

(2009) 11 BOM CK 0088

In the Bombay High Court

Case No : Criminal Writ Petition No. 2084 of 2007

Ketan T. Tirodkar

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 05-11-2009

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 190, 319
Maharashtra Control of Organised Crime Act, 1999 — Section 23(2), 24, 3(1), 3(2), 3(3)
Penal Code, 1860 (IPC) — Section 120B, 34, 384, 387, 392

Citation : (2009) 111 BOMLR 4530

Hon'ble Judges : Roshan Dalvi, J;B.H. Marlapalle, J

Bench : Division Bench

Advocate : Kranti Anand, Rafiq Dada, instructed by Law Loyal, for the Appellant; R.M. Kadam, General and P.A. Pol and I.A. Bagaria, for Noticee, for the Respondent

Judgement

B.H. Marlapalle, J.—Rule. The petition has been heard for final disposal by consent of the parties.

2. The petitioner who is one of the accused in Special MCOC Case No. 11 of 2004 while in custody in connection with the said case, has forwarded his petition through the central prison at Mumbai on 26.9.2007.

3. According to the petitioner when the Investigating Officer Shri S.S. Kamble, (retired ACP) of DCB(C.I.D.) was in the witness box for recording his depositions in Special MCOC Case No. 3 of 2003, he was present in the said court and the depositions of the said Investigating Officer indicated that he wanted to arrest Shri Rajendra Vale, Dy. Municipal Commission of Greater Mumbai in connection with Special MCOC Case No. 3 of 2003, but was prevented from doing so at the instructions of the Home Minister and the Police Commissioner, Mumbai. It is his case that the depositions of Shri S.S. Kamble indicated that there was nexus between the officers of the Municipal Corporation of Gr. Mumbai, the accused and

the Senior Police Officials as well as the Home Minister and therefore Shri Vale was not allowed to be impleaded as one of the accused in Special MCOC Case No. 3 of 2003. He therefore sought following relief's from this Court viz.:

a) To register an F.I.R. against the Home Minister and the Police Commissioner of Greater Mumbai for committing offences punishable u/s 3(3) of M.C.O.C. Act, and b) to appoint Dr. Prdnya Sarvade, the Additional Commissioner of Anti Corruption Bureau as the Investigating Officer, head of special team for investigating and submitting a report to Ms. Chitkala Zutshi, Additional Chief Secretary (Home), and other consequential relief's.

4. At the relevant time the petitioner was in jail and therefore amicus curiae was appointed, but subsequently he appointed an advocate after his release on bail in Special MCOC Case No. 11 of 2004

5. This Court in its order dated 16.10.2008, in regard to the prayer to register the F.I.R. against the Home Minister and the Commissioner of Police made the following observations:

To invoke the provisions of MCOC Act, the Petitioner ought to have before this Court satisfied the predicates of the provisions of the MCOC Act to show that the concerned Minister was also a part of the Organised Crime Syndicate. There is no such material placed before us. In our opinion, the mere statement of I.O. in that court at this stage cannot support to draw an inference that the provisions of MCOC Act has been made out

6. In the subsequent order dated 12.12.2008, by noting down the seriousness of the depositions of Shri Kamble and on perusal of the original files submitted by the learned Public Prosecutor, this Court directed the Dy. Chief Minister/Home Minister, Home Secretary, the then Commissioner of Police Mumbai and the Director General of Police Maharashtra State, to file individual affidavits. Accordingly the affidavits have been filed.

7. On considering the files and the affidavits filed by the abovementioned officers/authorities as well as Shri S.S. Kamble, the petition was allowed to be amended and the following prayer came to be added:

(aa) That in the interest of justice and equity this Hon'ble Court may be pleased to direct the respondents with appropriate writ/directions for prosecuting/charging then the Ward Officer Mr. Vale Rajendra and other responsible C.P.W.D. Officers and Police Officers for facilitating the illegal construction activities by the organised crime syndicate headed by Dawood Embrahim u/s 3(3) of MCOC (Maharashtra Control of Organized Crime Act, 1999) and under other provisions of penal law

It was made clear to the learned Counsel for the petitioner that the scope of the petition was limited only to the amended prayer. We agree with the opinion recorded in the earlier order dated 16.10.2008, that there is no case to register an F.I.R. against the Home Minister and Police Officers under the MCOC Act, and

therefore proceed to decide the petition for the said limited relief.

8. The undisputed facts briefly stated and leading to the petition could be set out as under:

On 5.3.2003, CR. No. 158 of 2003 was registered with the M.R.A. Marg Police Station for the offences punishable u/s 120B, 384, 387, 392 read with Section 34 of IPC in connection with the construction of "Sara Sahara Market Complex" which according to the State Government was being constructed by the persons involved in the underworld activities and who had links with the terrorist elements and therefore subsequently the investigation was transferred to the Crime branch on 5.3.2003 and it was reregistered as C.R. No. 20 of 2003 for the offences punishable u/s 120B, 384, 387, 392 read with 34 of IPC and Sections 3(1)(ii), 3(2), 3(4), 3(5) and 4 of MCOC Act of 1999. Shri S.S. Kamble, the then Asstt. Commissioner of Police, D1(South) was appointed as the Chief Investigating Officer. On 12.3.2003 the Investigating Officer applied for prior approval of the Joint Commissioner of Police (Crime), Mumbai for applying the provisions of MCOC Act, 1999 and accordingly the then Police Commissioner, Mumbai had granted approval u/s 23(2) of MCOC Act 1999 against three accused persons and Special MCOC Case No. 3 of 2003 was registered against the said three accused viz. (1) Shri Abdul Rehman Abdul Gafoor Shaikh alias Rehman Boss; (2) Shri Abdul Sattar Haji Jiva Radhanpur alias Sattar Teli; and (3) Shri Iqbal Hassan Ibrahim Kaskar alias Arab Saab at the first instance.

Subsequently, the Commissioner of Police by his order dated 24.12.2003 granted sanction u/s 23(2) of the MCOC Act, 1999 for the prosecution of Shri Narendra Ramlochan Rajbhor (an officer of the Municipal Corporation of Greater Mumbai for short BMC) and Shri Gulam Nabi Ramzan Tanwar for the offences under Sections 3(1)(ii), 3(2), 3(4), 3(5), 4 and 24 of MCOC Act of 1999.

Similar sanction was also granted by the Commissioner of Police against Shri Hasmukh R. Shah, Shri Kiran Vasant Acharekar, Shri Shirish Madhukar Salvekar (all officers of the BMC). Shri Tariq Abdul Kareem Parveen, Shri Dawood Ibrahim Kaskar(wanted accused), Shai Shaikil Babu Mohiddin Shaikh alias Chhota Shakil (wanted accused). Thus, in all eleven accused were put on trial in Special MCOC Case No. 3 of 2003. On 13.6.2007, the learned Special Judge under the MCOC Act rendered her verdict and convicted accused Nos. 1, 2 and 9 viz. accused No. 1 Shri Abdul Rehman Abdul Gafoor Shaikh alias Rehman Boss, accused No. 2 Shri Abdul Sattar Haji Jiva Radhanpur alias Sattar Teli and accused No. 9 Shri Tariq Abdul Kareem Parveen for the offences punishable u/s 120B read with Section 34 of IPC as well as Section 387 read with Section 34 of IPC.

9. Criminal Appeal No. 639 of 2007 has been filed by the original accused No. 9 and the same has been admitted by this Court, whereas Criminal Appeal No. 779 of 2007 has been filed by the State of Maharashtra against the order of acquittal passed against the original accused Nos. 3 to 8 viz. Iqbal Hassan Ibrahim Kaskar, Narendra Ramlochan Rajbhar, Gulam Nabi Ramzan Tanwar, Hasmukh

Parvinchandra Shah, Kiran Vasant Acharekar, Shirish Madhukar Salvekar. Four of these accused are the officers of the Municipal Corporation of Gr. Mumbai. By the said Criminal Appeal, the Appellant the State of Maharashtra has prayed to quash and set aside the order of acquittal against accused Nos. 3 to 8 and to convict and sentence them in Special MCOC Case No. 3 of 2003.

It is thus clear that by the time this petition was forwarded by the Superintendent of the Central Prison at Mumbai on 26.9.2007, Special MCOC case No. 3 of 2003 was already decided.

It is under these circumstances, and in view of the order of this Court dated 16.10.2008, the petition is confined to the amended prayer as reproduced hereinabove viz. for directions to prosecute Shri Rajendra Vale and other responsible officers of B.M.C. as well as the officers concerned and responsible from C.P.W.D. and Police Officers for facilitating the illegal construction activities by the organised crime syndicate headed by Dawood Embrahim u/s 3(3) of MCOC Act and under other provisions of penal law.

10. Shri Ravi Kadam, the learned Advocate General while opposing this petition has submitted that the petition was not registered as a Public Interest Litigation (PIL) Petition and even if so registered, it is not maintainable. He further submitted that even otherwise the petitioner himself being an accused in Sp. MCOC case No. 11 of 2004 and as such, he has no locus standi to file a writ petition in his personal capacity. These arguments have been supported by the learned Counsel for the intervenor as well as other respondents with equal vehemence.

Shri Ravi Kadam, also relied upon the affidavit in reply filed by Ms. Meera Chadha Borwankar, the then Joint Commissioner of Police (Crime), Mumbai in support of his contentions that the available material was critically examined against each of the accused/suspects and sanction orders were passed under 23(2) of MCOC Act 1999. There was no case to pass any such further order against Shri Rajendra Vale as well as other officers of B.M.C., and C.P.W.D at this belated point of time. Moreover, since the Spl. MCOC Case No. 3 of 2003 is already decided by the Special MCOC Court way back in the year 2007, there is no case to reconsider the issue of sanctions already granted u/s 23(2) of MCOC Act 1999.

11. The relevant portion of the depositions of Shri S.S. Kamble in Special MCOC Case No. 3 of 2003 and as reproduced in the order dated 16.10.2008 of this Court reads as under:

148. At the time of investigation I found that Mr. Vale was also at fault. I made necessary efforts to arrest Mr. Vale.

Court Question: Why Mr. Vale was not made an accused?

Answer: I have put up the material before CP for seeking permission for initial arrest of Mr. Vale. CP had recommended it however I was instructed from Mantralaya to go slow against Mr. Vale.

I agree that to give such instruction to any police officer is a very serious matter. I was instructed from Home Department. It is true that the persons who gave me such instructions have committed an offence. He was Home Minister himself. I did not feel to register offence against the then Home Minister. I feel that as a responsible police officer, it's a lapse on my part. (Witness volunteers that I have again put up the proposal, it was again turned down). It is true that the police officer should not succumb to the pressure of any higher authority. If the pressure would have been used in respect of other accused by the Home Ministry then I would have succumbed to such pressure. I did not complain because CP was aware of it. I did not give complaint to either CM or any other authority about the pressure. This thing was noted in writing in the form of notings between me and my superior. After recording statement of Mr. Vale these all events have taken place. I warned Mr. Vale that he was at fault

12. We have perused the record and files submitted before us by the learned Public Prosecutor as well as the confidential report submitted by the Director General of Police, Mumbai on 6.12.2008 in obedience of the order passed by this Court on 16.10.2008. The record shows that Shri Hasmukh Shah and Shri Narendra Ramlochan Rajbhar were Executing Engineer and Assistant Engineer respectively of the B.M.C. at the relevant time, whereas Shri Rajendra Vale was the Ward Officer of A Ward of B.M.C. during the period from 25.6.1997 and 10.1.2000 and again from 9.8.2002 onwards. Shri Kiran Acharekar was the ward officer during the period from 10.1.2000 to 8.1.2002 of the very same ward.

13. The Investigating Officer in his report dated 11.8.2003 specifically pointed out the role attributable to Shri Rajendra Vale and Shri Kiran Acharekar, the ward officers of the B.M.C. in the illegal construction of Sara Sahara Market Complex and had sought permission to arrest the officers of Building Proposal Department (Repair Board) and responsible ward officers of B.M.C. However, despite the sanction granted by the Commissioner of Police, Shri Vale, ward officer of B.M.C. was not arrested.

14. The Investigating Officer in his report dated 18.12.2003 (para-144) stated as under:

Referring to para-10 approval sought from the Commissioner of Police for the arrest of Assistant Engineer Rajbhar of Building Proposal Department (Repairs & Reconstruction) and Shri Rajendra Vale, the ward officer "A" ward. However, only Rajbhar was arrested initially, to judge a reaction, as it was expected that the B.M.C. workers' union would react and create law and order problems. After the arrest of Assistant Engineer Rajbhar, a meeting was held in the Chamber of D.C. M. in the presence of the then Commissioner and the principal Secretary Home Shri Virkar, who had instructed not to effect any further arrest without his consultation. Even today there is sufficient evidence on record to show that the ward officer had failed in his duties.

The Joint Commissioner of Police (Crime), however, in his submissions to the

Commissioner of Police stated that he was in agreement that there was sufficient evidence against Shri Rajbhor and Shri Gulam Tanwar for prosecuting them under the MCOC Act as well as the IPC. This resulted in the order dated 24.12.2003 passed by the Commissioner of Police granting sanction u/s 23(2) of MCOC Act, 1999 and for the prosecution of Shri Rajbhor(officer of the B.M.C.) and Shri Gulam Tanwar (Builder).

15. On 1.1.2004, the Chief Investigating Officer submitted further report wherein he once again sought sanction against the officials of the B.M.C. viz. 1) Shri Rajendra Wale, Asstt. Commissioner; 2) Shri Kiran Acharekar, ward officer 3) Shirish Madhukar Salvekar, Asstt. Engineer, 4) Hasmukh Parvinchandra Shah, Sr. Engineer. 5) Shri Devnath Kurmi Executive Engineer and 6) Shri D.G. Tambulwadkar, Asstt. Engineer. The DCP as well as the Joint Commissioner of Police (Crime), had agreed with the said proposal as is evident from the noting dated 16.10.2004. However, the Commissioner of Police accepted the said proposal in respect of Shri Tariq Anwar, Shri Shirish Madhukar Salvekar and Hasmukh Parvinchandra Shah only.

So far as the remaining three officers of B.M.C. were concerned, the Commissioner of Police stated that their cases could be reconsidered depending upon the progress in the trial and thus the case of Shri Rajendra Vale was once again dropped for sanction u/s 23(3) of MCOC Act.

Some time in the first week of January 2004, Shri S.S. Kamble retired and was replaced by Shri Sanjay Yenpure. On 27.1.2004 Shri Kiran Acharekar, Shri Salvekar and Shri Hasmukh Shah (all the officers of B.M.C.) came to be arrested while they were under suspension. On 12.4.2004 Shri Yenpure submitted his report and on the next date the Joint Commissioner of Police (Crime) Mumbai again sought sanction from the Commissioner of Police for prosecution of the remaining three B.M.C. officers viz. 1) Shri Rajendra Vale, 2) Shyri Karmi and 3) Shri D.G. Tambulwadkar. The record does not show that at any point of time during the pendency of the trial of Special MCOC Case No. 3 of 2003 the Commissioner of Police passed any order u/s 23(2) of MCOC Act either granting sanction or rejecting the same for prosecution of these remaining three officers of B.M.C.

16. Now coming to the maintainability of this petition, when the petition came up before the Division Bench on 10.3.2008, the petition along with the connected appeals was directed to be placed before the learned Chief Justice for ordering all the matters to be heard together. The farad does not show any further order to treat or register this petition as a PIL petition. Thus, the only issue of locus standi of the petitioner and as raised by the learned Advocate General requires consideration while entertaining the petition.

The term "locus standi" means legal capacity of the complainant/petitioner to intervene or initiate or participate in criminal proceedings. Under the scheme of the MCOC Act an individual or third party cannot institute a private complaint

before the Special Court directly and the Special Court cannot take cognizance of such a private complaint unless sanction u/s 23(2) of the said Act is granted by the Commissioner of Police, as has been held by the Apex Court in the case of Jamiruddin Ansari Vs. Central Bureau of Investigation and Another, .

The locus standi of the petitioner will have to be therefore examined in the backdrop of this legal position.

17. In the case of R. Rathinam Vs. State by DSP, District Crime Branch Madurai District, Madurai and Another, , about 75 advocates from different parts of Tamil Nadu had moved the Madras High Court to cancel the bail granted to the accused who had killed six persons belonging to the scheduled caste. They had not filed any formal application but had petitioned the Chief Justice. The Supreme Court upheld the rights of the advocates and interveners and observed thus:

It is not disputed before us that the power so vested in the High Court to cancel bail can be invoked either by the State or by any aggrieved party. If any member of the public, whether he belongs to any particular profession or otherwise who has a concern in the matter can move the High Court to remind need to invoke the power of the power of cancellation suo moto....

Further, in the case of Vishwa Mitter of Vijay Bharat Cigarette Stores, Dalhousie Road, Pathankot Vs. O.P. Poddar and Others, , the Supreme Court on the issue of locus standi observed as under

It is thus crystal clear that anyone can set the criminal law in motion by filing a complaint of facts constituting an offence before a Magistrate entitled to take cognizance u/s 190 and unless any statutory provision prescribes any special qualification or eligibility criteria for putting the criminal law in motion, no Court can decline to take cognizance on the sole ground that the Complainant was not competent to file the complaint. Section 190 of the CrPC clearly indicates that the qualification of the Complainant to file a complaint is not relevant. But where any special statute prescribes offences and makes any special provision for taking cognizance of such offences under the statute, the Complainant requesting the Magistrate to take cognizance of the offence must satisfy the eligibility criteria prescribed by the statute. Even with regard to offences under the Indian Penal Code, ordinarily anyone can set the criminal law in motion but the various provisions in Chapter XIV prescribe the qualification of the Complainant which would enable him or her to file a complaint in respect of specified offences and no Court can take cognizance of such offence unless the Complainant satisfies the eligibility criteria, but in the absence of any such specification, no Court can throw-out the complaint or decline to take the cognizance on the sole ground that the Complainant was not competent to file the complaint.

Following the aforesaid judgment, the Supreme Court in the case of A.R. Antulay Vs. Ramdas Srinivas Nayak and Another, , further elaborated the issue of "locus standi" in the following words:

It is a well recognised principle of criminal jurisprudence that anyone can set or put criminal law in motion except where the statute enacting or creating an offence indicates to the contrary. The scheme of the Code of Criminal Procedure envisages two parallel and independent agencies. The scheme underlying CrPC clearly reveals that anyone who wants to give information of an offence may either approach the Magistrate or the officer in charge of a Police Station. If the offence complained of is a noncognizable one, the Police Officer can either direct the Complainant to approach the Magistrate or may obtain permission of the Magistrate and investigate the offence. Similarly anyone can approach the Magistrate with a complaint and even if the offence disclosed is a serious one, the Magistrate is competent to take cognizance of the offence and initiate proceedings. It is open to the Magistrate but not obligatory upon him to direct investigation by police. Thus two agencies have been set up for taking offences to court....

18. Despite the depositions of Shri S.S. Kamble before the learned Special Judge as reproduced hereinabove, an application u/s 319 of the Code of Criminal Procedure for adding more accused like Shri Vale was not taken out, and finally the case was decided on 13.6.2007. So far as the B.M.C. officers are concerned and who were impleaded as accused, criminal proceedings filed by the State Government have not reached its finality as Criminal Appeal No. 779 of 2007 has been filed by the State Government against the order of acquittal passed against the said officers of B.M.C. and hence the State Government is not satisfied and it is aggrieved by the order of acquittal passed against them. It is under these circumstances, that the Petitioner's locus standi to approach this Court seeking directions to the Commissioner of Police(Crime), Mumbai for granting sanction u/s 23(2) of the MCOC Act requires to be upheld. As noted earlier, unless such a sanction is granted, the petitioner cannot in his individual capacity approach the Special Court under the MCOC Act against Shri Vale or remaining officers of B.M.C. as well as C.P.W.D. Hence the issue of petitioner's locus standi as raised by the learned Advocate General does not come in our way in entertaining this petition for the limited relief's for seeking directions against the Commissioner of Police (Crime), Mumbai to pass an order u/s 23(2) of MCOC Act against the remaining officers of the B.M.C., as reproduced hereinabove in terms of prayer Clause (aa). It would be apt to remind ourselves of the observations made by the Apex Court in A.R. Antulay's case (Supra),

Punishment of the offender in the interest of the Society being one of the objects behind the penal statutes enacted for the larger good of the society, right to initiate proceedings can not be whittled down, circumscribed or fettered by putting it into a straitjacket formula of locus standi.

19. Coming to the merits of the case, the learned Advocate General has relied upon the affidavit of Mrs. Meera Borvankar who was at the relevant time (i.e. 21.7.2004 to 18.6.2007) holding the post of Joint Commissioner of Police (Crime), Mumbai. The said affidavit deals with the report of the Investigating

Officer and by that time four charge sheets were also filed before the Special Court in MCOC Case No. 3 of 2003. In support of the said affidavit, the concerned files have been placed before us and more particularly the "Chart" regarding the opinion of the Investigating Officer, Special Public Prosecutor, Dy. Commissioner of Police, Joint Commissioner of Police as well as the Commissioner of Police. It is stated that considering the seriousness of the case, the Joint Commissioner of Police (Crime) had held discussions on 7.9.2005, 9.9.2005 and 14.9.2005, with the concerned officers as also with the Commissioner of Police. It appears that the Joint Commissioner of Police held further discussions with the Commissioner of Police in the meeting held on 17.9.2005. In the meeting held on 13.12.2005, the role of each of the accused based on the material on record was examined. This affidavit of the Joint Commissioner of Police (Crime) concludes by the following averments

I say that finally after considering the opinion of all the abovementioned officers and the Assistant Director and Public Prosecutor and Special Public Prosecutor including fact that some of the accused/suspects had cited as witnesses, in the same case in earlier charge sheet, it was jointly decided to take up the issue of any further action or arrest of officers of B.M.C.(including that of Rajendra Vale), C.P.W.D and others, only after the first phase of trial which was in progress, gets over.

20. In the chart referred to in the report of the Joint Commissioner of Police(Crime), the opinions of the Investigating Officer, Special Public Prosecutor, Dy. Commissioner of Police and the Joint Commissioner of Police have been recorded. It would be appropriate to reproduce these opinions in respect of the remaining three officers of B.M.C. i.e. Shri Rajendra Vale, Shri Devnath Kurmi and Shri D.G. Tambulwadkar as under:

(1) Shri Rajendra Vale: Opinions of

I.O. There is sufficient evidence to prosecute but the Commissioner of Police observes to collect more evidence.

Spl. PP There is sufficient evidence against the accused.

DCP In agreement with the Investigating Officer and the Spl. Public Prosecutor.

Jt. CP No case to file chargesheet under the MCOC Act.

(2) Shri Devnath Kurmi:

Opinions of

I.O. :There is sufficient evidence against him as mentioned alongside.

Spl. PP :Sufficient evidence.

DCP :Jt.

CP :No case to file charge sheet under MCOC Act.

(3) Shri D.G. Tambulwadkar:

Opinions of

I.O. :There is sufficient evidence against him.

Spl. PP :Sufficient evidence.

DCP :In agreement with the Investigating Officer and the

Spl. Public Prosecutor.

Jt. CP :It would be difficult to prove his knowledge about the organized crime syndicate involved in Sahara Complex. I do not recommend charges hitting him under MCOC Act.

21. It is material to note that the Dy. Commissioner of Police has recorded that he is in agreement with the opinions of the Special Public Prosecutor/Chief Public Prosecutor in all the three cases, but the Joint Commissioner of Police did not agree with the same as noted hereinabove. Consequently, no proposal for sanction u/s 23(2) of MCOC Act, against these three officers of B.M.C. was placed before the Commissioner of Police. Though, the Joint Commissioner of Police disagreed with the opinion of the Special Public Prosecutor, and the record does not indicate whether the Commissioner of Police, Mumbai was in agreement with the opinion of the Joint Commissioner of Police, in any case such an opinion could have been considered while passing an order u/s 23(3) of MCOC Act. The Commissioner of Police was required to apply his mind independently while discharging his statutory duties u/s 23(3) of MCOC Act, and more specifically when the noting dated 16.10.2004 had left these cases open for review on the basis of evidence that would be coming forth during the trial. The record does not indicate that the Commissioner of Police had reconsidered the cases of these B.M.C. officers or any one of them either to grant sanction or otherwise till the said case is finally decided on 13.6.2007. It was submitted before us that after Special MCOC Case No. 3 of 2003 was decided, the relief prayed for in terms of the amended prayer appeared to be redundant. If the State had not filed Criminal Appeal No. 779 of 2007, against the order of acquittal, there could be some scope to examine these submissions. By filing the appeal against the order of acquittal, the State Government has expressed its stand that the acquittal order against the prosecuted B.M.C. officers is unsustainable and these officers of B.M.C. are required to be convicted and sentenced. Thus, the prosecution against the B.M.C. officers has not reached its finality. At the same time, from the record we have perused including the report submitted by the Investigating Officer as well as the opinions of the Special Public Prosecutor, prima facie, no distinction appears in the role attributed to officers of B.M.C. viz. Shri Wale and Shri Acharekar and both of them were Ward Officers from the same Ward in which the building project came up.

22. If the Commissioner of Police had independently considered the cases of remaining three officers of B.M.C. for sanction u/s 23(2) of MCOC Act and

refused such a sanction, the scope of this petition could be limited and it would have been an entirely a different issue. By closing the cases of these remaining officers of the B.M.C., the criminal law was not allowed to be set in motion and the course of justice was thwarted. The veracity of the prima facie evidence collected during the course of the investigation is tested only during the trial before the Court and it is not permissible for the Supervisory Police Officer to disregard the opinion of the Special Public Prosecutor to prosecute the accused and close the case prematurely so as to prevent it from being considered by the Commissioner of Police or any other competent authority under a statutory powers u/s 23(2) of the MCOC Act. Though the opinion recorded in the chart relied upon in the affidavit of the Joint Commissioner of Police it has been stated that these three officers were cited as witnesses of the prosecution, the affidavit does not disclose that they were so examined before the Special Judge in Special MCOC Case No. 3 of 2003. In addition, the affidavit does not state that steps were taken to file an additional chargesheet against these three officers for the offences punishable under the Indian Penal Code in the pending case. The closing of the cases of these three officers of the B.M.C. has, in our considered opinion, resulted in the miscarriage of justice and, therefore, under the extra ordinary powers under Article 226 of the Constitution of India, this Court must step into set the criminal law in motion and even at the instance of the third party like the petitioner and the Special MCOC Case No. 3 of 2003 has already been decided. It is well settled that filing an additional chargesheet, the trial in Special MCOC Case No. 3 of 2003 could be reopened and recommenced against the added accused.

23. In the premises, this petition succeeds partly. The Commissioner of Police for Greater Mumbai is hereby directed to consider the cases of Shri Rajendra Vale, Shri Devnath Kurmi and Shri D.G. Tambulwadkar for granting sanction u/s 23(2) of the MCOC Act for their prosecution in Special MCOC Case No. 3 of 2003 and on the basis of the prima facie evidence collected by the I.O. and the opinion recorded by the Special Public Prosecutor as well as in the light of the observations made by us in this judgment. The order u/s 23(2) of the MCOC Act shall be passed by the Commissioner of Police, Greater Mumbai as expeditiously as possible and in any case by 15th December, 2009.

24. Rule is made absolute accordingly.

25. A copy of this order be forwarded to the Commissioner of Police, Greater Mumbai as well as the Commissioner, Mumbai Municipal Corporation of Greater Mumbai forthwith.