

(2013) 10 DEL CK 0250

In the Delhi High Court

Case No : Writ Petition (Criminal) 1205 of 2012

Ishtiyak

APPELLANT

Vs

State (NCT of Delhi)

RESPONDENT

Date of Decision : 08-10-2013

Acts Referred:

Citation : (2014) 2 JCC 1022

Hon'ble Judges : Sunita Gupta, J

Bench : Single Bench

Advocate : Joginder Tuli and Mr. A.K. Sharma, for the Appellant; Dayan Krishnan, ASC for State and Om Prakash, ASI, for the Respondent

Final Decision : Dismissed

Judgement

Sunita Gupta, J.—By this petition under Article 226 of the Constitution of India r/w Section 482 Cr.P.C., the petitioner seeks issuance of writ of certiorari for quashing the impugned order of learned Additional Sessions Judge dated 10th July, 2012, vide which the charge u/s 3 of Maharashtra Control of Organised Crime Act, 1999 (hereinafter referred as MCOCA) was framed against the petitioner in FIR No. 269/2011, PS Hauz Khas. The brief facts as they emerge from the record are that the petitioner Mohd. Ishtiyak was apprehended during vehicle checking in the area of PS Hauz Khas, New Delhi in a car bearing No. DL 6C Q 3398. During scrutiny of Registration Certificate, it was found that the genuine number of vehicle was DL 3C Q 3398. A number of stolen music systems, speakers, amplifiers, laptops and other electronic items were found loaded in the vehicle. Accordingly, a case was registered against the petitioner herein vide FIR No. 151/2009 u/s. 411/482/34 IPC at PS Hauz Khas, New Delhi. Investigation revealed that the petitioner has amassed a huge amount of wealth by way of unlawful activities. He was found involved in 26 cases of theft from 2006 to 2010. In many cases his accomplices, namely, Pradeep @ Bittu, S/o. Madan Lal, R/o. 51/A, Kewal Park, Azadpur, Delhi, Sakil @ Satish, S/o. Shokeen Ahmed, R/o. A1/84, Nehru Vihar, Karawal Nagar, Bhajanpura, Delhi and Satish

Chand, S/o. Alkesh Ram, R/o. B-1170, Sonia Vihar, New Delhi were also found to be involved. The modus operandi of the petitioner herein was to study the topography of a particular area and the other surrounding circumstances and after meticulous planning, he committed the crimes in an organised manner. The petitioner along with his syndicate was successful in creating fear psychosis and terror in the minds of people in the areas where they were active and gained huge pecuniary benefit. To curb his criminal activity, a proposal was prepared and approval to apply Section 3 MCOCA was obtained. Accordingly, a case vide FIR No. 269/11 u/s. 3 MCOCA was registered. During investigation, the petitioner was arrested. He was interrogated at length. As per his disclosure, investigation was conducted at his house as well as at his native place and he was found accumulating huge wealth. The confessional statement of the petitioner herein was also recorded by Sh. A.K. Ojha, DCP, South West District, Delhi u/s 18 MCOCA. During investigation vehicle No. DL-4C AG 2734 was found registered in the name of Mohd. Ishtiyak. The complete files of the vehicle was obtained which revealed that the petitioner used one LIC policy No. 172756096 issued at the address of one Wakil Ahmed as address proof with an affidavit in this regard in the transport authority to get the car registered in his name. On verification, the said LIC policy was found in the name of Sunil Kumar (LA) S/o. Jag Mohinder (P) B-1201, Jahangir Puri, New Delhi-33. The notary Bhoop Singh was interrogated and it became clear that the accused got the car transferred in his name on the basis of forged/fake LIC documents. Hence Section 420/468/471 IPC was also added. He was convicted in FIR No. 190/2010, PS DLF Phase I, Gurgaon Haryana.

2. It was alleged that the petitioner along with the members of his organized crime syndicate have been actively involved in criminal activities both jointly and singly and, as such, proceedings of MCOCA are made out against him.

3. Vide impugned order dated 10th July, 2012, the learned Additional Sessions Judge was of the view that prima facie case u/s 3 of MCOCA Act and Section 420/468/471 IPC is made out against the accused. As such, charge was framed against him. Feeling aggrieved by the said order, the present petition has been filed.

4. I have heard Sh. Joginder Tuli, Advocate for the petitioner and Sh. Dayan Krishnan, learned Additional Standing Counsel for the State and have perused the record.

5. Before considering the submissions of the appellant and the counter submissions made on behalf of the respondent/State, it is deemed expedient to refer to the Statement of Objects and Reasons of the MCOCA, which have a direct bearing on the matter in issue and read as under:

Statement of Objects and Reasons.-Organized crime has for quite some years now come up as a very serious threat to our society. It knows no national boundaries and is fueled by illegal wealth generated by contract killings, extortion, smuggling in contrabands, illegal trade in narcotics, kidnapping for

ransom, collection of protection money and money laundering, etc. The illegal wealth and black money generated by the organized crime is very huge and has serious adverse effect on our economy. It is seen that the organized criminal syndicates make a common cause with terrorist gangs and foster narco terrorism which extend beyond the national boundaries. There is reason to believe that organized criminal gangs are operating in the State and thus, there is immediate need to curb their activities.

It is also noticed that the organized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice.

2. The existing legal frame work i.e. the penal and procedural laws and the adjudicatory system are found to be rather inadequate to curb or control the menace of organized crime. Government has, therefore, decided to enact a special law with stringent and deterrent provisions including in certain circumstances power to intercept wire, electronic or oral communication to control the menace of the organized crime.

3....

6. Section 2(d), (e) and (f) of the Act define the terms "continuing unlawful activity", "organized crime" and "organized crime syndicate" as under:

2. Definitions. - (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 member of an organized 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) "organized crime" means any continuing unlawful activity by an individual, singly or jointly, either as a member of an organized 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) "organized crime syndicate" means a group of two or more persons who,

acting either singly or collectively, as a syndicate or gang indulge in activities of organized crime;

7. Section 3 of the MCOCA which deals with punishment for organized crime reads as follows:

3. Punishment for organized crime.-(1) Whoever commits an offence of organized crime shall,-

(i) if such offence has resulted in the death of any person, be punishable with death or imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees one lac;

(ii) in any other case, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees five lacs.

(2) Whoever conspires or attempts to commit or advocates, abets or knowingly facilitates the commission of an organized crime or any act preparatory to organized crime, shall be punishable with imprisonment for a term which shall be not less than five years but which may extend to imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees five lacs.

(3) Whoever harbours or conceals or attempts to harbour or conceal, any member of an organized crime syndicate shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to a fine, subject to a minimum fine of rupees five lacs.

(4) Any person who is a member of an organized crime syndicate shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees five lacs.

(5) Whoever holds any property derived or obtained from commission of an organized crime or which has been acquired through the organized crime syndicate funds shall be punishable with a term which shall not be less than three years but which may extend to imprisonment for life and shall also be liable to fine, subject to a minimum fine of rupees two lacs.

8. Shri Joginder Tuli, Advocate on behalf of the petitioner has mounted an assault on the order framing charge principally on the ground that the alleged offences were of theft only which were not intended by the legislature to be covered within the ambit of the MCOCA, 1999 as extended to Delhi. According to him the ingredients of Section 3 of MCOCA are not made out, inasmuch as, the petitioner is not a member of any "Organized crime syndicate" within the meaning of Section 2(f) of the Act nor has indulged in any "continuing unlawful activity" as envisaged by Section 2(d) of the Act.

9. It was further urged that it is the case of the prosecution that the accused is

involved in an apparently soft crime and, as such, the alleged offences did not involve the use of violence or threat of violence or intimidation or coercion. The petitioner did not obtain any pecuniary gain from the offences allegedly committed by him. His father is the owner of a property at Meerut, UP worth more than one crore and has sold the same and given it to the petitioner as per record of the year 1987-89. As such, there was no pecuniary gain out of the crime committed by him. Moreover all the stolen properties have been recovered by the police.

10. Learned Special Judge failed to appreciate that alleged confessional statement of accused u/s 18(c) of the Act was not voluntary. He was made to sign a blank paper. Moreover it was not recorded by the competent authority himself but by the stenographer, as such, the impugned order framing charge u/s 3 of MCOCA is liable to be set aside.

11. Countering the submissions made by the learned counsel for the petitioner, it was urged by Sh. Dayan Krishnan, learned standing counsel for the respondent that the petitioner has amassed a huge amount of wealth by way of unlawful activities. He was found involved in 26 cases of theft from 2006 to 2010 as detailed in para 8 of the status report. In many cases, his accomplices were also involved as detailed in further para 8 of the Status report. Same reflects that the petitioner along with the members of his organized crime syndicate have been involved in criminal activities both jointly and singly. As such, provisions of MCOCA are clearly made out. Confessional statement was recorded by Sh. A.K. Ojha, DCP, South West u/s 18 of the Act which is admissible in evidence. Moreover, on a prima facie view of the matter, the charge has been framed. The trial is still going on. Moreover, exercise of the power under Article 226 of the Constitution of India, r/w Section 482 Cr.P.C. are to be exercised in exceptional circumstances and circumstances of the present case do not warrant invocation of this power, as such the petition is liable to be dismissed.

12. By virtue of the present petition, the petitioner is seeking setting aside of the impugned order vide which charge u/s 3 of MCOCA has been framed meaning thereby that impliedly he is seeking his discharge for this offence u/s 227 of the Code of Criminal Procedure.

13. The scope of Section 227 of the Code was considered by the Supreme Court in the case of State of Bihar Vs. Ramesh Singh, wherein it was observed as follows:

4....Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing

the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. If the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial....

This Court has thus held that whereas strong suspicion may not take the place of the proof at the trial stage, yet it may be sufficient for the satisfaction of the Trial Judge in order to frame a charge against the accused.

14. In a subsequent decision i.e. in Union of India (UOI) Vs. Prafulla Kumar Samal and Another, Supreme Court after adverting to the conditions enumerated in Section 227 of the Code and other decisions, enunciated the following principles:

(1) That the Judge while considering the question of framing the charges u/s 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction u/s 227 of the Code the Judge which under the present Code is a senior and experienced court cannot act merely as a Post Office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

15. The scope and ambit of Section 227 was again considered in Niranjana Singh Karam Singh Punjabi and Others Vs. Jitendra Bhimraj Bijja and others, where it was held that:

6....Can he marshal the evidence found on the record of the case and in the documents placed before him as he would do on the conclusion of the evidence adduced by the prosecution after the charge is framed? It is obvious that since

he is at the stage of deciding whether or not there exists sufficient grounds for framing the charge, his enquiry must necessarily be limited to deciding if the facts emerging from the record and documents constitute the offence with which the accused is charged. At that stage he may sift the evidence for that limited purpose but he is not required to marshal the evidence with a view to separating the grain from the chaff. All that he is called upon to consider is whether there is sufficient ground to frame the charge and for this limited purpose he must weigh the material on record as well as the documents relied on by the prosecution. In the State of Bihar v. Ramesh Singh this Court observed that at the initial stage of the framing of a charge if there is a strong suspicion-evidence which leads the court to think that there is ground for presuming that the accused has committed an offence then it is not open to the court to say that there is no sufficient ground for proceeding against the accused. If the evidence which the prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged by cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. In Union of India v. Prafulla Kumar Samal this Court after considering the scope of Section 227 observed that the words "no sufficient ground for proceeding against the accused" clearly show that the Judge is not merely a post office to frame charge at the behest of the prosecution but he has to exercise his judicial mind to the facts of the case in order to determine that a case for trial has been made out by the prosecution. In assessing this fact it is not necessary for the court to enter into the pros and cons of the matter or into weighing and balancing of evidence and probabilities but he may evaluate the material to find out if the facts emerging there from taken at their face value establish the ingredients constituting the said offence.

16. In a recent decision, in the case of Soma Chakravarty Vs. State through CBI, 3 it was held as under:

10. The settled legal position is that if on the basis of material on record the Court could form an opinion that the accused might have committed offence it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence. At the time of framing of the charges the probative value of the material on record cannot be gone into, and the material brought on record by the prosecution has to be accepted as true. Before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible. Whether, in fact, the accused committed the offence, can only be decided in the trial.

19. Charge may although be directed to be framed when there exists a strong suspicion but it is also trite that the Court must come to a prima facie finding that there exist some materials therefor. Suspicion cannot alone, without anything more, form the basis therefor or held to be sufficient for framing charge.

17. In P. Vijayan Vs. State of Kerala and Another, 8 it was held that:-

10. At the stage of Section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. In other words, the sufficiency of ground would take within its fold the nature of the evidence recorded by the police or the documents produced before the Court which ex facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him.

18. The aforesaid principles enunciated above are to be applied to the present case in order to find out whether or not the Court below was justified in framing charge u/s 3 of the MCOCA.

19. The basic submission of learned counsel for the appellant is that as per the prosecution case also he was involved in theft cases only, therefore, it cannot be said to be constituting any threat to the peace and tranquillity in the locality. The alleged activities of the petitioner is not causing any undue disturbance to the public at large.

20. There is no dispute about the fact that the petitioner is facing trial or stands convicted in respect of more than 26 cases. This clearly establishes that he has proclivity of committing offences. Therefore, even though it may be accepted that some of the offences which are registered against him are the offences of theft or burglary, nevertheless, he is equally involved in serious offences bearing FIR No. 191/2010 u/s 186/353/307 IPC and 25/27 Arms Act and the present FIR where Sections 420/468/471 were added. Therefore, it can be safely said that the petitioner is not confining his period of operation to one particular definite kind of offence. He seems to be doing all illegal things and merely because some of the activities by him cannot apparently be disturbing the peace and tranquillity of the locality but nevertheless the same are illegal and have a tendency of creating a bang in the area where frequent burglaries and theft etc. are taking place. The investigation further revealed that there were pecuniary gains by continuously being involved in such type of offences and it is alleged that properties and vehicles were purchased, otherwise the petitioner and his associates have no legal source of income. Statement of the petitioner was recorded u/s 18 of MCOCA wherein he disclosed that he belonged to a poor family and came in contact with bad elements of the society and started committing petty offences of theft. Later on, they started committing theft of stereo and other articles from car. He formed a gang with his brother Ashfaq and Anwar, who resided with him. Ashfaq and Anwar were having a Hyundai Accent and a Honda City respectively, which were purchased by them from the money obtained by selling stolen stereos, laptop etc. He also involved his associates for selling these stolen articles. When his business of stereo theft grew, he started selling stolen articles at Delhi, Meerut, Pilibhit and other places of UP. He also purchased a piece of land measuring 100 sq. mtr. in Vishnu Enclave, Govind Puram, Ghaziabad, UP for a sum of Rs. 13 lacs accumulated from the money through various crimes. He also got a double storey building constructed on it and spent Rs. 21 lacs on its construction. His associates Ishrar and Ishfaq were

found to be history sheeter of PS-Khakheda and were found to be involved in more than 20 criminal cases of theft, Gangster Act, Gunda Act, Kidnapping and Rape etc. Ishtiaq was found in possession of a plot of 300 sq. yds., a house of 2.5 storey was found built in 100 sq. yards at Ghaziabad, UP, the cost of which was assessed to be Rs. 45-50 lacs. He also disclosed that the electronic shop in the name of his brother was opened from the funds made through these crimes. He had LIC policies. It was also revealed that he got his car No. DL-4C-AG 2734 transferred in his name on the strength of forged and fake LIC documents. He had forged LIC policy.

21. The plea of learned counsel for the petitioner that the confessional statement was not voluntary in nature and he was merely made to sign the same and that it was not recorded by the concerned DCP himself but by the stenographer, it is trite law that the same cannot be entertained at the stage of framing of charge and must be decided during the trial when the witnesses are examined.

22. As regards the submission that the properties were purchased even prior to registration of FIR against him or that his father owned a property worth more than one crore etc., at best can be the defence of the petitioner which are required to be proved at the time of his defence evidence but at the time of framing of charge, the material available on record was only required to be scrutinized which made out a case u/s 3 MCOCA Act and Section 420/468/471 IPC. As such, no infirmity can be found in the impugned order which warrants interference.

23. There is another aspect of the matter. The petition has been filed u/s 226 of the Constitution of India and u/s 482 Cr.P.C. The power of High Court u/s 482 Cr.P.C. has been discussed at length in various pronouncements. In the State of Haryana and others Vs. Ch. Bhajan Lal and others, the Supreme Court defined the categories of cases wherein the extraordinary power under Article 226 or Section 482 Cr.P.C. can be exercised by the High Court by illustrating as under:

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers u/s 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated u/s 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

24. In State of Bihar Vs. Rajendra Agrawalla, , the Supreme Court has shed light on the power of this Court u/s 482 Cr.P.C. and held as under:

It has been held by this Court in several cases that the inherent power of the court u/s 482 of the Code of Criminal Procedure should be very sparingly and cautiously used only when the court comes to the conclusion that there would be manifest injustice or there would be abuse of the process of the court, if such power is not exercised.

25. So far as the order on framing of charge by learned Additional Sessions Judge is concerned, inherent power can be exercised only if the allegations in the First Information Report together with other material collected during investigation taken at their face value, do not constitute the offence alleged.

26. Having regard to the object of MCOCA and the material on record as discussed above, I have no hesitation in recording that prima facie, the material available on record made out a case for framing of the charge and the impugned order does not suffer from any illegality which calls for interference. In view of the discussion made above, the writ petition being without any merit, is dismissed. It is, however, clarified that nothing stated in this order will tantamount to an expression of opinion on merits of the case and it will be open to the learned Additional Sessions Judge to decide the case on merits in view of the evidence which will come on record.