

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION  
**CRIMINAL BAIL APPLICATION NO. 905 OF 2016**

|                          |     |            |
|--------------------------|-----|------------|
| Uttam Baban Gaikwad      | ... | Applicant  |
| Vs.                      |     |            |
| The State of Maharashtra | ... | Respondent |

Mr.A.P.Mundargi, Senior Counsel i/b. Mr. Gaurav Jachak, Advocate for the applicant.

Mr. A.H.H.Ponda i/b. Mr. P.G.Sarda for Intervener.

Mr. S.S.Pednekar, APP, for the State.

**CORAM: SMT.SADHANA S.JADHAV,J.**

**DATE : 14th October, 2016.**

**P.C.**

1. This is an application under Section 439 of Cr.P.C. The applicant herein is seeking enlargement on bail in MCOC Case No. 6 of 2016 pending before the Special Judge at Pune.

2. The applicant is being prosecuted for the offences punishable under Sections 302, 120B read with Section 34 of the Indian Penal Code, under Section 3 read with Section 25 of the Arms Act and under Section 3(1)(i)(ii) and Section 3(4) of the MCOC Act.

3. It is the case of prosecution that on 9.9.2015, at about 6 p.m., Ramdas Gulab Modak (intervener) lodged a report at the police station alleging therein that on 19.2.2015, there was a quarrel between the present applicant and deceased Hemant Gaikwad over a trifling issue and complaints were filed. The complainant was an eye-witness. That he had received threats from the applicant. On 9.5.2015, the complainant along with Amol Suresh Gaikwad and Hemant Prakash Gaikwad were chit-chatting in the hotel of one Bala Zende. Thereafter, he along with Hemant Gaikwad had been to the house of the brother of the complainant i.e. Vishal Modak. The complainant went towards the house of his brother. Hemant Gaikwad informed him that he would go and meet his relative Soma. In the meanwhile, upon hearing noise of firing, he turned back and saw that there was a firing. He rushed towards the car and at that time he saw Mangesh Modak and three others seated on the motor cycle of Mangesh. Mangesh and one other unknown person was carrying revolver. Hemant Gaikwad was struggling to rescue himself and was proceeding towards the Photo Studio of Soma and at that time there was another firing after which he collapsed. Hemant cried for help. He shouted that 'Mangya had shot at him'. At that time, the assailants cried that they have completed their work and they should inform Anil immediately. The complainant had stated that

he would be able to identify the assailants. On the basis of the said report, Crime No.338 of 2015 was registered at Loni Karbhor Police Station against Anil Gaikwad, Uttam Gaikwad, Sagar Gaikwad, Dashrath Gaikwad, Sagar Modak, Amol Modak, Mangesh and 3 unknown persons and others. After completion of investigation, charge sheet was filed on 5.3.2016. One Tushar Hambir has been charge-sheeted under Section 299 of Cr.P.C. Accused-applicant Uttam Gaikwad was arrested on 11.9.2015 and is in custody. The original complainant has filed an intervention application.

4. The learned Senior counsel appearing for the applicant has vehemently submitted that there was a long standing enmity between the family of the applicant and the family of the deceased. At the outset, the learned senior counsel has drawn attention of this Court to the station diary dated 9.9.2015 an entry No.35 recorded at about 4.20 p.m. which indicates that at about that time Doctor of Noble Hospital Pune informed the police station that the patient i.e. Hemant Prakash Gaikwad, resident of Wadaki was brought to the hospital at about 4 p.m. with a history of firing by somebody. He was admitted by Amol Suresh Gaikwad and that he has died due to firing. The learned senior counsel has submitted that the investigating agency has recorded the statements of witnesses under section

164 of Cr.P.C.

5. The statement of witness Roshan Pawar would show that on 9.9.2015, it is specifically submitted that the statements do not disclose any incriminating circumstance against the present applicant. According to the learned senior counsel, the principal allegation against the present applicant is in respect of Section 120B of the Indian Penal Code. The statement of Santosh Modak which is recorded on 11.9.2015 would indicate that in the first week of August 2015, he had been to his plot at Gaidara. Just adjacent to his plot, Anil Gaikwad had done plotting in the name of Adarsh Developers. Anil Gaikwad has constructed two rooms on the said plot. While the witness was passing through the plot, he peeped inside the rooms and saw Anil, Uttam, Sagar and other co-accused were discussing some serious topics and, therefore, he tried to hear their conversation and at that time, he saw all of them telling Dada Zende and Mangesh Modak to eliminate Hemant Gaikwad for which he would be paid a consideration of Rs.25 lakhs. They were to pay Rs.10 lakhs as advance. He had heard them saying that because of the complaint filed by Hemant Gaikwad, they had to pay a fine of Rs.3 crore and had to undergo imprisonment for some time. That he also saw Mangesh Modak and Dada Zende assured to oblige them. That Mangesh was given an advance of Rs.5 lakhs in front of the witness.

On the very next day, the witness had informed Hemant Gaikwad about the same and had asked him to be cautious. According to the prosecution, a conspiracy was hatched and the present applicant along with his brothers and relatives had hatched the said conspiracy.

6. The learned senior counsel has further submitted that it is true that there was a quarrel between both the families and cases were registered against each other. It is submitted that in fact the provisions of MCOC Act are not applicable to the present case and that only in order to see that the applicant is not enlarged on bail, the provisions of MCOC Act have been added.

7. The learned APP has filed an affidavit and it is vehemently submitted by the learned APP that the statements of the relatives and wife of the deceased Hemant Gaikwad would clearly indicate that during the lifetime itself, Hemant Gaikwad had expressed his apprehension and threat perception at the hands of the present applicant and others. According to the learned APP, the applicant is a member of a gang led by Tushar Hambir who is absconding. It is further submitted that only after considering criminal antecedents and criminal history of the present applicant, the

sanctioning authority had sanctioned prosecution under the provisions of the MCOC Act. It is submitted that 8 offences punishable with imprisonment for 3 years or more are registered against the present applicant and that more than one charge sheet has been filed against the organization in the precedent 10 years and, therefore, it is clear that the applicant is indulging into continuing unlawful activity in terms of Section 2(1)(d) of the MCOC Act. It is pertinent to note that the case papers would indicate that Hemant Gaikwad was admitted in the hospital by Amol Gaikwad. However, the statement of Amol was not recorded by the police in the course of investigation.

8. The learned APP submits that since the applicant is not entitled to be enlarged on bail as he is the member of an organization led by Tushar Hambir and that Tushar Hambir is still absconding. The learned senior counsel submits that the submission of the learned APP cannot be taken into consideration for the simple reason that the applicant was being prosecuted in Crime No.55 of 2015. In the course of investigation, it was revealed that no offence is made out against him and therefore, the investigating agency had filed "C" Summary against the applicant on 24.6.2015 bearing RCC No. 0402696/2015. It is specifically submitted that

in the course of investigation, no confessional statement of the accused was recorded which would implicate the applicant. That the applicant was not present at the time of incident and is only being impleaded by virtue of Section 120B of the Indian Penal Code and therefore deserves to be enlarged on bail.

9. The learned senior counsel also submits that on 19.2.2015, Sagar Gaikwad lodged a report at Loni-Kalbhori Police Station wherein the deceased was shown as accused No.2 and has been charge-sheeted under Sections 323, 323, 143, 147, 148, 149, 504 of the Indian Penal Code.

10. The learned APP has placed implicit reliance upon a Judgment of the Hon'ble Apex Court in the case of **State of Maharashtra vs. Vishwanath Maranna Shetty (2012) 10 SCC 561**. Implicit reliance has been placed on paragraph 29 of the said Judgment which is as follows :-

*“29) While dealing with a special statute like MCOCA, having regard to the provisions contained in sub-section (4) of Section 21 of this Act, the Court may have to probe into the matter deeper so as to enable it to arrive at a finding that the materials collected against the accused during the investigation may not justify a judgment of conviction. Similarly, the Court will be required to record a finding as to the possibility of his committing a crime after grant of bail. What would further be necessary on the part of the Court is to see the culpability of the accused and his involvement in the*

*commission of an organized crime either directly or indirectly. The Court at the time of considering the application for grant of bail shall consider the question from the angle as to whether he was possessed of the requisite mens rea. In view of the above, we also reiterate that when a prosecution is for offence(s) under a special statute and that statute contains specific provisions for dealing with matters arising there under, these provisions cannot be ignored while dealing with such an application. Since the respondent has been charged with offence under MCOCA, while dealing with his application for grant of bail, in addition to the broad principles to be applied in prosecution for the offences under the IPC, the relevant provision in the said statute, namely, sub-section (4) of Section 21 has to be kept in mind. It is also further made clear that a bare reading of the non obstante clause in sub-section (4) of Section 21 of MCOCA that the power to grant bail to a person accused of having committed offence under the said Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973 but also subject to the restrictions placed by clauses (a) and (b) of sub-section (4) of Section 21. Apart from giving an opportunity to the prosecutor to oppose the application for such release, the other twin conditions, viz., (i) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. The satisfaction contemplated in clauses*

*(a) and (b) of sub-section (4) of Section 21 regarding the accused being not guilty, has to be based on "reasonable grounds". Though the expression "reasonable grounds" has not been defined in the Act, it is presumed that it is something more than prima facie grounds. We reiterate that recording of satisfaction on both the aspects mentioned in clauses (a) and (b) of sub-section (4) of Section 21 is sine qua non for granting bail under MCOCA."*

11. In view of the above observations of the Hon'ble Apex Court, after taking into consideration the history of the present case, criminal

antecedents of the applicant, the inherent enmity between both the families, it would not be possible to record a finding that in the eventuality that the applicant is enlarged on bail, he would not commit a similar offence to wreck vengeance. As far as the submission that the provisions of MCOC Act would not be applicable, it would not be appropriate for this Court to record a finding to that effect which can be dealt with in Writ Jurisdiction. As on today, the applicant is being prosecuted under the MCOC Act and therefore, the parameters for grant of bail as laid down by the Hon'ble Apex Court in the case cited supra would be a guideline for considering an application seeking bail when the accused is being prosecuted under the MCOC Act. Hence, the application being sans merits stands rejected.

**(SMT.SADHANA S.JADHAV, J.)**