(2014) 11 BOM CK 0154

In the Bombay High Court

Case No : Criminal Application Nos. 3990, 3993, 4026 and 4887 of 2014

Mujahid APPELLANT

Vs

The State of Maharashtra RESPONDENT

Date of Decision : 20-11-2014

Acts Referred:

Arms Act, 1959 — Section 3(25), 4(25)
Criminal Procedure Code, 1973 (CrPC) — Section 482
Essential Commodities Act, 1955 — Section 10, 3, 7, 9
Maharashtra Control of Organised Crime Act, 1999 — Section 1(e), 1(f), 2, 2(1)(d), 2(1)(e)
Penal Code, 1860 (IPC) — Section 120-B, 143, 147, 148, 149

Citation : (2015) ALLMR(Cri) 876 : (2015) 3 BomCR(Cri) 704

Hon'ble Judges : S.S. Shinde, J;N.W. Sambre, J

Bench : Division Bench

Advocate : D.A. Karnik, Shaikhmazhara and Jahagirdar, Advocates for the Appellant; V.D. Godbharle, APP, Advocates for the Respondent

Judgement

N.W. Sambre, J.—Heard. Rule. Rule is made returnable forthwith and by consent, the matters are heard finally. By these applications under section 482 of the Code of Criminal Procedure, the applicants/accused seek quashing of first information report in C.R. No. 43 of 2014, registered at Shevgaon police station, to their extent, insofar as an offence punishable under section 3(1)(ii), 3(2) and 3(4) of the Maharashtra Control of Organised Crime Act, 1999 (hereinafter referred to as "MCOCA", for the sake of brevity).

2. The applicants, claiming to be permanent residents of Ahmednagar district allege that they were arrested in C.R. No. 43 of 2014, which came to be registered with Shevgaon police station, on 15th February, 2014 for an offences punishable under sections 307, 395, 143, 147, 148, 149, 120-B, 323, 504, 506, 435 and 427 of the Indian Penal Code read with section 3(25) and 4(25) of the Arms Act. The applicants further claim that after their arrest in C.R. No. 43 of 2014, they have been released on regular bail by the Sessions Court at

Ahmednagar.

3. It is the case of the applicants that subsequent to their release on bail, they came to know from reliable sources that the prosecution has decided to proceed against them under the provisions of MCOCA in C.R. No. 43 of 2014. It is further claimed by the applicants/accused that as the provisions of the said Act which are draconian in nature, the prosecution has sought to rearrest the applicants for the offence alleged to have been committed by them under the MCOCA.

4. The applicants further submit that in view of apprehension of arrest under the MCOCA, pre-arrest bail application moved by them also came to be rejected.

5. In support of their contentions, the applicants/accused allege that the very applicability of the provisions of the MCOCA as against them is required to be quashed and set aside in view of the fact that the act of the prosecution of invoking the provisions of MCOCA is contrary to the requirement of the Act. The applicants allege that except C.R. No. 43 of 2014, no other crime is registered against them, but for one single charge-sheet, no charge-sheet is filed or pending against them in any criminal Court. Vithal Munde, the informant in C.R. No. 43 of 2014, has inter alia alleged in the first information report that since the sand spot in river bed of Godavari at Mungi was not allotted in auction to accused Yunus Chand Shaikh and it was allotted to one Rajendra Daund, annoyed by the same, accused Yunus Chand Shaikh, accompanied by the applicants herein and other accused named in the first information report, hatched a criminal conspiracy, formed an unlawful assembly and assaulted the informant and witnesses by means of sword, sticks, iron rods and stones and caused injuries to them. It is further alleged that the accused fired two rounds in air from the Revolver in their possession and thus tried to commit murder of the informant. The said accused also robbed the informant and witnesses of mobile phones and cash amount. In support of their contentions, the applicants have sought to rely upon the provisions of the MCOCA, more particularly provisions of clause (d) of section 2 of the said Act.

6. Learned Counsel appearing on behalf of the applicants Shri Jahagirdar and Shri Karnik have sought to urge that in view of the isolated offence registered against the applicants or pendency of only one charge-sheet against them, the applicants cannot be termed to have been involved in ''continuing un-lawful activity'' as defined under MCOCA. The applicants also urge that the invocation of provisions of section 23 of the MCOCA against them is also uncalled for as the said order, according to the applicants, suffers from non application of mind. The applicants have sought to rely upon the judgment of the Apex Court, in the matter of State of Maharashtra and Others Vs. Lalit Somdatta Nagpal and Another, , so as to canvass that the provisions of section 2(1)(d) cannot be invoked against the applicants qua scheme of the MCOCA and as such, a case for quashing of the first information report qua said provisions of the MCOCA is made out before this Court.

7. While countering the above referred submissions, Shri Godbharle, learned Additional Public Prosecutor appearing on behalf of respondents, has strenuously urged that the requirement under clause (d) of section 2 is not as regards the pendency of more than one charge-sheets against the applicants, but what is contemplated under the scheme of the MCOCA is the pendency of more than one charge-sheets against the syndicate/gang involved in continuing unlawful activity. He submits that the applicants are noticed to be members of gang of which Yunus Chand Shaikh is gang leader and head of the gang is involved in illegal business of sand and other activities. Learned A.P.P. has invited attention of this Court to the number of offences registered against said Yunus Chand Shaikh, the crime numbers, the sections under which the offence is punishable and status of the same. He further submits that invocation of the powers of the MCOCA against the applicants herein is very much justified as according to him, the law laid down by the Apex Court in the matter of State of Maharashtra and Others Vs. Lalit Somdatta Nagpal and Another, fell for consideration before this Court, in the matter of Sachin Bansilal Ghaiwal v. State of Maharashtra, (Criminal Appeal No. 25 of 2014) and Umesh Mohan Kirve v. State of Mah., (Criminal Appeal No. 1115 of 2013), in the judgment pronounced on 16th July, 2014. He has also invited attention of this Court to the law laid down by this Court in the matter of Govind Sakharam Ubhe Vs. The State of Maharashtra (At the instance of DCB, CID, Unit IV) , so as to canvass that the judgment of the Apex Court, in the matter of State of Maharashtra and Others Vs. Lalit Somdatta Nagpal and Another, has no applicability to the facts of the present case and the reliance on the same is wholly misplaced, having regard to the observations of this Court in the case of Govind Sakharam Ubhe Vs. The State of Maharashtra (At the instance of DCB, CID, Unit IV) and in the case of Sachin Ghaiwal (cited supra). He submits that the present proceedings are required to be rejected since the same are pre-mature as the investigation against the present applicants under the provisions of the MCOCA is in progress and the applicants herein are absconding.

8. Having considered rival contentions of the parties, following factors are required to be taken note of. It is an admitted position on record that against all the applicants, C.R. No. 143 of 2014 is registered for offences punishable under sections 307, 395, 143, 147, 148, 149, 120-B, 323, 504, 506, 435 and 427 of the Indian Penal Code read with section 3(25) and 4(25) of the Arms Act, which is pending investigation. It is also required to be taken note of the fact that Yunus Chand Shaikh is observed to be the gang leader by the prosecution, is also main accused in the said crime. It is further required to be taken note of the fact that the applicant in Criminal Application No. 3990 of 2014, namely, Mujahid Ibrahim Pathan, in addition to above referred C.R. No. 43 of 2014, is also facing prosecution under section 379 of the Indian Penal Code read with sections 14 and 15 of the Indian Mines and Minerals Act and in the said matter a charge-sheet is submitted to the Court of Judicial Magistrate First Class, Shevgaon, pursuant to first information report dated 30th October, 2010. Against said Yunus Chand Shaikh, following offences are registered and the nature of accusations

and the status of the cases is as under:--

9. From the above referred fact what is established before this Court is, against the said gang leader more than one charge-sheets are pending and in most of the charge-sheets offences alleged, are punishable with more than three years of imprisonment. It is also required to be taken note of the fact that the offences alleged to have been committed by the gang leader of which present applicants are alleged to be members are for financial gain. It is also required to be taken note of the fact that the investigation in the matter is incomplete and same is under progress. In view of above, the invocation of the provisions of MCOCA, in our opinion, at this stage, prima facie appears to be justified as the requirement of clause (d) of section 2 of MCOCA is very much justified. What is contemplated under said section is a situation where a group of persons as members of organised crimes syndicate indulge in organized crime who use the violent means to gain pecuniary benefit or un-due economic or other advantage for themselves or any other persons. The clause which defines the ''continuing unlawful act'' which is prohibited by law and must be cognizable offence punishable with imprisonment for three years or more. Such unlawful activity can be undertaken by 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. The words "in respect of which more than one charge-sheets have been filed", in our opinion, cannot be stretched to the extent that minimum one charge-sheet is required to be pending against each member of the crime syndicate. A reading of the entire scheme of the Act reflects that pendency of more than one charge-sheets within a period often years is enough qualification for invoking the provisions of the MCOCA, provided same is pending against the members of the crime syndicate, who operates as individually or jointly in commission of organised crime. What is required to be taken note of is the very involvement, attachment, nexus or the link of such member/person with the organised crime syndicate while commission of the offence, the very link of such member of the crime syndicate is considered to be the crux of the term "continuing unlawful activity". It is also required to be taken note of the fact that if the contention of the learned Counsel for the applicants i.e. the requirement of the statute, in their submission, is the pendency of the minimum two charge-sheets for an offence punishable with more than three years imprisonment in the last period often years is to be accepted, the same shall take the very object and intention of the statute to illogical end. What is contemplated under section 2(1)(d) of MCOCA is the activities prohibited by the law have been undertaken either singly or jointly, as a member of an organised crime syndicate and as such the requirement of one or more charge-sheets is in relation to the unlawful activity of the unlawful crime syndicate and not of each and every member of such syndicate. We are fortified in our view, in the light of the law laid down by this Court in the case of Govind Sakharam Ubhe Vs. The State of Maharashtra (At the instance of DCB, CID, Unit IV) . The observations made by this Court in paragraphs No. 32 to 40 are required to be relied upon, which read thus:--

"32. In order to understand this submission it is necessary to have a closer look at certain provisions of the MCOCA and its preamble. The preamble states that it is an Act to make special provisions for prevention and control of, and for coping with the criminal activity by organized crime syndicate or gang, and for matters connected therewith and incidental thereto. The MCOCA, states the preamble, makes special provisions for prevention and control of, for coping with, criminal activity by organized crime syndicate or gang. Essentially, therefore, the MCOCA targets the unlawful activities of the organized crime syndicate.

33. Section 1(f) defines ''organized crime syndicate'' to mean a group of two or more persons who acting singly or collectively as a syndicate or gang indulge in activities of organized crime. Section 1(e) defines ''organized crime'' to mean 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 objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any other person or promoting insurgency.

34. Therefore, the MCOCA contemplates a situation where a group of persons as members of organized crime syndicate indulge in organized crime. That is, they indulge in use of violence, threats of violence, intimidation, etc. to gain pecuniary benefit or undue economic or other advantage for themselves or any other person. These activities as per the definition of organized crime are continuing unlawful activity prohibited by law.

35. It is now necessary to go to the definition of continuing unlawful activity''. Section 2(1)(d) defines ''continuing unlawful activity'' to mean 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 organized crime syndicate or on behalf of such syndicate in respect of which more than one charge-sheet have been filed before a competent court within the preceding ten years and that court have taken cognizance of such offence. Thus, for an activity to be a ''continuing unlawful activity''--

a) the activity must be prohibited by law;

b) it must be a cognizable offence punishable with imprisonment of three years or more;

c) it must be undertaken singly or jointly;

d) it must be undertaken as a member of an organized crime syndicate or on behalf of such syndicate

e) in respect of which more than one charge-sheet have been filed before a competent court.

36. The words ''in respect of which more than one charge-sheet have been filed''

cannot go with the words ''a member of a crime syndicate'' because in that case, these words would have read as ''in respect of whom more than one charge-sheet have been filed''.

37. But even otherwise, if all provisions are read together we reach the same conclusion. Section 2(1)(d) which defines ''continuing unlawful activity'' sets down a period of 10 years within which more than one charge-sheet have to be filed. The members of the crime syndicate operate either singly or jointly in commission of organized crime. They operate in different modules. A person may be a part of the module which jointly undertakes an organized crime or he may singly as a member of the organized crime syndicate or on behalf of such syndicate undertake an organized crime. In both the situations, the MCOCA can be applied. It is the membership of organized crime syndicate which makes a person liable under the MCOCA. This is evident from section 3(4) of the MCOCA which states that any person who is a member of an organized crime syndicate shall be punished 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 fine, subject to a minimum of fine of Rs. 5 lakhs. The charge under the MCOCA ropes in a person who as a member of the organized crime syndicate commits organized crime i.e. acts of extortion by giving threats, etc. to gain economic advantage or supremacy, as a member of the crime syndicate singly or jointly. Charge is in respect of unlawful activities of the organized crime syndicate. Therefore, if within a period of preceding ten years, one charge-sheet has been filed in respect of organized crime committed by the members of a particular crime syndicate, the said charge-sheet can be taken against a member of the said crime syndicate for the purpose of application of the MCOCA against him even if he is involved in one case. The organized crime committed by him will be a part of the continuing unlawful activity of the organized crime syndicate. What is important is the nexus or the link of the person with organized crime syndicate. The link with the ''organized crime syndicate'' is the crux of the term ''continuing unlawful activity''. If this link is not established, that person cannot be roped in.

38. In order to substantiate our construction of Section 2(1)(d) of the MCOCA, we will take hypothetical example of accused 1(A), accused 2(B), accused 3(C) and accused 4(D), who are members of the organized crime syndicate and who have committed crimes within preceding ten years. Insofar as accused A is concerned, it is alleged that he has committed an offence resulting in the death of any person which is punishable with death or imprisonment for life as described in Section 3(1) of the MCOCA. Accordingly, one charge-sheet is filed against him. Insofar as accused B is concerned, it is alleged that he has committed an offence resulting in the death of any person which is punishable with death or imprisonment for life as described in Section 3(2) of the MCOCA. Accordingly, one charge-sheet is filed against him. Likewise, insofar as accused C is concerned, it is alleged that he has committed an offence resulting in the death of any person which is punishable with death or imprisonment for life as

described in Section 3(3) of the MCOCA. Accordingly, one charge-sheet is filed against him. Finally, it is alleged that accused D is a member of organized crime syndicate as described in Section 3(4) of the MCOCA and as such has indulged in organized crime and against whom also one charge-sheet is filed.

39. The submission on behalf of the appellant is that even though all the four accused namely, A, B, C and D may be members of the organized crime syndicate since against each of the accused not more than one charge-sheet is filed, it cannot be held that they are engaged in continuing unlawful activity as contemplated under Section 2(1)(d) of the MCOCA. Apart from the reasons which we have given herein above as to why such a construction is not possible, having regard to the object with which the MCOCA was enacted, namely to make special provisions for prevention and control of organized crime syndicate and for coping with criminal activity by organized crime syndicate, in our opinion, Section 2(1)(d) cannot be so construed. Such a construction will defeat the object of the MCOCA. What is contemplated under Section 2(1)(d) of the MCOCA is that activities prohibited by law for the time being in force which are punishable as described therein have been undertaken either singly or jointly as a member of organized crime syndicate and in respect of which more than one charge-sheets have been filed. Stress is on the unlawful activities committed by the organized crime syndicate. Requirement of one or more charge-sheet is qua the unlawful activities of the organized crime syndicate.

40. In our opinion, in this connection, reliance placed by Mr. Desai on Lalit Nagpal''s case is misplaced. The ratio of the said judgment is misconstrued by the appellant. In that case, the issue whether the words ''more than one charge-sheet'' refer to the unlawful activities of an organized crime syndicate or to the individual members was neither raised nor canvassed. Consequently, the said issue did not fall for consideration and was not decided. This is clear from the submissions made on behalf of the State and recorded particularly in paragraphs 15, 16 and 17 of the Judgment. In paragraph 54 of the said judgment, the Supreme Court clearly stated that from the submissions made on behalf of the State of Maharashtra, it appears that the main question for determination related to the applicability of the MCOC Act to offences under the Essential Commodities Act, 1955 having particular regard to the enactment of the Essential Commodities (Special Provisions) Act, 1981. The High Court had proceeded on the basis that offences punishable under the provisions of the Essential Commodities Act, 1955 committed during the period when the Essential Commodities (Special Provisions) Act, 1981 was in force, could not be said to be offences which could be considered for the purpose of continuing unlawful activity as defined in Section 2(1)(d) of the MCOC Act. On consideration of provisions of both the Acts, the Supreme Court rejected this contention. The Supreme Court then considered individual cases. The Supreme Court observed that so far as Lalit Nagpal and Anil Nagpal are concerned, their involvement was shown in several cases of similar nature. However, so far as Kapil Nagpal was concerned, his involvement was shown only in respect of C.R. No. 25 of 2003 of

the Rasayani Police Station under Sections 468, 420, 34 of the IPC and Sections 3, 7, 9 and 10 of the Essential Commodities Act. However, permission to register offence under Section l(ii) of the MCOCA was taken only in respect of an offence under Section 63 of the Sales Tax Act. The Supreme Court observed that Section 63 of the Sales Tax Act would not attract the provisions of the MCOC Act. Kapil Nagpal was thus not linked to the organized crime syndicate. The nexus was lacking. It is in this context that the Supreme Court observed that so far as Kapil Nagpal is concerned, he has not been shown to be involved in any continuing unlawful activity. The attempt was to apply the MCOCA to a person who had no nexus with the organized crime syndicate. The Supreme Court therefore observed that the provisions of the MCOCA have to be strictly interpreted and the concerned authorities would have to be bound down to strict observance of the said provisions. Observations of the Supreme Court cannot be torn out of context. This judgment, in our opinion, does not lay down the proposition canvassed by Mr. Desai."

The said view is followed by this Court in the case of Sachin Bansilal Ghaiwal (cited supra), wherein this Court, while dealing with the said contentions has observed at paragraphs No. 38 and 39 as under:--

"38. Thus, according to us and in our humble opinion and after giving our earnest consideration, the expression ''member'' as has been termed in Section 2(1)(d) of the MCOC Act can be interpreted and defined as, a person who participates ion the crime either actively or passively or a person who facilitates the commission of the crime committed by the organized crime syndicate or on behalf of the organized crime syndicate, automatically becomes the member of the said crime syndicate which commits the offence or on whose behalf the offence in question is committed, as contemplated under Sec. 2(1)(d), 2(1)(e), Section 3 and other provisions of the MCOC Act.

39. The said intention of the legislature can further be gathered from the expression which is used in Sub-section (2) of Section 3 of the MCOC Act i.e. "any act preparatory to organised crime'' has direct bearing with the expression ''member'' which appears in Section 2(1)(d) of the MCOC Act and therefore taking into consideration the intention of the legislature, widest possible meaning has to be given to the expression ''member'' as is appearing in Sections 2(1)(d), 2(1)(e), Section 3 and other provisions of the MCOC Act."

10. In view of above, we are of the view that the reliance placed by the learned Counsel for the applicants on the judgment of the Apex Court, in the matter of State of Maharashtra and Others Vs. Lalit Somdatta Nagpal and Another, is wholly misplaced. The Apex Court, while dealing with the case brought before it, particularly while allowing the claim for quashing of the MCOCA prosecution against Kapil Nagpal has reached to the conclusion of involvement of the said applicant i.e. Sachin has not been sough to be involved in "continuing unlawful activity". This Court, in the matter of Govind Sakharam Ubhe Vs. The State of Maharashtra (At the instance of DCB, CID, Unit IV) has already dealt with the

said issue as is reflected in paragraph 40 of the judgment in the case of Govind Sakharam Ubhe, as is reproduced herein above.

11. The Special Inspector General of Police, Nashik Range, Nashik, vide his order dated 30th April, 2014, pursuant to provisions of section 23(1)(a) of MCOCA and a proposal/report dated 25th April, 2014 submitted by Police Inspector, Shevgaon police station has accorded prior approval to apply the provisions of MCOCA to C.R. No. 43 of 2014, referred supra. A condition is also incorporated that the concerned Sub-Divisional Police Officer, Nagar Sub-Division should obtain sanction of the Additional Director General of Police (Law and Order) before filing charge-sheet in the case.

12. Perusal of the prior approval reflects consideration of the investigation papers, record of evidence and the record of the accused persons arrested in the offence. The said authority has also gone through the evidence indicating involvement of the accused persons including that of the applicants in the offence. The authority has recorded its satisfaction that the accused persons involved in C.R. No. 43 of 2014 are members of the organized crime syndicate headed by accused Yunus Shaikh Chand. The authority has also taken into account the ''continuing unlawful activity'' of the organized crime syndicate headed by Yunus Shaikh Chand, in respect of which more than one charge-sheets have been filed before the competent Court within the preceding period of ten years in respect of cognizable offence punishable with imprisonment of three years or more and the Court has taken the cognizance of the same and as such recorded satisfaction that the case is made out to attract the provisions of the MCOCA.

13. Perusal of the order dated 30th April, 2014, passed by Special Inspector General of Police, Nashik Range, Nashik and the record produced by the investigating agency/respondents herein discloses complete application of mind before passing the order of approval. In view of above, in our opinion, no case for interference is made out. The present applications being sans merit stand rejected. Rule stands discharged.