to constitute an

organized crime. The learned Judge of the Special Court has not considered all these aspects and has convicted and sentenced the appellants merely

for being involved in continuing unlawful activity which in itself is not an offence which is made punishable under the MCOC Act.

11. In view of the above, the Appeal deserves to be allowed and is accordingly allowed. The impugned judgment and order convicting the appellants is

quashed and set aside. They are acquitted of the offences punishable under Sections 3(1)(ii) and 3(4) of the MCOC, Act. They may be set at liberty if

not required in any other crime. Fine amount if paid be refunded.

12. The Criminal Application No.430/2021 is disposed of.

