

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Reserved on: 23.09.2009
Date of decision: 15.10.2009

+ WP (CRL.) No.375 of 2007

OM PRAKASH SHRIVASTAVA
@ BABLOO SHRIVASTAVA

...PETITIONER

Through: Mr. K.T.S. Tulsi, Sr. Advocate
with Mr. Raj Kamal, Advocate.

Versus

STATE OF NCT OF DELHI & ORS.

...RESPONDENTS

Through: Ms. Mukta Gupta, Standing Counsel
for the Government of NCT of
Delhi / Respondent Nos. 1 & 2.

Mr. Chinmoy Khaladkar with
Mr. Priank Adhiyan, Advocates
for the State of Maharashtra /
Respondent No. 3.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE AJIT BHARIHOKE

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| 1. | Whether the Reporters of local papers
may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be
reported in the Digest? | Yes |

SANJAY KISHAN KAUL, J.

1. The petitioner against whom thirty-three (33) FIRs were registered for various serious offences during the period 1983-1995 was extradited from Singapore to India on 30.8.1995. The extradition was based on four (4) FIRs out of the said thirty-three (33) FIRs and in the subsequent

period during 1995 to 1999 six (6) more FIRs were registered against the petitioner. On 2.1.2002 the Maharashtra Control of Organised Crime Act (MCOCA), 1999 (hereinafter referred to as the said Act) was extended to the National Capital Territory of Delhi vide GSR6(E). Two (2) more FIRs were registered against the petitioner being FIR Nos.33/03 and 125/03 though according to the petitioner they arise out of the same incident. On 29.12.2006, FIR No.104/06 was registered at P.S. Lodhi Road under Section 3 of the said Act against the petitioner and another accused.

2. The petitioner filed a writ petition, being WP (Crl.) No.84/2007 under Article 226 of the Constitution of India read with Section 482 of the Cr.P.C. seeking quashing of FIR No.104/2006 on the ground that the registration of the said FIR was in derogation of the mandate contained in Article 20 (1) of the Constitution of India which prohibits application of *ex post facto* criminal laws. The proceedings recorded in the said criminal writ petition on 22.1.2007 show that files of WP (Crl.) Nos.45/2006, 159-160/2006 & 161-162/2006 titled as Jagmohan @ Mohar Singh Vs. Commissioner of Police and Others decided on 1.12.2006 were called. It is the case of the petitioner that there were certain observations made in the decision of Jagmohan & Mohar Singh case (supra) which had an effect on the writ petition filed by the petitioner and thus the counsel for the petitioner withdrew WP (Crl.) No.84/2007 with liberty to file

a fresh petition seeking to challenge the constitutional validity of the said Act as applicable to Delhi being violative of Article 20 of the Constitution of India. It is thereafter that the present writ petition has been filed in March 2007 making the following prayers:

“....

A. strike down Section 3 of the Maharashtra Control of Organised Crime Act, 1999 (as applicable to NCT of Delhi), as ultra vires being violative of Article 20 (1) of the Constitution of India;

B. Quash the impugned FIR No.104/06, dated 29.12.2006 registered at P.S. Special Cell under Section 3 of the Maharashtra Control of Organised Crime Act, 1999 (as extended to the NCT of Delhi) and proceedings emanating therefrom;

....”

3. The pleadings were completed in the writ petition and since the question raised in the writ petition was regarding interpretation of Section 3 of the said Act, learned counsel for the State of Maharashtra also requested that he should be heard and thus the State of Maharashtra was impleaded as the third respondent in terms of the order dated 13.7.2009. The synopsis filed by the counsel for the petitioner sought to raise various issues but during the course of hearing learned senior counsel for the petitioner, on instructions, confined the submissions only to one issue, which is as under:

“Whether the act/offence committed prior to the coming into force of MCOCA can be taken into account for prosecution under Section 3(1) of the said Act?”

4. The MCOCA was enacted as an Act to make special provisions for prevention and control of and for coping with criminal activity by organized crime syndicate or gang, and

for matters connected therewith or incidental thereto. The objects and reasons of the Act insofar as the State of Maharashtra is concerned have discussed the fact that organized crime has come up as a serious threat to our society irrespective of national boundaries. Such activity is fueled by illegal wealth generation by contract killings, extortion, smuggling in contrabands, illegal trade in narcotics, kidnapping for ransom, collection of protection money and money laundering, etc. The organized crime syndicates make a common cause with terrorist gangs and foster narco terrorism which extend beyond the national boundaries. The State felt that it had also become necessary to have law for interception of wire and oral communications used in furtherance of these criminal activities so as to prevent their commission and the existing legal framework was found rather inadequate to curb or control organized crime. It was for this purpose that the special law was enacted. The said Act was extended to the National Capital Territory of Delhi by GSR6(E) in exercise of powers conferred by Section 2 of the Union Territories (Laws) Act, 1950 by the Central Government with certain modifications. It is necessary to refer to some of the provisions which are germane for the present controversy.

5. Section 2 of the said Act is the Definitions Section and as to what constitutes “continuing unlawful activity” is defined under sub-clause (d) while “organized crime” is defined under sub-clause (e) which read as under:

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

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

6. The punishment for organized crime is provided for in Section 3 of the said Act, which reads as under:

“3. Punishment for organised crime-

(1) Whoever commits an offence of organised 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 organised crime or any act preparatory to organised 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 of rupees five lacs.

(3) Whoever harbours or conceals or attempts to harbour or conceal, any member of an organised 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 organised 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 of obtained from commission of an organised crime or which has been acquired through the organised 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.”

7. Learned senior counsel for the petitioner drew our attention to the provisions of Article 20 (1) of the Constitution of India which reads as under:

“20. (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.”

8. Learned counsel, thus, contended that the acts which are alleged to constitute an offence under different provisions of The Indian Penal Code, 1860 (hereinafter referred to as the IPC) prior to the said Act being applicable to Delhi could not be taken into account for prosecuting the petitioner under Section 3 of the said Act which provides for punishment for “organized crime”. Learned counsel contended as to what constitutes “organized crime” is defined under Section 2 (1) (e) of the said Act and the consequences are made penal for the first time under Section 3 of the said Act. Thus, such “organized crime” has been made a new offence under the provisions of the said Act and the natural sequittor is that only acts done after the

enactment has come into force would be relevant for determining whether the offence of such “organized crime” has been committed which should be punished in accordance with Section 3 of the said Act.

9. Learned senior counsel for the petitioner elucidated his argument by explaining that an act to constitute “organized crime” within the meaning of Section 2 (1) (e) of the said Act must have various ingredients:

- i. Continuing unlawful activity;
- ii. Singly or jointly, either as a member of an organized crime syndicate or on behalf of such syndicate;
- iii. Use of violence or threat of violence or intimidation or coercion or other unlawful means;
- iv. Objective of gaining pecuniary benefits or gaining undue economic or other advantage for himself or any other person or promoting insurgency.

10. As to what is meant by the expression “continuing unlawful activity” in the definition of “organized crime” it was submitted that the statute defines the same in Clause (d) of Section 2 (1) of the said Act. In terms of this definition the activity prohibited by law should be a cognizable offence punishable with imprisonment of three (3) years or more and in respect of which more than one charge-sheet has been filed before a competent court within “the preceding period of ten (10) years” of which the court has taken cognizance. It was submitted that the period of ten (10)

years specified is the permissible outer limit and since there has to be more than one (1) charge-sheet, the said charge-sheet should be for an act after the Act has been made applicable.

11. The task of the learned senior counsel for the petitioner, as submitted by him had become easier and confined to a narrow compass in view of the counter affidavit filed on behalf of the Union of India as verified on 15.9.2009. In para 12 of the affidavit, the Union of India submitted that no offence committed prior to 2.1.2002 had been made an offence under MCOCA and those offences would continue to be tried under the relevant provisions of the IPC. However, further the plea advanced on behalf of the Union of India in that paragraph is that certain offences committed in the last ten (10) years in which charge-sheet has been filed and a court of competent jurisdiction has taken cognizance would be taken into account for the purposes of determining whether the accused is indulging in continued unlawful activity. It is this aspect which was disputed by learned senior counsel for the petitioner and that is what gave rise to the framing of the question which required adjudication referred to aforesaid.
12. Learned senior counsel emphasized that Article 20 (1) of the Constitution of India has been held to be much wider in terms than the principles incorporated in the American Constitution which merely prohibits an *ex post facto* law. The submission advanced was that what is prohibited under

the Indian Constitution is subjecting a citizen to penalty to *ex post facto* laws and extends to conviction on sentence and fullest effect has been given to this Article by the Supreme Court. In support of his contention learned counsel referred to the judgement of the Supreme Court in Rao Shiv Bahadur Singh & Anr. Vs. The State of Vindhya Pradesh (1953) 4 SCR 1188. The two questions examined by the Supreme Court related to: “(1) the proper construction of Article 20 of the Constitution; and (2) whether the various acts in respect of which the appellants were convicted constituted offences in this area only from the date when the Ordinance was passed or were already so prior thereto”. The Supreme Court after referring to Article 20 (1) of the Constitution of India observed as under:

“10. This article in its broad import has been enacted to prohibit convictions and sentences under *ex post facto* laws. The principle underlying such prohibition has been very elaborately discussed and pointed out in the very learned judgment of Justice Willes in the well known case of *Phillips v. Eyre* [(1870) 6 Q.B.D. 1, at 23 and 25.] and also by the Supreme Court of U.S.A. in *Calder v. Bull* [3 Dallas 386; 1 Law. Edition 648 at 649.]. In the English case it is explained that *ex post facto* laws are laws which voided and punished what had been lawful when done. There can be no doubt as to the paramount importance of the principle that such *ex post facto* laws, which retrospectively create offences and punish them are bad as being highly inequitable and unjust. In the English system of jurisprudence repugnance of such laws to universal notions of fairness and justice is treated as a ground not for invalidating the law itself but as compelling a beneficent construction thereof where the language of the statute by any means permits it. In the American system, however, such *ex post facto* laws are themselves rendered invalid by virtue of article 1, sections 9 and 10 of its Constitution. It is contended by the learned Attorney-General that article 20 of the Constitution was meant to bring about nothing more than the invalidity of such *ex post facto* laws in the post-Constitution period but that the validity of the pre-Constitution laws in this behalf was not intended to be

affected in any way. The case in *Keshavan Madhavan Menon v. The State of Bombay* 1951 S.C.R. 228. has been relied on to show that the fundamental rights guaranteed under the Constitution have no retrospective operation, and that the invalidity of laws brought about by article 13(1) of the Constitution relates only to the future operation of the pre-Constitution laws which are in violation of the fundamental rights. On this footing it was argued that even on the assumption of the convictions in this case being in respect of new offences created by Ordinance No. XLVIII of 1949 after the commission of the offences charges, the fundamental right guaranteed under article 20 is not attracted thereto so as to invalidate such convictions.

11. This contention, however, cannot be upheld. On a careful consideration of the respective articles, one is struck by the marked difference in language used in the Indian and American Constitutions. Sections 9(3) and 10 of article 1 of the American Constitution merely say that "No ex post facto law shall be passed ..." and "No State shall pass ex post facto law ..." But in article 20 of the Indian Constitution the language used is in much wider terms, and what is prohibited is the conviction of a person or his subjection to a penalty under ex post facto laws. The prohibition under the article is not confined to the passing or the validity of the law, but extends to the conviction or the sentence and is based on its character as an ex post facto law. The fullest effect must therefore be given to the actual words used in the article. Nor does such a construction of article 20 result in giving retrospective operation to the fundamental right thereby recognised. All that it amounts to is that the future operation of the fundamental right declared in article 20 may also in certain cases result from acts and situations which had their commencement in the pre-Constitution period. In *The Queen v. St. Mary Whitechapel* [116 E.R. 811 at 814.] Lord Denman C.J. pointed out that a statute which in its direct operation is prospective cannot properly be called a retrospective statute because a part of the requisites for its action is drawn from a time antecedent to its passing. The general principle therefore that the fundamental rights have no retrospective operation is not in any way affected by giving the fullest effect to the wording of article 20. This article must accordingly be taken to prohibit all convictions or subjections to penalty after the Constitution in respect of ex post facto laws whether the same was a post-Constitution law or a pre-Constitution law. That such is the intendment of the wording used in article 20(1) is confirmed by the similar wording used in articles 20(2) and 20(3). Under article 20(2), for instance, it cannot be reasonably urged that the prohibition of double jeopardy applies only when both the occasions therefore arise after the

Constitution. Similarly, under article 20(3) it cannot be suggested that a person accused before the Constitution can be compelled to be a witness against himself, if after the Constitution the case is pending.

12. In this context it is necessary to notice that what is prohibited under article 20 is only conviction or sentence under an ex post facto law and not the trial thereof. Such trial under a procedure different from what obtained at the time of the commission of the offence or by a court different from that which had competence at the time cannot ipso facto be held to be unconstitutional. A person accused of the commission of an offence has no fundamental right to trial by a particular court or by a particular procedure, except in so far as any constitutional objection by way of discrimination or the violation of any other fundamental right may be involved."

13. The Supreme Court after discussing the scope and ambit of the Constitution of India on the second issue observed as under:

"13. In this connection our attention has been drawn to the fact that the Vindhya Pradesh Ordinance XLVIII of 1949, though enacted on 11th September, 1949, i.e., after the alleged offences were committed, was in terms made retrospective by section 2 of the said Ordinance which says that the Act "shall be deemed to have been in force in Vindhya Pradesh from the 9th day of August, 1948," a date long prior to the date of commission of the offences. It was accordingly suggested that since such a law at the time when it was passed was a valid law and since this law had the effect of bringing this Ordinance into force from 9th August, 1949, it cannot be said that the convictions are not in respect of "a law in force" at the time when the offences were committed. This, however, would be to import a somewhat technical meaning into the phrase "law in force" as used in article 20. "Law in force" referred to therein must be taken to relate not to a law "deemed" to be in force and thus brought into force but the law actually in operation at the time or what may be called the then existing law. Otherwise, it is clear that the whole purpose of article 20 would be completely defeated in its application even to ex post facto laws passed after the Constitution. Every such ex post facto law can be made retrospective, as it must be, if it is to regulate acts committed before the actual passing of the Act, and it can well be urged that by such retrospective operation it becomes the law in force at the time of the commencement of the Act. It is obvious that such a construction which nullifies article 20 cannot possibly be adopted. It cannot therefore be

doubted that the phrase "law in force" as used in article 20 must be understood in its natural sense as being the law in fact in existence and in operation at the time of the commission of the offence as distinct from the law "deemed" to have become operative by virtue of the power of legislature to pass retrospective laws. It follows that if the appellants are able to substantiate their contention that the acts charged as offences in this case have become such only by virtue of Ordinance No. XLVIII of 1949 which has admittedly been passed subsequent to the commission thereof, then they would be entitled to the benefit of article 20 of the Constitution and to have their convictions set aside. This leads to an examination of the relevant pre-existing law."

14. Learned senior counsel for the petitioner, thus, drew a parallel to the case in hand to contend that since the acts charged had become offences for the first time under the said Act, the acts committed prior to the said Act coming into force could not give rise to the prosecution of the petitioner under the provisions of Section 3 of the said Act as the petitioner would be entitled to the benefit of Article 20 of the Constitution of India.
15. Learned senior counsel for the petitioner also referred to the judgement of the Supreme Court in Soni Devrajibhai Babubhai Vs. State of Gujarat & Ors. (1991) 4 SCC 298. The matter pertained to the prosecution under Section 304B of the IPC which had been inserted in the IPC w.e.f 19.11.1986. The petitioner's daughter had been married to the second respondent on 5.12.1984 and she had died on 13.8.1986. Both these dates were prior to the date of coming into force of Section 304B of the IPC. The High Court took the view that the offence was committed prior to the insertion of Section 304B of the IPC on account of which the Section would have no application to the facts of the

case as the offence of dowry death punishable under Section 304B of the IPC was a new Section inserted in the IPC w.e.f. 19.11.1986. It was held that Section 304B was a substantive provision creating a new offence and not merely a provision effecting a change in the procedure for trial of a pre-existing substantive offence and thus applying the said Section to the offence in question would clearly deny the protection afforded by Article 20 (1) of the Constitution of India.

16. Learned counsel submitted that the bedrock of his case are the observations of the Supreme Court in the aforesaid two judgements but proceeded to also refer to the judgement in Union of India Vs. Yumnam Anand M. @ Bocha @ Kora @ Suraj & Anr. (2007) 10 SCC 190, more specifically paras 5 & 6. We, however, find that the said case is one of preventive detention where observations have been made in paras 5 & 6 as to how a representation against the preventive detention is to be considered and the sanctity of the protection granted under Article 21 of the Constitution of India of personal liberty. In the facts of the present case the said observations appear to us to have no relevance. Not only that learned counsel also referred to some other judgements to contend that the enormity and gravity of the offence cannot justify the action of the State if it is not supported by law. In V.C. Mohan Vs. Union of India & Ors. (2002) 3 SCC 451 while dealing with the issue of preventive detention being admittedly an invasion of personal liberty it

was observed that the guardian angel of the Constitution stand poised with a responsibility to zealously act as a watchdog so that injustice does not occur: let us not be understood to mean however that there ought to be any overzealousness since the same may lend assistance to a situation which is otherwise not compatible with social good and benefit. In para 15 it was observed that the enormity and gravity of the offences alleged against the petitioner does not require further scrutiny if the safeguards of preventive detention are not met. To the same effect are the observations in Kundanbhai Dulabhai Shaikh Vs. District Magistrate, Ahmedabad & Ors. (1996) 3 SCC 194 and Kamleshkumar Ishwardas Patel Vs. Union of India & Ors. (1995) 4 SCC 51.

17. Learned counsel also referred to the judgement of the Supreme Court in Standard Chartered Bank & Ors. Vs. Directorate of Enforcement & Ors. (2006) 4 SCC 278 to explain as to what constitutes an offence:

“....The word “offence” is not defined in the Act. According to Concise Oxford English Dictionary, it means, “an act or instance of offending”. Offend means, “commit an illegal act” and illegal means, “contrary to or forbidden by law”. According to New Shorter Oxford English Dictionary, an offence is “a breach of law, rules, duty, propriety, etiquette, an illegal act, a transgression, sin, wrong, misdemeanour, misdeed, fault”. Thus, an offence only means the commission of an act contrary to or forbidden by law. It is not confined to the commission of a crime alone. It is an act committed against law or omitted where the law requires it and punishable by it. In its legal signification, an offence is the transgression of a law; a breach of the laws established for the protection of the public as distinguished from an infringement of mere private rights; a punishable violation of law, a crime, the doing that which a penal law forbids to be done or omitting to do what it commands (see P. Ramanatha Aiyar’s

Advanced Law Lexicon, 3rd Edn., 2005, p. 3302). This Court in *Depot Manager, A.P. SRTC v. Mohd. Yousuf Miya* stated that the word “offence” generally implies infringement of a public duty, as distinguished from mere private rights punishable under criminal law. In *Brown v. Allweather Mechanical Co.*¹⁶ it was described as: (All ER p. 476 A-B)

A failure to do something prescribed by a statute may be described as an offence, though no criminal sanction is imposed but merely a pecuniary sanction recoverable as a civil debt.

The expression “offence” as defined in Section 3(38) of the General Clauses Act means an act or omission made punishable by any law for the time being in force. “Punishable” as noticed by this Court in *Sube Singh v. State of Haryana* is ordinarily defined as deserving of, or capable or liable to punishment. According to Concise Oxford English Dictionary, “punish” means, “inflict a penalty on as retribution for an offence, inflict a penalty on someone for (an offence)”. In New Shorter Oxford English Dictionary (Vol. 2, 3rd Edn., reprint 1993), the meaning of punishment is given as, “infliction of a penalty in retribution for an offence; penalty imposed to ensure application and enforcement of a law”. Going by Black’s Law Dictionary (8th Edn.) it is:

“A sanction—such as a fine, penalty, confinement, or loss of property, right, or privilege—assessed against a person who has violated the law.”

According to Jowitts Dictionary of English Law, Vol. 2, (2nd Edn. by John Burke), punishment is the penalty for transgressing the law....”

18. The case both on behalf of the Union of India and the State of Delhi was advanced by Ms. Mukta Gupta, Advocate while Mr. Chinmoy Kaladkar, Advocate made his submissions on behalf of the State of Maharashtra. The challenge laid by the petitioner was alleged to be misconceived in view of existing judicial pronouncements which had dealt with the provisions of Section 3 of the said Act and upheld the same. The origination of the litigation in respect of the said Act was a criminal writ petition filed against the State of Maharashtra. The first aspect of the challenge was in

respect of the legislation making provision for interception of telecommunication which was alleged to be an already occupied field by The Indian Telegraph Act, 1885 and thus the State of Maharashtra could not legislate on that subject. The second aspect of challenge was based on the assumption of existence of legislative competence in the Maharashtra Legislature but the provisions making serious inroads on fundamental rights of citizens and thus the legislation being unconstitutional. This challenge was decided in Bharat Shantilal Shah, Shamim Mirza Arif Beg & Sanjay Patil Vs. The State of Maharashtra (2002) 1 BOM LR 527. The discussion in the judgement shows that undisputedly the entire enactment revolved around what was meant by continuing unlawful activity, organized crime and organized crime syndicate. The definitions contained in Section 2 (1)(d), (e) & (f) were alleged to be so interwoven and interdependent that they were unconstitutional taken together as they violate the requirement of Article 13 (2) of the Constitution of India. The Division Bench of the Bombay High Court thereafter proceeded to consider these definitions and their constitutional validity. The definition in Section 2 (1) (d) of “continuing unlawful activity” was contended to be violative of Article 14 of the Constitution of India. It was contended on behalf of the petitioner therein that a person charged ten (10) 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 (3) years punishment cannot be touched by this definition if he is not charged with more than two of such offences. The plea of the petitioner therein that the definition of continuing unlawful activity is, thus, vague as it did not state with any certainty as to who and when shall be said to have engaged in continuing unlawful activity was negated relying on the observations of the Supreme Court in Amritsar Municipality Vs. State of Punjab AIR 1969 SC 1100 where it was observed as under:

“But the rule that an Act of a competent legislature may be "struck down" by the Courts on the ground of vagueness is alien to our Constitutional system. The Legislature of the State of Punjab was competent to enact legislation in respect of "fairs" vide entry 28 of List II of the Seventh Schedule to the Constitution. A law may be declared invalid by the superior Courts in India if the Legislature has no power to enact the law or that the law violates any of the fundamental rights guaranteed in Part III of the Constitution or is inconsistent with any Constitutional provision, but not on the ground that it is vague.”

19. The Division Bench, thus, rejected the argument based on the definition of continued criminal activity being vague. Similarly, the challenge to the said provision being violative of Article 14 of the Constitution of India was also negated in the following words:

“...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 one for which charge sheet has been filed in the court of competent jurisdiction in the part 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 unequal 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 vide of class legislation.”

20. There are some other observations also made on the aspect of challenge that the equality clause in the Constitution of India was violated and it would be useful to reproduce them:

“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. In *P. Rathinam v. Union of India* 1994CriLJ1605 the Supreme Court repelled a some what similar challenge to the validity of Section 309 of the IPC as follows:

"18. In so far as treating of different attempts to commit suicide by the same measure is concerned, the same also cannot be regarded as violative of Article 14, inasmuch as the nature, gravity and extent of attempt may be taken care of by tailoring the sentence appropriately. It is worth pointing out that Section 309 has only provided the maximum sentence which is up to one year. It provides for imposition of fine only as a punishment."

28. Section 2(1)(d) defines what the continuing unlawful activity is and the enactment is intended to prevent and control organized crime. Organized crime is something which is continued unlawful activity and that continuing unlawful activity is repeatedly indulging or facing charge of indulgence in crimes punishable with three years or more. The definition therefore thus defines with clarity what is meant by continuing unlawful activity for the purpose of achieving the object of the Act. There is therefore no vagueness nor any violation of Article 14 of the Constitution. We therefore hold the definition in Section 2(1)(d) as constitutionally valid. We reject the submission of the petitioners and it is liable to be struck down for any of the two grounds dealt with by us in the foregoing paragraphs.

29. We therefore hold that there is no ambiguity or vagueness of any kind in the definitions of the organized crime and organized crime syndicate occurring in Section 3(e) and (f). It is true that these sections are interconnected and dependent on each other for their construction. Once we read Section 2(1)(d) to mean unlawful activity as quoted above the definition of organized crime as contained in Section 2(1)(e) does not suffer from any flaw. There is no vagueness in any other part of this section and in our opinion therefore Section 2(1)(e) is also valid and constitutional. For the same reasons we also hold that the provisions of Section 2(1)(f) defining organized crime syndicate are also clear and unambiguous and therefore constitutionally valid."

21. The Division Bench thereafter proceeded to consider the provisions of Section 3 of the said Act. The aspect of Section 4 of the said Act providing punishment for possession of unaccountable wealth on behalf of member of organized crime syndicate being violative of Article 20 of the Constitution of India was also examined as under:

"36. Another submission is that this section makes an act which was not a crime prior to coming into force of this Act, a crime. As required by Article 20 therefore such an action can not be made a crime with retrospective effect. However in our opinion, this mischief also can be remedied by reading the section as under:

"4. Punishment for possessing unaccountable wealth on behalf of member of organized syndicate.--If any person on behalf of a member of an organized crime

syndicate is, or, at any time (after coming into force of this Act) has been, in possession of movable or immovable property which he can not satisfactorily account for, he shall be punishable with imprisonment for a term which shall not be less than three years which may extend to ten years and shall also be liable to fine, subject to a minimum fine of rupees one lac and such property shall also be liable for attachment and forfeiture, as provided by Section 20."

37. There is another reason for so reading it. Perusal of the complete enactment will disclose that it is only prospective and not retrospective in any place. Therefore the words "at any time" must be read prospectively to mean at any time after coming into force of this Act. So read there will be no error or vagueness or infirmity in Section 4. We therefore hold that it be read as stated above and so read we hold that it is constitutionally valid."

22. The Division Bench, thus, read down the provisions to imply that the words "at any time" must be read prospectively keeping in view the Article 20 of the Constitution of India.
23. The matter thereafter went to the Supreme Court in State of Maharashtra Vs. Bharat Shanti Lal Shah & Ors. (2008) 13 SCC 5. The constitutional validity of Section 3 of the said Act was upheld along with that of Section 2 (1) (d), (e) & (f) of the said Act. It was found that there was no vagueness nor did it suffer from vice of class legislation and was not violative of Article 14 of the Constitution of India. The fact that Section 4 of the said Act was also sought to be challenged as being violative of Article 20 of the Constitution of India was also noticed and the plea rejected.
24. The judgement of the Bombay High Court has been dealt with by us in detail because learned senior counsel for the petitioner sought to make out a case that the Supreme Court had not commented on the aspect of the provisions of Section 3 of the said Act being hit by Article 20 (1) of the

Constitution of India while learned counsels for the respondents pointed out the aforesaid observations to show that the aspect of Article 20 of the Constitution of India has been discussed in detail in the judgement of the Bombay High Court which has been upheld by the Supreme Court to that extent.

25. The aforesaid becomes relevant as learned counsel for the State of Maharashtra referred to the judgement in M/s. Kesho Ram & Co. & Ors. Etc. Vs. Union of India & Ors. (1989) 3 SCC 151 to advance the proposition that once the constitutional validity of a provision is upheld by the Supreme Court, the principles of constructive *res judicata* would come into play as all grounds must be presumed to have been considered by the court and a fresh litigation challenging validity of the same provision on some additional grounds would be barred by the principle of *res judicata*. The validity of Section 3 of the E.P. Urban Rent Restriction Act, 1949 was upheld in Punjab Tin Supply Co., Chandigarh & Ors. Vs. Central Government & Ors. (1984) 1 SCC 206. Some of the tenants who were unsuccessful before the Supreme Court had again filed petition challenging the validity of Section 3 on the additional grounds. It was held that the petition by such tenants was not maintainable as the same was barred by principle of *res judicata* since they ought to have raised all the grounds in the earlier petition and cannot raise the same grounds in the subsequent petition. It was observed that finality in

litigation and public policy both require that a litigant should not be permitted to challenge the validity of the provisions of the Act or notification at different times on different grounds. The binding effect of a decision of the Supreme Court was held not to depend upon whether a particular argument was considered or not provided the point with reference to which the argument is advanced subsequently was actually decided in the earlier decision. Similarly, in Delhi Cloth & General Mills Ltd. Vs. Shambhu Nath Mukherji & Ors. (1977) 4 SCC 415 the fact that the challenge to Section 10 of the Industrial Disputes Act, 1947 being violative of Article 14 of the Constitution of India had been repelled earlier was held to be sufficient and the Supreme Court categorically stated that it was not permissible to raise the question again by submitting that a new ground could be made to raise objection affecting its constitutionality. The learned counsel for the State of Maharashtra also referred to the observations of the Full Bench of the Gujarat High Court in Sarjubhaiya Mathurbhaiya Kahar Vs. Deputy Commissioner of Police & Anr. 1984 Cri.LJ 1474 to the effect that once a matter has been considered by the Supreme Court on earlier occasions as a result of which consideration sections have been held to be valid, a new ground of challenge even on the basis of approach made in later decisions of the Supreme Court may not be available before this Court to the petitioner.

26. A reference was also made to the Division Bench judgement of the Bombay High Court in Jaisingh Vs. State of Maharashtra 2003 BomCR (Cri) 1606 where the petitioner sought to challenge the constitutional validity of the provision of law contained in the said Act being violative of Article 20 (1) of the Constitution of India. The challenge in the course of arguments was restricted to the ground of unconstitutionality of the expression “within the preceding period of ten years” in Section 2 (1) (d) of the said Act contending that the same to be in contravention of the provisions of law contained in Article 20 (1) of the Constitution of India as on account of the said expression the competent authority under the said Act is empowered to consider the acts committed prior to the enforcement of the said Act as the offences under the said Act. Section 3, Section 2 (1) (d), (e) & (f) were discussed specifically in the context of observations made in Rao Shiv Bahadur Singh & Anr. case (supra). It was observed in The Queen Vs. St. Mary Whitechapel 116 E.R. 811 referred to by the Apex Court in Rao Shiv Bahadur Singh & Anr. case (supra) as well as the judgement of the Supreme Court in Sajjan Singh Vs. State of Punjab 1964 (4) SCR 630 became material as merely because a part of the requisites for its action under the statute is drawn from a time antecedent to its passing, such statute which is otherwise prospective in nature cannot be said to be retrospective in nature. In Jai Singh case (supra) while dealing with the law contained in Sajjan

Singh Vs. State of Punjab case (supra) dealing with Section 5 (3) of The Prevention of Corruption Act, 1988 it was observed that it was impossible to say by reference to the provision that the pecuniary resources and property acquired before the date on which the Prevention of Corruption Act came into force should not be taken into account even if in possession of the accused or any other person on his behalf. To accept such an interpretation would imply that the Section contained additional words “if acquired after the date of this Act” for which there was no justification. It was further observed as under:

“18. Referring to the statute under consideration in the case in hand, neither the definition of the term "organised crime" nor of the term "continuing unlawful activity" nor any other provision therein declares any activity performed prior to 24-2-1999 to be an offence under the said Act nor the punishment provision relates to any offence prior to the date of enforcement of the said Act. Yet by referring to the expression 'preceding period of ten years' in Section 2(d) which is a definition clause of the term "continuing unlawful activity" inference is sought to be drawn that in fact it takes into its ambit the acts done prior to the enforcement of the said Act as being offences under the said Act.

19. There is lot of difference between the act or activity itself being termed or called as an offence under a statute and such act or activity being taken into consideration as one of the requisites for taking action under the statute. The former situation has to satisfy the mandate of Article 20(1) of the Constitution; however, in case of latter situation, it stands on totally different footing. Undoubtedly, for the purpose of organised crime there has to be a continuing unlawful activity. There cannot be continuing unlawful activity unless at least two charge-sheets are to be found to have been lodged in relation to the offence punishable with three years' imprisonment during the period of ten years. Undisputedly, the period of ten years may relate to the period prior to 24-2-1999 or thereafter. In other words, it provides that the activities which were offences under the law in force at the relevant time and in respect of which two charge-sheets have been filed and the Court has taken cognizance thereof, during the period of preceding ten years, then it will be considered

as continuing unlawful activity on 24-2-1999 or thereafter. It nowhere by itself declares any activity to be an offence under the said Act prior to 24-2-1999. It also does not convert any activity done prior to 24-2-1999 to be an offence under the said Act. It merely considers two charge-sheets in relation to the acts which were already declared as offences under the law in force to be one of the requisites for the purpose of identifying continuing unlawful activity and/or for the purpose of an action under the said Act. This by itself cannot be said to be in any manner violative of the mandate of Article 20(1) considering the law laid down by the Apex Court in Rao Shiv Bahadur Singh's case as well as in Sajjan Singh's case.

20. As regards the second submission pertaining to the reading down of Section 2(d) in relation to the expression 'preceding period of ten years' to be effective or to commence from 24-2-1999, if accepted virtually amounts to reading something in the said provision of law which is not intended by the Legislature, and thereby it would virtually amount to defeat the very purpose of the said Act itself, apart from the fact that it is settled law that once the contention about unconstitutionality of the provision of law is rejected, question of reading down the same provision does not arise. The Apex Court in *Electronics Corporation of India Ltd. and others v. Secretary, Revenue Department, Government of Andhra Pradesh and others* reported in AIR1999SC1734 has held that "the question of reading down comes in if it is found that these provisions are ultra vires as they stand. We have held that these provisions are not ultra vires because Article 285 does not apply when the property that is to be taxed is not of the Union of India but of a distinct and separate legal entity." Similarly, in *K. G. Ashok and others v. Kerala Public Service Commission and others* reported in [2001]3SCR453, wherein though the candidates had applied for selection in more than one district, they could appear only in one district in view of the fact that the test was conducted in all the districts on one day, it was sought to be contended that the rule restricting filing of application for one district incorporated in Note 2 of the notification should be read down in its application to the cases of the appellants in those appeals before the Apex Court, while rejecting the said contention, it was ruled that "the submission has been made only to be rejected as in the present case we have already held that the aforesaid restriction contained in Note 2 is not violative of Article 14 of the Constitution. Therefore, the question of reading down the same does not arise." The very fact that the expression used in the Section 2(d) contains the word 'preceding' knowing well that the Act has to come into force from 24-2-1999, it is apparent that it has to relate to the period even prior to 24-2-1999. Undoubtedly, had it been directly related to

declaring any act as an offence under a present Act prior to the date of enforcement of the said Act, certainly it would have been in violation of the mandate of Article 20(1) of the Constitution. However, as already observed above, the period specified in Section 2(d) of the said Act relates to merely one of the requisites to consider whether the activity is a continuing unlawful activity or not for the purpose of taking action under the said Act and being so, applying the law laid down by the Apex Court in Rao Shiv Bahadur's case and Sajjan Singh's case the same cannot be held to be in any manner violative of Article 20(1) of the Constitution.

21. In the result, therefore, there is neither any scope for declaring the provisions of law in the said Act to be violative of the Article 20(1) of the Constitution nor there is scope for reading down the provision in the manner indicated by the petitioners and, therefore, the challenge to the provisions of the said Act being in violation of the constitutional mandate fails."

27. Ms. Mukta Gupta, Advocate emphasized that Section 4 of the said Act deals with the punishment for possession of unaccountable wealth on behalf of member of organized crime syndicate while Section 20 of the said Act provides for forfeiture and attachment of property. Section 4 of the said Act reads as under:

"4. Punishment for possessing unaccountable wealth on behalf of member of organized syndicate.--If any person on behalf of a member of an organized crime syndicate is, or, at any time (after coming into force of this Act) has been, in possession of movable or immovable property which he cannot satisfactorily account for, he shall be punishable with imprisonment for a term which shall not be less than three years which may extend to ten years and shall also be liable to fine, subject to a minimum fine of rupees one lac and such property shall also be liable for attachment and forfeiture, as provided by Section 20."

28. Learned counsel, thus, contended that even if an asset was acquired in the past but it continued to be held by the accused, then the act of continuation of holding that property became an offence and such continuing unlawful

activity was a distinct offence, thus, in such a case the accused is not tried for a past offence but for a distinct offence of continuing to possess that property. Learned counsel referred to the judgement in Sajjan Singh Vs. State of Punjab case (supra) where it was observed in para 13 as under:

“13. A statute cannot be aid to retrospective "because a part of the requisites for its action is drawn from a time antecedent to its passing". (Maxwell on Interpretation of Statutes, 11th Edition, p. 211; See also State of Maharashtra v. Vishnu Ramchandra 1961CriLJ450 . Notice must be taken in this connection of a suggestion made by the learned Counsel that in effect sub-section 3 of section 5 creates a new offence in the discharge of official duty, different from what is defined in the four clauses of s. 5(1). It is said that the act of being in possession of pecuniary resources or property disproportionate to known sources of income, if it cannot be satisfactorily accounted for, is said by this sub-section to constitute the offence of criminal misconduct in addition to those other acts mentioned in cls. a, b, c and d of s. 5(1) which constitute the offence of criminal mis-conduct. On the basis of this contention the further argument is built that if the pecuniary resources or property acquired before the date of the Act is taken into consideration under sub-section 3 what is in fact being done is that a person is being convicted for the acquisition of pecuniary resources or property, though it was not in violation of a law in force at the time of the commission of such act of acquisition. If this argument were correct a conviction of a person under the presumption raised under the s. 5(3) in respect of pecuniary resources or property acquired before the Prevention of Corruption Act would be a breach of fundamental rights under Art. 20(1) of the Constitution and so it would be proper for the Court to construe s. 5(3) in a way so as not to include possession of pecuniary resources or property acquired before the Act for the purpose of that sub-section. The basis of the argument that s. 5(3) creates a new kind of offence of criminal misconduct by a public servant in the discharge of his official duty is however unsound. The sub-section does nothing of the kind. It merely prescribes a rule of evidence for the purpose of proving the offence of criminal misconduct as defined in s. 5(1) for which an accused person is already under trial. It was so held by this Court in C. D. S. Swamy v. The State 1960CriLJ131 and again in Surajpal Singh v. State of U. P. It is only when a trial has commenced for criminal misconduct by doing one or more of the acts

mentioned in cls. a, b, c and d of s. 5(1) that sub-s. 3 can come into operation. When there is such a trial, which necessarily must be in respect of acts committed after the Prevention of Corruption Act came into force, sub-section 3 places in the hands of the prosecution a new mode of proving an offence with which an accused has already been charged.”

29. In the aforesaid context it was submitted that Section 2 (d) of the said Act has different ingredients and it was a new offence of continuing unlawful activity. It was submitted that the provision of the preceding 10 years under Section 2 (1) (d) of the said Act become redundant and “more than one charge sheet” would suffice was the contention of the petitioner to be accepted. The first offence will not bring into force Section 3 of the said Act even if it is after the Act come into force but if a second offence is committed then it would be a continuing unlawful activity within the definition of Section 2 (1) (d) of the said Act.
30. Learned counsel also sought to draw strength from the observations of the Division Bench of this Court in Jagmohan @ Mohar Singh case (supra) where the relevant provisions of the said Act were discussed threadbare. The challenge of the petitioner revolved around the phrase “preceding period of ten years” in the definition of Section 2 (d) of the said Act for continuing unlawful activity. It was pleaded on behalf of the petitioner that the expression be read down as being applicable with effect from the date when the Act came into force. The Division Bench observed as under:

“16. So far as the objection to taking into account the cases in which an acquittal has taken place in view of bar of Article 20 of the Constitution of India is

concerned one has to keep in mind that the accused/petitioner is not being asked to stand trial for those cases. Those cases are cited only to say that he has been accused in the past.

17. In fact the very definition shows that before a case under MCOCA is registered there should be previous charge-sheets and cognizance taken thereon. In case, petitioners interpretation of Article 20 being applicable is accepted, entire definition of the offence would be hit by Article 20 and, therefore, should be struck down. Although, the petitioner's counsel is categorical that he is not challenging the constitutionality of the Act but he wants to protect his client under Article 20. The Bombay High Court dealt with the question of virus of the Act in the light of the fundamental rights of the citizens and in that connection also came to examine whether the result of the previous prosecutions had any effect on the current FIR or prosecution. The Bombay High Court came to the same conclusion that the result of the previous charge-sheet is not material for our present purpose. While holding the definition of Section 2(1)(d) to be constitutionally valid High Court of Bombay in the case of Bharat Shantilal Shah and Ors. v. The State of Maharashtra Criminal Writ Petition No. 27/2003, observed as under:

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.

18. The definition of the offence, i.e., continuing unlawful activity and organized crime under Section 2(d) & (e) of MCOCA, pre-supposes an earlier trial with filing of the charge-sheet and cognizance being taken by the Court. The acquittal or conviction is not determinative of commission of the offence. Rather, the filing of the charge-sheets and cognizance by the Court are regarded as demonstrative of indulging in and having propensity in unlawful activity or organized crime, which is actionable under the Act.

19. Learned Counsel for the petitioners had laid considerable emphasis in urging that the facts of the cases in which petitioners have been acquitted cannot be taken into account for the purposes of invocation of

MCOCA. As noted earlier, the conviction is not a sine qua non for invocation of the offence under Section 2(d) & (e) of MCOCA. The ingredients of the offence to be satisfied are filing of more than one charge-sheet before the Competent Court against a member of the organized crime syndicate and taking of cognizance. The requirement of conviction has understandably not been made one of the ingredients of the offence considering the object sought to be achieved. Respondents have sought to demonstrate the chain and sequence of events, where acquittals have followed witnesses turning hostile or the non-availability of witnesses. Understandably, petitioners cannot be permitted to take advantage of these acquittals, especially which have followed witnesses turning hostile or evidence being obliterated.

20. The petitioner's counsel claim that only the offences registered after the promulgation of MCOCA in Delhi can be taken into consideration for booking a person under MCOCA. He has cited authorities to show that the penal law applicable to an offence is the one that was in force at the time of commission of the offence. According to him since the earlier alleged offences were committed before coming into force of MCOCA in Delhi, those cannot be taken into account for invoking MCOCA. Again as stated earlier, the petitioner is not being prosecuted for whatever he did in the past. He is being prosecuted for continuing with the unlawful activity. Certainly if a person commits no unlawful activity and is not arrested in any case after the invocation of MCOCA, he cannot be arrested under this Act on account of the offence committed by him before coming into operation of MCOCA even if he had been found guilty in them. In case, however, he continues with his unlawful activity and is arrested after the promulgation of the Act, the Act will come into play and he can be arrested and challaned for the act.

21. One of the important points raised by the petitioners is that the FIRs and the charge-sheets recorded against the petitioners prior to the coming into operation of this Act of MCOCA in Delhi cannot be considered as the law has only prospective effect. It is submitted by the counsel for the petitioners that the offences committed prior to 2nd January, 2002 could not be termed as organized crime and the petitioners could not have been termed as organized crime syndicate because at that time the Act was not in force and the offence of the petitioners, if any, could not be either "organized crime" or "continuing unlawful activity". In case the argument of the learned Counsel for the petitioners has to be accepted the first case under this Act can be registered only after two cases of the nature described in the Act had been registered against a person or against an organized crime syndicate after 2nd January, 2002. As the definition

shows for making a crime punishable under Sections 3 & 4 of MCOCA, there has to be more than one case registered or in other words it is the third case which can be registered for an offence under Sections 3 & 4 of MCOCA. Such an interpretation will come directly in conflict with the very purpose of the Act. The object of the Act as stated in the extended title of the Act is, "The Act to make special provisions for prevention and control of and for coping with criminal activity by organized crime syndicate or gang and for matters connected with and incidental thereto." If such an interpretation is accepted then the state will have to wait and helplessly watch organized crime taking place till it is the third time a person or a syndicate is found involved in the offence after the Act came into operation in Delhi. It is further to be noticed that "continuing unlawful activity" could have taken place ten years prior to the registration of the new case. Obviously the intention of the legislature could not have been other than giving immediate effect to the Act by taking note of all the offences or charge-sheets registered within ten years prior to the commencement of the Act."

31. It may be noticed that learned counsel for the petitioner contends that the aforesaid observations are obiter in nature.
32. On giving our thoughtful consideration to the pleas of the learned counsels for the parties it is obvious to us that insofar as the challenge to the provisions of Section 3 of the said Act are concerned, the judgement of the Division Bench of the Bombay High Court in Bharat Shantilal Shah, Shamim Mirza Arif Beg & Sanjay Patil case (supra) clearly negated the same on the aspect of Article 20 (1) of the Constitution of India being violated. The Division Bench of the Bombay High Court in Jai Singh case (supra) has specifically dealt with Sections 2 (1) (d), (e) & (f) and Section 3 of the said Act as also the mandate of Article 20 (1) of the Constitution of India. The detailed discussion in

this behalf is abundantly clear and explicit. A Division Bench of this Court also in Jagmohan @ Mohar Singh case (supra) has, once again, dealt with this aspect of the challenge and come to the conclusion that there was nothing unconstitutional about these provisions as the accused was not being asked to stand trial for cases prior to the said Act coming into force. We see no reason to differ from this view of the co-ordinate Bench of this Court. The judgement of the Supreme Court in State of Maharashtra Vs. Bharat Shanti Lal Shah & Ors. case (supra), once again, expounds this position and it is not possible to accept the contention of the learned senior counsel for the petitioner that the test based on Article 20 (1) of the Constitution of India has not been examined. We also find considerable force in the contention of the learned counsel for the State of Maharashtra that once the highest court has examined the aspect of constitutional validity of a statutory provision, the matter cannot be raked up again and again as that would be hit by considerable object of *res judicata*. The observations in M/s. Kesho Ram & Co. & Ors. Etc. Vs. Union of India & Ors. case (supra) and Delhi Cloth & General Mills Ltd. Vs. Shambhu Nath Mukherji & Ors. case (supra) are pertinent in this regard.

33. The affidavit of the Union of India makes it abundantly clear that no offence committed prior to 2.1.2002 could be made an offence under the said Act. Simultaneously, the observations in The Queen Vs. St. Mary Whitechapel case

(supra) relied upon both by the Bombay High Court and the Supreme Court cannot be lost sight of that a statute which in its direct operation is prospective cannot be called a retrospective statute because a part of the requisites for its action is drawn from a time antecedent to its passing. The act of omission or commission which constitutes an offence of the crime has to be after the said Act come into force and the accused person should have been involved in cognizable offences punishable with imprisonment of three (3) years or more in respect of such offences, more than one charge sheet having been filed before the competent court. The limitation for the charge sheets to be considered is that they should have been filed within a period of ten years preceding the date of the commission of offence in respect of which an FIR is sought to be registered under the said Act and the competent court has taken cognizance of one more such charge sheet. The fact that some charge sheets have been filed prior to the said Act coming into force does not mean that they become *ipso facto* subject matter of the prosecution under the said Act. This is also the stand of the respondents and thus, there is really no aspect of retrospectivity which is involved.

34. The charge sheets which have been filed against the petitioner earlier would be taken cognizance of and tried in accordance with law prevalent at the relevant stage of time. These charge sheets would not be tried under the said Act. However, in the facts of the present case there

are two FIRs filed in the year 2003 and one in 2006. There are, thus, undisputedly more than one charge sheet filed after the said Act come into force. The stand of the Union of India is also consistent with the aforesaid to the extent that charge sheets filed before 2.1.2002 would be proceeded with under the relevant provisions of the IPC and not MCOCA. Section 2 (1) (d) & (e) read with Section 3 of the said Act are stated to take into account the charge sheets filed by the police on which cognizance have been taken by the competent court in the preceding ten years but the earlier charge sheets were not to be tried under MCOCA. The stand of the Union of India is, however, and rightly so, that one cannot lose sight of the object with which the said Act is being brought into force, which is to control organized crime which transcends borders. Persons located in different countries continue to indulge in criminal activity from distance afar through various communication channels. The problem is more aggravated because such crime has direct linkage with terrorism and the larger interest of State requires that such persons should be brought to book. It is with this salutary objective in mind that the special Act was brought into force.

35. If the past is completely wiped out and one has to begin only with the date of 2.1.2002 then an accused would have to commit at least two offences after the said Act, charge sheets would have to be filed regarding those two offences and the court of competent jurisdiction would have to take

cognizance of those two offences. The aspect of continuing offences cannot be ignored. The distinction between the act or activity itself being termed as an offence under the statute and being taken into consideration as one of the requisite as under the statute cannot be lost sight of. It is the former which has to satisfy the mandate of Article 20 (1) of the Constitution of India. It is the continuing activity which was even an offence earlier which has now been made into an offence within the definition of Sections 2 (1) (d), (e) & (f) of the said Act.

36. An illustration was given in Jagmohan @ Mohar Singh case (supra) where a person commits no unlawful activity after the invocation of the said Act. In that case the person cannot be arrested under the said Act on account of offences committed by him before coming into force of the said Act even if he is found guilty of the same. However, if the person continues with his unlawful activities and is arrested after the promulgation of the said Act then the person can be tried for offence under the said Act. If a person ceases to indulge in any unlawful act after the said Act then he is absolved of the prosecution under the said Act but if he is continuing unlawful activity it cannot be said that the State has to wait till he commits two acts of which cognizance is taken by the Court after the Act coming into force. The observations in Sajjan Singh Vs. State of Punjab case (supra) are to the effect that a statute cannot be said to be retrospective merely because a part of the requisites

for its action is drawn from a time antecedent to its passing, thus, cannot be ignored. We have gone into this aspect in detail even though we find in the factual matrix of the present case there are two FIRs of the year 2003 and one of 2006 which are both after the said Act come into force.

37. The observations of the Full Bench of the Gujarat High Court in Sarjubhaiya Mathurbhaiya Kahar Vs. Deputy Commissioner of Police & Anr. case (supra) are material to the effect that once a matter has been considered by the Supreme Court on earlier occasions as a result of which consideration of sections have been held to be valid a new ground of challenge even on the basis of approach made in later decisions of the Supreme Court may not be available before the Court to the petitioner.
38. In view of all the aforesaid reasons we find no merit in the petition, which is dismissed with costs quantified at Rs.25,000.00.

SANJAY KISHAN KAUL, J.

OCTOBER 15, 2009
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AJIT BHARIHOKE, J.