

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 781 OF 2014

State of Maharashtra	]
(At the instance of A.C.P.,	] ... Appellant
Police Station, Mumbai.)	](Original Complainant)

Versus

1 Gopal Sadhusharan Pandey,	]
R/at Sai Baba Complex, Bld. No.12	]
Room No.2, Aagashi Road, Virar (W)	]
Dist. Thane.	]

2 Harun Ibrahim Shaikh,	]
R/at Makrani Pada, Ramjan Chawl,	]
Room No.5, Subhash Nagar,	]
Jogeshwari (E), Mumbai-60.	]

3 Birbal Ramvilas Singh	]
R/at Jagannath Patil Chawl,	]
Room No.4, Chandansar Road, Beside	]
of Rajkarna Hotel, Virar (E),	]
Dist. Thane.	]

4 Brijesh Shambhunath Mishra,	]
R/at Shaikh Construction, Flat No.188]	]
Back side of Gokul Anand Hotel,	]
Dahisar (E), Mumbai-68	]

5 Abhijit Anand Bhosale,	]
R/at R.T. Anjali Villa Chawl, Room	]
No.122, Near Sector-5, Back side of	]
Rashmi Garden, Ever Shine City,	]
Vasai (E), Dist. Thane.	]

6 Sachin Rajaram Chorge,	]
R/at Shramik Colony, ¾ (Bombay	]

Garden Chawl), Hanuman Hill,]
Beside of Ramkrishna School,]
Kajupada, Borivali (E), Mumbai.] ... Respondents

Mr. J.P. Yagnik, APP, for the Appellant-State.

Mr. B.L. Jagtap for the Respondent Nos. 1, 4 & 5.

Mr. S.P.Kadam for the Respondent Nos.2, 3, and 6.

Mr. Rizwan Merchant for the Original Complainant.

CORAM : S.C. DHARMADHIKARI &
SMT. BHARATI H. DANGRE, JJ.

MONDAY, 06TH NOVEMBER, 2017

ORAL JUDGMENT: [Per S.C. Dharmadhikari, J.]

1 This appeal was listed on prior occasions. On account
of earlier orders, we proceed to admit it.

2 This is an appeal by the State. All the accused are
before the Court and equally the original complainant and having
heard them finally, we dispose of this appeal by this judgment
and order.

3 The appeal is directed against an order passed by the
learned Judge presiding over a Court under The Maharashtra

Control of Organised Crime Act, 1999 (for short "MCOCA"). That order is passed in MCOCA Special Case No.19 of 2012. By the impugned order dated 8th August, 2014, copy of which is at Annexure H, the application preferred by the accused has been allowed and they have been discharged from the special case.

4 The prosecution case, briefly stated, is as under.

5 The informant Kishorbhai Ratilal Dhakan, resident of Borivali, Mumbai, had gone out of Mumbai to Delhi on 25th April, 2012, for some work. He had a talk with his younger brother Nitin Dhakan on his mobile in the morning on 26th April, 2012. He informed Nitin that the said Nitin must go to the office and thereafter visit the house of a deceased relative at Borivali West for offering condolences. On the same day, at about 15:30 Hrs in the afternoon, he tried to contact Nitin on his mobile phone for some other work, but the contact could not be established. Thereafter, an SMS was forwarded requesting Nitin to contact him, but there was no reply. Nitin's brother-in-law Dr. J.P. Soni contacted the informant Kishorbhai on his mobile at 18:00 Hrs in the evening and informed him that Nitin's friend Bipin informed

the sister-in-law of Nitin, Bharti Yogesh Rambhia that Nitin was involved in a car accident at Mahalaxmi, Mumbai. This call came from Nitin's mobile No.9820666555. The informant, on obtaining this information, told Dr. J.P. Soni that he is rushing to Mumbai and that he would be returning on 26th / 27th April, 2012. The informant started preparations for returning to Mumbai. At that time, he received another call on his mobile from Dr. Soni that his wife Nita Sona had called on Nitin's mobile and at that time Nitin's friend Bipin informed that he is alright, but there is damage to the car and that he is in a meeting. The informant states that he repeatedly called on Nitin's mobile, but failed to establish any contact. Both the mobile phones were switched off. That is how he returned from Delhi to Mumbai by the first flight and after holding some discussions with his family members, he came to know that his office boy Ashish Suresh Dahake informed that he had seen Nitin going out of the office alone in a silver colour Innova car No.MH-02-BT-0214 belonging to their cousin Chandrakant Govindlal Dhakan. He was also informed that Nitin's sister-in-law Bharti Yogesh Rambhia recorded a missing complaint on 27th April, 2012, following which the police published a wireless message. Thus, all relatives were trying to

establish contact on Nitin's mobile, but there was no response. The call data records (CDRs) of the mobile was obtained by the police machinery. There were two mobiles. There were some phone calls on the same and the police tried to obtain information in relation to these calls, but they did not receive any concrete response.

6 The Borivali Police Station then made inquiries with the Tardeo and Agripada Police Stations to ascertain whether Nitin had met with an accident. They also visited Nair Hospital and other places for inquiry. They also inquired with the lodges at Dahisar and Mira Road. They obtained the call details of Nitin's mobile again, but Nitin was not found. During the investigations, the police was informed that on 26th April, 2012, two unknown persons had come to the flat of Nitin at 9:30 in the night and opened it. When the watchman of the building inquired with them, they told him that they were workers of an Architect and have come for inspecting the plaster of paris work. After stating that, they immediately closed the flat and left. It is in these circumstances that the police then state that somebody utilised the credit card of Nitin and made some purchases from a

shop named Prince Collection on S.V. Road Borivali West. The informant came to know that some purchases were made at about 21:10 Hrs on 26th April, 2012. That is how the informant Kishorbhai lodged a complaint on 30th April, 2012, that some unknown persons abducted Nitin along with the Innova car and have confined and restrained him. Crime No.174/12 was registered on the basis of the information. The Crime Branch Unit XI, Kandivali, Mumbai, arrested the accused on 13th June, 2012. Then there was a confession by accused No.1 that he abducted Nitin along with some others and thereafter assaulted and beat him. He killed him, burned his body by pouring petrol in the forest at Manor / Palghar. A Memorandum of the statement was prepared and the bones of the deceased and the soil at the spot were seized under panchanama. The Borivali Police took the custody of the accused on that day itself and arrested them. The investigations revealed that the accused No.1 claimed that the plot of land in Survey No.120/2B CTS No.16 of Jairam Mahale was in his possession and there was a willingness expressed by him to sell this land / plot to the deceased Nitin. A token sum of Rs.1,11,000/- was accepted and this gentleman was demanding a sum of Rs.5 crore from Nitin which was stated to be the balance

amount. Then, what is stated by the prosecution is that the Forensic Laboratory despatched a squad who visited and inspected the site with accused No.1. They found a human skull. That was seized under a panchanama. Thereafter, the motor vehicle was also seized at the instance of accused No.1. The accused No.5 showed the place from where he purchased the petrol can and the petrol pump from where he took petrol and the shop from where he had purchased new mobile phones for using sim card of the deceased which were done away while disposing of the dead body. That is how the panchanama was prepared, the cash amount was seized and even the credit cards recovered at the instance of the other accused, namely, accused Nos.2, 4 and 6. The statements of the employees of the petrol pump were recorded. Thus, the investigations proceeded and later on the sections, including section 302 of the Indian Penal Code were applied.

7 During the course of investigations it was revealed that the accused No.1 is the leader of the gang. That is an organised criminal gang. They have conspired and committed crimes of murder, abduction, forcibly taking possession of the

plots / immovable properties, preparing false documents, selling one property to many persons and beating them and taking money. The accused No.1 did this to establish his supremacy and for pecuniary benefits. The investigations revealed that this is an organised crime to which the provisions of MCOCA were applicable. Thereafter a proposal was moved to the competent authority. In terms of section 23 of the MCOC Act, an approval was granted on 20th August, 2012. The provisions of MCOCA were added to the crime. The chargesheet was filed after sanction for prosecution was given by the Commissioner of Police. Thus, the requirement of section 23 has been complied with.

8 Before we proceed further, we reproduce section 23 of the MCOCA. That reads as under :

“23. (1) Notwithstanding anything contained in the Code,-

(a) no information about the commission of an offence of organised crime under this Act shall be recorded by a police officer without the prior approval of the police officer not below the rank of the Deputy Inspector General of Police;

(b) no investigation of an offence under the provisions of this Act shall be carried out by a police

officer below the rank of the Deputy Superintendent of Police.

(2) No Special Court shall take cognizance of any offence under this Act without the previous sanction of the police officer not below the rank of Additional Director General of Police.”

9 Thus, sub-section (1) of section 23 opens with a non obstante clause and overrides anything contained in the Code of Criminal Procedure. By clause (a) of sub-section (1), no information about the commission of an offence of organised crime under the MCOCA shall be recorded by a police officer without the prior approval of the police officer, not below the rank of the Deputy Inspector General of Police. Clause (b) of sub-section (1) provides that no investigation of an offence under the provisions of this Act shall be carried out by a police officer below the rank of the Deputy Superintendent of Police. Sub-section (2) deals with a situation where cognizance can be taken by a Special Court of any offence under the MCOCA only after the previous sanction of the police officer, not below the rank of Additional Director General of Police has been obtained or granted.

10 In the present case, there is a compliance, according to the prosecution, of both these requirements. A copy of the prior approval issued under section 23(1)(a) of the MCOCA, copy of which is at Annexure-B, pages 41-44 of the paper-book and the sanction order is dated 12th September, 2012, copy of which is at Annexure-C, pages 45-49 of the paper-book.

11 For ready reference, we reproduce that sanction order for there is some argument revolving around the same :

O R D E R

Sanction U/s. 23(2) of Maharashtra

Control of Organised Crime Act 1999

Reference: Report of A.C.P., Borivali Division, Mumbai, Dated 01/09/12 Submitted through Dy. Commissioner of Police, Zone-XI, Mumbai, Addl. Commissioner of Police (North Region) Mumbai and the Jt. Commissioner of Police (Crime), Gr. Mumbai.

Read : Papers of investigation in Borivali Police Station CR No. 174/2012 Under section 365, 302, 201, 342, 364, 380, 392, 404, 420, 457, 468, 471, 34 IPC r/w 3(1)(i), 3(2), 3(4) of MCOC Act, 1999.

WHEREAS, Shri Vijay Mestri, Assistant Commissioner of Police, Borivali Division, Mumbai the Investigating Officer, has submitted his report dated 01/09/12 along with the papers of investigating in Borivali Police Station CR No. 174/2012 U/s 365, 302, 201, 342, 364, 380, 392, 404, 420, 457, 468, 471, 34 Indian Penal Code r/w 3(1)(i), 3(2), 3(4) of MCOC Act, 1999 through Dy. Commissioner of Police, Zone-II, Mumbai, Addl. Commissioner of Police (North Region), Mumbai and the Jt. Commissioner of Police (Crime), Gr. Mumbai for according sanction to prosecute the accused persons Under Sections 3(1)(i), 3(2), 3(4) of Maharashtra Control of Organised Crime (MCOC) Act, 1999.

2 AND WHEREAS, prior approval o the Addl. Commissioner of Police (North Region) Mumbai was obtained vide order no 1121/2012 dated 18/08/2012 or applying the provisions of M.C.O.C. Act 1999 to Borivali Police Station CR No.174/2012 Under section 365, 302, 201, 342, 364, 380, 392, 404, 420, 457, 468, 471, 34 IPC.

3 AND WHEREAS, I, Dr. Satyapal Singh, I.P.S., Commissioner of Police, Brihan Mumbai, of the rank of the Addl. Director General of Police, have gone though the case papers, perused the statements of the witnesses, Panchanamas, other papers of investigation and reports enclosed with the report under reference ;

4 AND WHEREAS, on going through the case

papers, Panchanamas, reports and statements placed before me, I am satisfied that prima facie a case is made out against the accused persons for being tried Under Sections 3(1)(i), 3(2), 3(4) of MCOC Act, 1999.

5 *AND WHEREAS, I find that the arrested accused persons, viz. 1) Gopal Pandey aged 45 years 2) Harun Shaikh aged 35 years 3) Birbal Singh aged 37 years 4) Brijesh Mishra aged 33 years 5) Abhijit Bhosale aged 24 years 6) Sachin Chorge aged 28 years have formed an Organised Crime Syndicate under the leadership of accused Gopal Pandey. The arrested accused being the members of Organized Crime Syndicate singly and jointly have committed violent crime for and on behalf of the organised crime syndicate by kidnapping complainants brother namely Nitin Dhakan - a builder cum Jeweller and murdered him and disposed off the body in Manor, Palghar, for gaining money in property matter and also other advantages.*

6 *AND WHEREAS , after going through the above mentioned documents, I am satisfied that the said crime was committed by the gang leader Gopal Sadhusharan Pandey aged 45 years and his gang members 1) Harun Shaikh aged 35 years 2) Birbal Singh aged 37 years 3) Brijesh Mishra aged 33 years 4) Abhijit Bhosale aged 24 years 5) Sachin Chorge aged 28 years, for gaining money in property matter and also other advantages which amounts to an Organized Crime committed by Organized Crime Syndicate headed by Gopal Sadhusharan Pandey*

aged 45 years as defined in Section 2(1) of Maharashtra Control of Organised Crime (MCOC) Act 1999 and thereby committed offence punishable U/sec. 3(1)(i), 3(2), 3(4), of MCOC Act 1999.

7 *AND WHEREAS, I am further satisfied that, more than one charge sheets of the cases committed with the motive of gaining money in property matter and also other advantages have been filed against the leader of the said Organized Crime Syndicate Gopal Sadhusharan Pandey aged 45 years in the preceding 10 years and the Competent Courts have taken cognizance of the said serious and non bailable offences.”*

12 It is common ground that by section 11 of the MCOC Act, 1999, the Special Court is empowered, after taking cognizance of an offence punishable under MCOC Act, to record an opinion that the offence is not triable by it. After it records such an opinion, it shall, notwithstanding that it has no jurisdiction to try such offence, transfer the case for trial of such offence to any court having jurisdiction under the Code of Criminal Procedure and the court to which the case is transferred, may proceed with trial of the offence as if it had taken cognizance of the same.

13 The application stated to be invoking section 11 of the MCOCA and such of the provisions of the Code of Criminal Procedure, 1973, which enable the competent criminal court to discharge the accused from the criminal case were also invoked and applied. The application was made by respondent Nos.1 and 2 to this appeal. Respondent No.1 is Gopal Sadhusharan Pandey and respondent No.2 is Harun Ibrahim Shaikh. The respondent Nos.3 to 5 are stated to be the other accused.

14 A copy of this application is annexed as Annexure-D to this appeal paper-book.

15 After narrating that respondent Nos.1 and 2 are permanent residents of Mumbai, residing alongwith this families, gainfully employed and having firm roots in the society, were implicated as accused initially for an offence punishable under section 365 of the Indian Penal Code. The first respondent is a watchman and the second respondent is an Estate Agent.

16 Thereafter, the incident leading to the filing of the charge-sheet and invoking of MCOCA has been set out. It is stated

in the grounds that the provisions of MCOCA are not applicable so far as these accused are concerned. These provisions are applicable only to the cases where the crime can be related to criminal activity by an organized crime syndicate or a gang. After referring to the definition of the aforesaid two words, namely, 'organized crime' and 'organized crime syndicate', it is urged that the object of the enactment is to punish such person or persons indulging in continuing unlawful activity with the objective of gaining pecuniary benefit or gaining undue economic or other advantage for him or any other person. The facts of the present case would reveal that the charge-sheet does not make any out *prima facie* case to invoke MCOCA. The sanction order also does not refer to any material which would enable the special Judge to conclude that the provisions of a stringent and harsh law should be applied to the applicants / accused in the criminal case. The sanction order itself is self-contradictory. Thus, there are no materials on record which would satisfy the ingredients of the three important provisions or the definitions which are the foundation for application of the MCOC Act.

17 The prosecution was served with this discharge

application. It filed a reply. The prosecution, as also the advocate of the accused were heard and by the impugned order, which is fairly detailed, the learned special Judge held that the charge or the offence punishable under MCOC Act does not survive. The accused are entitled to be discharged from the provisions of the MCOC Act. They cannot be tried by the Special Court and that is how the learned special Judge proceeded to exercise his jurisdiction under section 11 of the MCOC Act. The operative order reads thus :

“ORDER

i) Accused (1) Gopal Sadhusharan Pandey, (2) Harun Ibrahim Shaikh, (3) Birbal Ramvilas Singh, (4) Brijesh Shambhunath Mishra, 5) Abhijit Anant Bhosale and (6) Sachin Rajaram Chorge are discharged under section 227 of the Code of Criminal Procedure, 1973 from the charges of the offences punishable under sections 3(1)(i), 3(2) and 3(4) of the MCOC Act, 1999.

ii) The case is transferred under section 11 of the MCOC Act, 1999 to the regular court having jurisdiction under the Code of Criminal Procedure, 1973, for the trial of the offences under sections 365, 302, 201, 420, 457, 465, 468, 471 380, 364, 342, 404, 392 read with 34 of the Indian Penal Code, 1860.

iii) Registrar (S) is directed to place this order before the Hon'ble Principal Judge, Bombay City & Sessions Court, Greater Bombay for appropriate orders for assigning the case to any court.

Date: 08/08/2014

*(Y.D. SHINDE)
Special Judge under
MCOC Act and NIA Act."*

18 It is this order which is challenged in appeal before us by the prosecution.

19 Mr. J.P. Yagnik, learned Additional Public Prosecutor appearing in support of this appeal would submit that the impugned order is *ex-facie* erroneous and illegal. The impugned order is unsustainable for the learned Judge has clearly deprived the prosecution of an opportunity available to it in law to establish and prove that the materials before the special court are enough to bring home the offence punishable under the MCOC Act. Mr. Yagnik's argument is that the MCOC Act may be a stringent or a harsh law. Nevertheless, it is 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 State was of the view that it was expedient to make special provisions for prevention of such crimes and which are organized and committed by crime syndicates or gangs. The law is upheld and it has been brought into force with effect from 24th April, 1999. Mr. Yagnik would rely upon section 2(1) clause (d) of the MCOC Act which defines the words “continuing unlawful activity”. Then he invites our attention to the definition of the term 'organized crime' appearing in section 2(1) clause (e). He also relies upon section 2(1) clause (f) which defines the expression “organized crime syndicate”. Mr. Yagnik would submit that by sub-section (2) of section 2, the law clarifies that the words and expressions used but not defined in MCOC and defined in the Code of Criminal Procedure Code shall have the same meanings respectively assigned to them in the Code. Mr. Yagnik's precise submission is that the continuing unlawful activity postulates firstly that it is a activity prohibited by law for the time being in force. Secondly, it 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-sheets have been filed

before a competent court within the preceding period of ten years and that court has taken cognizance of such offence. In the present case, all three requirements of law are satisfied according to Mr. Yagnik. There is a continuing unlawful activity because an activity prohibited by law for the time being in force, namely, Indian Penal Code and such other penal laws and which is a cognizable offence within the meaning of the said term and expression defined by the Code of Criminal Procedure and thirdly, it is immaterial whether it is undertaken either singly or jointly so long as it is undertaken as a member of an organized crime syndicate or on behalf of such a syndicate. Therefore, when the charge-sheets and more than one have been filed before the competent court within the preceding period of ten years and the court has taken cognizance of the offence against the present accused, then, the prosecution deserved an opportunity of proving the allegations and establishing the guilt of the accused. That opportunity has been denied when the learned special Judge has commented upon the merits of the charge covered by these charge-sheets. He has thus pre-judged the matter by foreclosing the avenues which the prosecution possesses as of right in law. It is such an approach of the learned special Judge which has

resulted in the order of discharge. That is clearly perverse.

20 Mr. Yagnik has taken us through the allegations in the MCOC case, the order of approval and the sanction order to contend that at this stage the court must presume that the allegations are true and correct. At this *prima facie* stage, it is not necessary for the prosecution to bring home the guilt to the hilt. So long as there was a strong *prima facie* case, then, the prosecution deserved an opportunity and which has been erroneously and wrongfully denied. The impugned order is, therefore, clearly illegal and should be set aside.

21 Mr. Yagnik has relied upon the grounds in the memo of this Appeal to submit that they are fairly elaborate and which sum up his submissions.

22 Mr. Yagnik, in support of the above submissions, has relied upon the following judgments :

(i) *State of Maharashtra & Ors. vs. Lalit Somdatta Nagpal & Ors. 2007 All MLR 1078.*

- (ii) *Jagan Gagansingh Nepali @ Jagya & Anr. 2011 All MR (Cri) 2961.*
- (iii) *Sachin Bansilal Ghaiwal vs. State of Maharashtra Criminal Appeal No.25 of 2014 with Criminal Appeal No.1115 of 2013 decided on 16th July, 2014.*
- (iv) *Ranjit Singh Brahmajeetsing Sharma vs. State of Maharashtra & Anr. (2005) 5 SCC 294.*
- (v) *Prafulla Uddhav Shende vs. State of Maharashtra through S.D.P.O., 2009 All. MR (Cri) 870.*
- (vi) *S.K. Sinha, Chief Enforcement Officer vs. Videocon International Limited & Ors., AIR 2008 SC 1213.*
- (vii) *State of Maharashtra vs. Rahul Ramchandra Taru, 2011 All MR (Cri) 2100.*
- (viii) *Ushaben vs. Kishorbhai Chunilal Talpada & Ors., 2012(3) SCALE 594.*
- (ix) *State of Maharashtra vs. Somnath Thapa & Ors., (1996) 4 SCC 659.*
- (x) *Anil Sadashiv Nanduskar Vs. State of Maharashtra, 2008 (3) Mah. L.J.(Cri.) 650.*

(xi) *Govind Sakharam Ubhe vs. State of Maharashtra, 2009, ALL MR (Cri) 1903.*

23 He has also relied upon a compilation, which compiles for our benefit, the three charge-sheets referred to by the learned special Judge.

24 Mr. Rizwan Merchant appearing for the complainant, in addition to supporting the arguments of Mr. Yagnik, has raised one more point for our consideration. Mr. Merchant would submit that section 23 sub-sections (1) and (2) of MCOCA would cover the matter of investigation of a crime punishable under the MCOCA. He would submit that section 23 appears in the statute book later. By section 21, the MCOC Act clarifies that the provisions of the Code of Criminal Procedure would apply in a modified form. Then, by section 22 there is a presumption as to offences under section 3. The cognizance of offence and investigation into an offence is, therefore, a matter covered by section 23 entirely. By section 25, the MCOC Act has been given an overriding effect.

25 Mr. Merchant would submit that the learned special Judge has clearly overlooked the scheme of the Act and the placement of these provisions while discharging the accused. Mr. Merchant would submit that though MOCOA is an exceptional and stringent statute, yet, its object is salutary. That object is to curb and prevent crimes by organized crime syndicate. There is spurt in such crimes, particularly in the city of Mumbai. He would submit that the property prices and the real estate boom has resulted in several persons evincing their interest in investing in properties, some of them resort to illegal and unlawful means. They grab the property belonging to others with the help of criminals thus encouraging such criminals to organize themselves. These criminals often assist those property grabbers, builders and developers who are interested in making a bonanza by cashing on the price of the immovable property which is scarce in a city like Mumbai. Therefore, the learned Judge in this case was obliged to go by the sanction order and as it stands. Nothing could have been added or subtracted from the same. Once that sanction order after the approval is in place and the learned special Judge has taken cognizance of the offence, then, it

is not possible or permissible to exercise the powers under section 11 of the MCOC Act for discharging the accused. There, according to Mr. Merchant, is a slight departure from the scheme of the Code of Criminal Procedure and the MCOC Act. If, at this stage, the prosecution, which is relying upon the sanction order, is not permitted to prove its case as alleged and set out therein, then, MCOCA can never be invoked and applied. The learned Judge has clearly misdirected himself in law. Mr. Merchant goes to the extent of urging that he has exceeded his powers and acted beyond the same in discharging the accused.

26 Therefore, on these additional grounds, Mr. Merchant would submit that the impugned order be quashed and set aside. Mr. Merchant has relied upon the order of the learned special Judge while taking cognizance of the case. Mr. Merchant, apart from that, has brought to our notice, a judgment of the five-Judge Bench of the Hon'ble Supreme Court in the case of *Prakash Kumar @ Prakash Bhutto vs. State of Gujarat* reported in (2005) 2 SCC 409. Mr. Merchant relied upon section 18 of the Terrorist & Disruptive Activities (Prevention) Act, 1987, and submits that this provision is *para materia* to section 11 of the MCOCA. Mr.

Merchant also brought to our notice, together with Mr. Yagnik, the Full Bench judgment of this Court in the case of *State of Maharashtra vs Jagan Gagansingh Nepali @ Jagya & Anr.*, reported in *2011(5) Mh. LJ, 386*. Our attention is also invited to an unreported order passed in the case of *Farman Iran Shah @ Kari vs. State of Maharashtra* in Criminal Appeal No. 12 of 2014 by a Division Bench of this Court, dated 25th March, 2014.

27 On the other hand, Mr. S.P. Kadam appearing on behalf of the contesting respondent Nos.1 and 2 would submit that the order under challenge requires no interference in our appellate jurisdiction. Mr. Kadam would submit that from the scheme of the MCOCA it is apparent that there are enough powers vested in the MCOC Court enabling it to take note of and decide an application of the accused seeking discharge from the criminal case. The powers in that behalf are not disputed. Section 11 itself enables the MCOC Court, after it has taken cognizance, to arrive at the requisite satisfaction or opinion referred therein. Further, such of the provisions in the Criminal Procedure Code, 1973, which enable a competent criminal court to take cognizance and decide a discharge application are applicable to

cases styled as special cases under the MCOCA. The whole of the Criminal Procedure Code, 1973, is not held to be inapplicable. It is applicable in its modified version. That is also clarified by section 21 of the MCOCA. Therefore, Mr. Merchant is not right in urging that though section 25 gives the law an overriding effect, but that overriding effect is not such which would take away the powers of the learned special Judge or the special court under the MCOCA to exercise jurisdiction conferred by section 11 and that of sections 227, 239, 245 of the Code of Criminal Procedure, 1973. Therefore, there is no question of revisiting or sitting in judgment over an order of sanction as is urged in this case. It is a clear case where the learned Judge has proceeded on the footing that even if all the allegations in the three charge-sheets relied upon by the prosecution are assumed to be true and correct, still, they are not enough to apply the MCOCA. Therefore, allowing a criminal case of this nature to proceed when even *prima facie* there is no question of invocation and application of MCOCA is an abuse of the process of the Act. That would unnecessarily waste the precious judicial time of a special court. It is that power and aspect which has been borne in mind by the learned special Judge while discharging the accused. Mr. Kadam would submit that this

Court cannot sit in judgment over the opinion or satisfaction of the learned special Judge unless it is demonstrably perverse or vitiated by an error of law apparent on the face of the record. It should be an order which is *ex-facie* erroneous and illegal. If this requirement is not satisfied, this Court would be interfering with the order under appeal only because it is of a different opinion. That is not permissible in law. For these reasons, Mr. Kadam would submit that the appeal deserves dismissal.

28 For properly appreciating the rival contentions, we must first refer to the MCOCA.

29 As has been held by the Hon'ble Supreme Court in the case of *Ranjitsingh Sharma* (supra) that the Act is deterrent in nature. It provides for deterrent punishment. It envisages three to ten years of imprisonment and may extend to life imprisonment. Death penalty can also be imposed if somebody commits a murder. Similarly, fines ranging between three to ten lakhs can be imposed. The provisions of the said Act, therefore, must receive a strict construction so as to pass the test of reasonableness. In paragraphs 24, 34, 35 and 42 of this decision,

the Hon'ble Supreme Court concluded and held thus :

“24. The Statement of Objects and Reasons clearly state as to why the said Act had to be enacted. Thus, it will be safe to presume that the expression 'any unlawful means' must refer to any such act which has a direct nexus with the commission of a crime which MCOCA seeks to prevent or control. In other words, an offence falling within the definition of organised crime and committed by an organised crime syndicate is the offence contemplated by the Statement of Objects and Reasons. There are offences and offences under the Indian Penal Code and other penal statutes providing for punishment of three years or more and in relation to such offences more than one chargesheet may be filed. As we have indicated hereinbefore, only because a person cheats or commits a criminal breach of trust,

... ..

34. The Act is deterrent in nature. It provides for deterrent punishment. It envisages three to ten years of imprisonment and may extend to life imprisonment. Death penalty can also be imposed if somebody commits a murder. Similarly, fines ranging between three to ten lakhs can be imposed.

35 Presumption of innocence is a human right. (See Narendra Singh and Another Vs. State of M.P., para 31) Article 21 in view of its expansive meaning not only protects life and liberty but also envisages a fair procedure. Liberty of a person should not ordinarily be interfered with unless there exist cogent grounds therefor. Sub-Section (4) of Section 21 must be interpreted keeping in view the aforementioned salutary principles. Giving an opportunity to the public prosecutor to oppose an application for release of an accused appears to be reasonable restriction but Clause (b) of Sub-section (4) of Section 31 must be given a proper meaning.

... ..

42 The provisions of the said Act, therefore, must receive a strict construction so as to pass the test of reasonableness.”

30 Even in the case or judgment relied upon by Mr. Yagnik in *State of Maharashtra vs. Lalit Somdatta Nagpal & Anr.*, and reported in *2007 All SCR 1078*, the Hon'ble Supreme Court has clearly held that the law has not to be invoked and applied routinely. It has to be applied only when the ingredients of the offence punishable thereunder are attracted. Mr. Yagnik has heavily relied upon this judgment, but we would come to it a little later.

31 Firstly, the preamble of the Act must be noted. Some of its definitions are relevant. The definitions are set out in section 2. We are concerned with the five definitions thereof and they are incorporated in section 2(1), clauses (b), (c), (d), (e) and (f). We reproduce them below :

“2. (1) In this Act, unless the context otherwise requires,—

(a)

(b) “Code” means the Code of Criminal Procedure, 1973;

(c) “Competent Authority” means the Competent Authority appointed under section 13;

(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 other person or promoting insurgency;

(f) “organised crime syndicate” means a group of two or more persons who, acting either singly or collectively, as a syndicate or gang indulge in activities of organised crime;”

32 The words “special court” means special court constituted under section 5 (see section 2(1) clause g). Section 3 sets out the punishment for organised crime. Section 4 sets out the punishment for possessing unaccountable wealth on behalf of members of an organised crime syndicate, whereas section 5 contemplates setting up of special courts. The jurisdiction of the special court is set out in section 6 and it overrides anything contained in the Code of Criminal Procedure. Thus, the offence punishable under the MCOC shall be triable only by the special

court within whose local jurisdiction it was committed or, as the case may be, by the special court constituted for trying such offences under sub-section (1) of section 5. Whereas, by section 7 a special court is empowered to also try any other offence which the accused may, under the Code, be punishable and charged at the same trial, if the offence is connected with such other offence. The powers in that behalf are specified in section 7. Section 8 deals with prosecutors who have been appointed for every special court. The procedure and power of special court is set out in section 9 and by sub-section (1) it is stated that a special court may take cognizance of any offence without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence or upon a police report of such facts. Then, we have a procedure of the trial under the Act and by sub-section (2) of section 9 that is set out. The special court with a view to obtaining the evidence of any person, supposed to have been directly or indirectly concerned in or privy to an offence, tender a pardon to such person and that is provided by sub-section (3) of section 9. Then, by sub-section (4) of section 9 it is stated that subject to the provisions of the MCOC Act, a Special Court shall, for the purpose of trial of any offence, have all the

powers of a Court of Session and shall try such offence as if it were a Court of Session, so far as may be, in accordance with the procedure prescribed in the Code for the trial before a Court of Session. Then, by section 10, the trial by special court shall have precedence over the trial of other cases and the trial of such other cases will remain in abeyance. Then comes section 11 and which reads as under :

“11. Where, after taking cognizance of an offence, a Special Court is of the opinion that the offence is not triable by it, it shall, notwithstanding that it has no jurisdiction to try such offence, transfer the case for trial of such offence to any Court having jurisdiction under the Code and the Court to which the case is transferred may proceed with the trial of the offence as if it had taken cognizance of the offence.”

33 From a perusal of the provision, it is evident that the power to transfer cases of a regular court vests in the special court and which can be exercised after taking cognizance of an offence.

34 Mr. Merchant would heavily rely upon the order which was passed by the learned special Judge while taking

cognizance. That order reads as under :

“CORAM: H.H. THE SPL. JUDGE SHRI Y.D. SHINDE FOR MCOC AND NIA ACT, (CR 56)

*SPP D.M. Shah for State present.
IO Vijay Mestry, Borivali Division present.*

The OI submits chargesheet against six accused and prays for permission to give truncated copies of charge-sheet to the accused.

A1 - to 6 produced from JC at 1.30 p.m.

Adv B.L. Jagtap for all accused present.

It is submitted that sanction for prosecution is obtained from the Commissioner of Police. Perused sanction dated 12/09/12 issued by C.P. Mumbai against all six accused u/s 23(2) of the MCOC Act and I pass the following order:

ORDER

MA /12 is allowed and disposed of as follows:

Registrar (S) is directed to register the chargesheet.

The IO hands over truncated copies of charge-sheet to all accused.”

35 We do not think from a perusal of this order and as rightly contended by Mr. Kadam that the accused was prevented from making an application to seek discharge. The accused may have remained present through advocate at that stage, but they

had no opportunity to point out to the court that section 11 of the MCOCA enables it even after taking cognizance to pass the order in terms thereof. Secondly, they had no opportunity to point out at that stage that in the facts and circumstances of the present case, even if one assumes everything to be true and correct, still, the provisions of the stringent and exceptional enactment like MCOCA are inapplicable. We do not think, therefore, that in the facts and circumstances of the present case, the accused were prohibited or prevented from invoking section 11 and such other powers vesting in the Court under the Code of Criminal Procedure enabling discharge from the criminal case.

36 We do not refer to the further provisions of the MCOCA, save and except stating that by sections 14, 15 and 16, there are enough safeguards, checks and balances so as to make the law reasonable and not to dislodge the presumption which the Hon'ble Supreme Court holds, to be a part and parcel of the right to life and liberty. By section 9(3) there are special rules of evidence. By section 18, certain confessions made to police officers can be taken into consideration whereas by section 19, there is a protection of witnesses. There is a forfeiture of and

attachment of the property contemplated by section 20 and by section 21, there is a modified application of certain provisions of the Code. Thus, this law is comprehensive and enables trial of the cases by the special court and punish the guilty in terms of the MCOC Act. There may be an overriding effect given to the Act by section 25, but save and except the provisions to which we have made specific reference, we do not find anything by which a discharge application of the present nature being entertained is ruled out. In other words, in the facts and circumstances of the present case, the application for discharge of the present nature is clearly maintainable.

37 Then what we have before us are the contents of the discharge application. From a reading of the impugned order and the paper-book, it is evident that the learned special Judge had before him an application seeking discharge. In that application, there was a specific contention raised that there is no direct or circumstantial evidence to connect the accused with the alleged offence and the materials placed on record by way of charge-sheets do not invite the provisions of the MCOCA. The learned Judge was required to record a *prima facie* opinion as to whether

the ingredients of section 2 clause (e) were satisfied and whether in the present case, there could be said to be an organised crime syndicate, indulging in activities of organised crime. For that, the learned special Judge was obliged to find out whether there was a continuing unlawful activity within the meaning of section 2 clause (d) of the MCOCA. The learned special Judge, therefore, had to refer to the charge-sheets. To our mind, the learned Judge has not added or taken away anything from these charge-sheets. The three charge-sheets referred by the learned special Judge are CR No.425 of 2005 of Borivali Police Station, CR No. 210 of 2007 of the Borivali Police Station and CR No. 119 of 2007 of Manikpur Police Station. The copies of these charge-sheets are at pages 355 to 491 of the MCOCA charge-sheet. The learned special Judge has clearly referred to the materials on record and in paragraph 44 observed that though the Investigating Officer in his reply Exhibit-5A, listed ten crimes against the accused No.1 and two crimes each against accused Nos.2, 3 and 4, out of the two crimes mentioned against the accused No.2 and 3, CR No.251/2012 of Borivali Police Station is a later crime and the certified true copy of that charge-sheet has not been produced. The prosecution has only relied upon and reproduced certified true copies of the three

charge-sheets referred by us.

38 The learned special Judge has expressed his opinion and from paragraph 45 onwards. The learned special Judge, in paragraph 45, observes that accused No.1 Gopal Pandey has, according to the prosecution, several crimes registered against him. CR Nos. 2512, 260 and 261 of 2012 are obviously later crimes. CR No. 411 of 2011 of Borivali Police Station is at Sr. No.1 in the list of crimes registered against Gopal Pandey. CR No. 11 of 2008 of Vikramgad Police Station is at Sr. No. 5 and CR No.96 of 2009 of Borivali Police Station is at Sr. No.10 in the list. However, the prosecution has not produced charge-sheets of all the six crimes. The prior approval and sanction order do not mention the crime numbers of the previous charge-sheets. The sanction order, as we have reproduced above, and referred to in details, only mentions various criminal cases and charge-sheets pending against the accused. The accused No.4 in the present case, Brijesh Mishra, is accused No.3 in CR No.119 of 2007 of Manikpur Police Station. Hence, the charge-sheets of only three cases would have to be looked into and to satisfy oneself whether they have any nexus with the organised crime allegedly

committed by accused No.1 Gopal Pandey who is stated to be allegedly the head of the organised crime syndicate.

39 We have independently and in order to satisfy ourselves perused the copies of these charge-sheets. There is a compilation which has been handed in by Mr. Yagnik. The copy of CR No. 415 of 2005 is at page 3 of the compilation. In that it is stated by the complainant that he is an autorickshaw driver. He is plying his rickshaw from Govind Nagar Circle, Sodawala Lane and he resides with his family at the Govind Nagar corner, Sodawala Lane junction within the limits of the Borivali Police Station. On his statement, the FIR has been registered and section 326 of the IPC has been invoked and applied. This complainant says that he always comes at the junction to meet his friends and from such meetings, he has been made aware that one Gopal Pandey is operating for last three to four years from that place. Even the complainant knows him. He only says that prior to one year before registration of the crime, he and Gopal Pandey had some transaction over which there was a difference of opinion. Thereafter, what he narrates is that at about 13:30 Hrs in the afternoon on the date of the incident, he came to

Govind Nagar Circle from Shimpoli. While he was waiting at the junction, Gopal Pandey came near him and started abusing him. When the complainant told him that he should not abuse, Gopal Pandey was annoyed and he assaulted the complainant with an iron rod on his legs and by which the complainant fell down. Thereafter, Gopal Pandey got into another rickshaw and went away. The complainant then informed about this incident to his friend Gulpu Yadav and thereafter he was taken to Bhagwati Hospital for treatment. Thus, Gopal Pandey assaulted him with sticks and iron rod. This is the allegation as found by the learned special Judge in FIR No.415 of 2005 registered on 20th November, 2005 by the Borivali Police Station. The second charge-sheet of which true copy is filed is CR No.119 of 2007, that is also registered against this very accused at Manikpur Police Station. That is registered on 31st March, 2007 and the provisions of the IPC, including section 395 have been invoked and applied. The allegations therein and which have been summed up by the learned special Judge are in Marathi, but we do not think that the understanding of the learned special Judge of these allegations is flawed or suffers from such legal infirmities as would enable us to take a different view. The learned special Judge has found from

these allegations that there were certain statements of witnesses and which would denote that the accused came to the site and have threatened as also abused the complainant and several others and that these persons had tried to grab the lands. These cases referred to are of transaction of land. The material against these persons on the basis of these charge-sheets is that though for Manikpur Police Station section 324 was earlier invoked, but that was deleted and sections 395 and 397 have been added. Though the learned Judge was persuaded to hold that these are the charge-sheets which have been expressly referred and nothing beyond the same is on record insofar as the sanction order is concerned, the learned Judge comes to the conclusion that even if this charge-sheet of the case registered at Manikpur Police Station is perused, at best, these would be acts which are otherwise punishable, but certainly they are not enough to invoke the provisions of the MCOC Act. The materials are that there was a plot of land and that plot of land which was also referred to in the subject case in which MCOCA was sought to be applied could be belonging to some third person. However, the accused may have tried to dispose of the same and to several persons as is complained. We do not find that there was anything in this

charge-sheet which, read as a whole, was enough to invoke the MCOCA. The charge-sheet has been referred and the learned special Judge, in paragraph 47, holds that the present accused Nos.1 to 4 are shown as accused Nos.1 to 3 in that case along with along with more six other accused, including the brother of accused No.1. The case in that charge-sheet and in short is that the complainant was unknown to the accused and the offence of robbery, dacoity and mischief arose in the course of assault by the accused as the accused stood in front of Santro car of the informant touching the car and though informant told them to move aside, they did not move and then the accused started assaulting him and one more person in the car.

40 We have also then perused a copy of the charge-sheet in CR No. 210 of 2007 which is at page 31 of the compilation handed in by Mr. Yagnik, That is a crime registered at Borivali Police Station on 20th June, 2007, and the sections invoked are sections 326, 365, 342, 279, 323, 504, 506(2) of the Indian Penal Code. The complainant therein says that there was an incident where the complainant parked his vehicle to enter the Kapol Bank, Court Lane. He had gone there for the purpose and work of

franking. He was carrying the forms and together with his lawyer. He was to deliver them at the Borivali Court. He delivered them and when he was returning home and he came near Raichura Circle from Chandavarkar Road, it started raining. Therefore, he took shelter under a tree. This was at about 12:30 in the afternoon. From the Western side and towards the station, one white coloured jeep and driven in a high speed came and it brushed him. Thereafter, the vehicle stopped after proceeding at some distance. The complainant walked towards the vehicle and told the driver that he should drive a little slowly and that persons like him who have been operated should not, therefore, suffer any injuries. There was a heated exchange and thereafter the persons from the vehicle, namely the jeep, got down and started assaulting him. The whole incident was referred by the learned Judge and what is evident therefrom is that this complainant was taken to a alleged place is stated by these people and further threatened and assaulted and in order to demonstrate that they cannot be challenged. Even these allegations which we have referred are extensively referred by the learned special Judge in paragraph 48 and he says that the accused No.1 and one Vijay Kumar Dubey are alleged to have

committed these offences, but the informant was unknown. The incident took place as the jeep of the accused went closely by the side of the informant in high speed, halted ahead and when the informant went near the jeep and told the accused to drive the vehicle slowly, he got down and abused and assaulted him and then forcibly took him in the jeep to oneabela. He was again assaulted and forced to drink liquor from a bottle and thereafter he was shown to have been intoxicated.

41 Barring these three charge-sheets and the materials therein, there are no other materials on record. The statements therein have been extensively referred by us only in order to satisfy ourselves as to whether the prosecution indeed deserves an opportunity as contented and prayed by Mr. Yagnik. Even if these charge-sheets and the statements of the complainants there are taken as they are read together and as a whole, we do not think that the material, relevant and important ingredients of the term 'continuing unlawful activity' as defined in MCOCA are satisfied. It is not enough that there is a charge-sheet as is alleged by Mr. Yagnik. There are indeed more than one charge-sheets filed before a competent court within the preceding period

of ten years. They are indeed cognizable offences and punishable with imprisonment of three years or more. They are indeed activities prohibited by the law for the time being in force, but to bring them within the purview of organised crime such activities which are termed as 'continuing unlawful activity' have to be indulged in or performed with the objective of gaining pecuniary benefit or gaining undue economic or other advantage for him or any other person. It is these activities committed by an organised crime syndicate which bring in a statute like the MCOCA. We do not think that the later but significant requirements of section 2(1) clause (e) which defines the term "organised crime" are satisfied in this case. Once this is the conclusion reached by the learned special Judge, then, we do not think that the same is vitiated in law. The learned special Judge was mindful of all these expressions and words and to which we have made an extensive reference. The learned Judge has not misread or misinterpreted these terms or travelled beyond the same or their requirements. He has read them as a whole and together in the backdrop of the three charge-sheets, copies of which were placed before him. He found from the same that there is no *prima facie* material which would enable him to conclude that there is any organised crime or

criminal activity conducted by the accused or any continuing unlawful activity that can be connected to an organised crime syndicate. We are of the opinion that once there is a specific requirement laid down by the statute so as to term continuing unlawful activity as an organised crime, that cannot be ignored or brushed aside. We cannot ignore the plain language of the statute and allow an opportunity as contended by Mr. Yagnik and Mr. Merchant. This is not a case where anybody is going behind the sanction order. This is not a case where the learned special Judge has ignored any of the legal provisions or the requirements set out therein or their ingredients. He has referred to them and concluded that even if all the charge-sheets are taken as they are, they do not make out any case for applying and invoking the MCOCA. Such a conclusion, which can be imminently arrived at in the facts and circumstances peculiar to this case, cannot be termed as perverse. The appraisal and appreciation of the *prima facie* materials by the learned special Judge cannot be said to be vitiated by any error law apparent on the face of the record. Therefore, even if the reasoning in paragraphs 49 to 52 has been heavily criticized before us, we do not think that any other conclusion can be reached.

42 Mr. Yagnik may place reliance on several judgments and particularly in the case of *Lalit Somdatta* (supra). *Lalit Somdatta* was a case where applicability of MCOCA to offences alleged to have been committed by Lalit and Kapil Nagpal. At that time, the argument was that offences punishable under the Essential Commodities Act, 1955 also attracted MCOCA. The State argued on these lines, whereas the accused urged that the expression 'continuing unlawful activity' would necessarily mean continuous engagement in unlawful activity where there would have been different offences alleged. The isolated incidents spread over a period of ten years would not attract the provisions of the MCOCA. The argument was, and as summarized in paragraph 36, that in order to attract the provisions of the MCOCA, the cognizable offence had to be punishable with imprisonment of three years or more which is not so in respect of offences under the Essential Commodities (Special Provisions) Act, 1981, where the punishment has been limited to two years only. The other conditions of the Principal Act of 1955 has been amended by the Essential Commodities (Special Provisions) Act, 1981. Once that is referred and added, then, there is no

satisfaction of the requirements specified in section 2(1) clause (e) of the MCOCA. There was an additional argument as well. That is why their Lordships of the Hon'ble Supreme Court determined the main question of applicability of MCOCA to offences under the Essential Commodities Act, 1955 and the Essential Commodities (Special Provisions) Act, 1981. Therefore, we cannot consider the paragraphs relied upon by Mr. Yagnik and read them in isolation. We cannot be unmindful of the factual backdrop in which they have been made. The Hon'ble Supreme Court was dealing with such limited question that it made these observations and which are heavily relied upon. In that case, the order was passed granting a sanction. The order granting sanction has, therefore, been upheld to the extent of Lalit Nagpal and Anil Nagpal. The appeal of Kapil Nagpal was allowed.

43 We do not think that this judgment is of any assistance to Mr. Yagnik. Then, Mr. Yagnik relies upon the other judgments in the compilation and which are firstly *State of Maharashtra & Ors. vs. Somnath Thapa & Ors. (1996) 4 SCC 659*. That was once again a judgment rendered by the Hon'ble Supreme Court on an application seeking cancellation of bail granted to

Thapa. The three questions of law summarized in paragraph 5 are - What are the ingredients of 'criminal conspiracy' as defined in section 120-A of the Indian Penal Code ?; When these charges can be framed ?, and, What is the effect of repeal of TADA ? It is in that context that His Lordship the Hon'ble Mr. Justice Hansaria (as His Lordship then was) speaking for a three Judge Bench held that if on the basis of material on record, a court could come to the conclusion that commission of offence is a probable consequence, a case for framing charges exists. To put it differently, if the court were to think the accused might have committed the offence it can frame the charge, though for conviction the conclusion required is that the accused has committed the offence. It is apparent that at the stage of framing of charge, probative value of the materials on record cannot be gone into; the materials brought on record by the prosecution have to be accepted as true at that stage.

44 We do not think that the learned special Judge in this case was unmindful of this test and he applied precisely the same. He was in no error because he proceeded on the footing that the materials brought before him are true. Yet, in the facts and

circumstances peculiar to this case, it was not possible to conclude that the accused might have committed an offence punishable under MCOCA.

45 Similarly, in the case of *Anil Sadashiv Nanduskar vs. State of Maharashtra, 2008(3) MhLJ (Cri) 650*, what we must see a little carefully are once again the facts. The facts in that case were that whether the approval dated 28th August, 2004, stated to be granted in exercise of powers under section 23(1)(a) of the MCOCA and the sanction dated 7th January, 2005, granted in terms of sub-section (2) of section 23 are valid and lawful. The Division Bench of this Court was deciding a writ petition. The argument was that these two orders nowhere referred to any finding of the involvement of the petitioner before the court in an offence which could be said to be an organised crime within the meaning of the said expression under the MCOC Act. Therefore, the approval be held to be bad in law and consequently all further proceedings be declared unlawful. In paragraphs 2, 3 and 4, the factual aspects and the submissions have been summarized whereas in paragraphs 4 and 5, the arguments of the State.

46 It is in the above context and since the aforesaid nature of arguments would require this Court to go into the correctness or otherwise of the satisfaction on merits, that it held that the accused cannot insist on discharge unless the objection relates to inherent lack of jurisdiction to the concerned authority to grant sanction or approval and such issue can be decided on undisputed facts. Pertinently, the case was not of grant of a discharge, but challenge to the order of approval and sanction on merits. The Division Bench held while referring to the acts of the accused that all the ingredients of the definition of organised crime do not seem to have been incorporated in the order of approval. However, that itself cannot be a justification for interference and holding it to be invalid or bad in law because the prosecution is entitled to establish the same by leading necessary evidence. Thus, the extreme and technical argument that all ingredients have to be specifically referred and incorporated in the order of approval were turned down and in the backdrop of that case. The court came to the conclusion that the competent authority appears to have taken into consideration all the materials which would reveal or disclose the commission of the organised crime involving the appellant-accused. Therefore, it

was termed as premature to arrive at any conclusion to the contrary merely on reading of the order of approval. This is how the further observations in paragraphs 17, 18 and 19 have been made. We do not think that they have any bearing on the factual controversy before us. Even if one was to assume and in favour of Mr. Merchant that all the factual materials referred to in the order of approval and sanction cannot be reappraised or re-appreciated to such an extent as is indicated by the Division Bench, still, in the present case this is not the position emerging from the order of the learned special Judge. Once he was required to pass an order on the application seeking discharge from the criminal case, he referred to both approval and sanction and the materials therein. He did not re-appreciate and re-appraise these factual materials, but assumed everything in the charge-sheet and the order of approval to be true and correct. He applied the precise test as was sought to be laid down by the Hon'ble Supreme Court in *Somnath Thapa*. Therefore, we need not refer to this decision in *Anil Nanduskar* in further details.

47 *Govind Sakharam Ubhe vs. State of Maharashtra*
 2009 ALL MR (Cri) 1903 was a case where there was an order of

discharge. It was challenged in Criminal Appeal No.18 of 2009. That was decided on 11th June, 2009. The criminal appeal arose from the refusal of the trial court to discharge the accused. While laying down the tests under section 227 of the Code of Criminal Procedure to be applied for deciding the discharge application, the Division Bench came to the conclusion that the continuing unlawful activities and which are referred to in section 2(1)(d) of MCOCA, contemplate filing of one or more charge-sheets. The requirement is where the unlawful activities are of the crime syndicate or of any individual member thereof. We are mindful of this test and we have not sustained the order under discharge merely because according to Mr. Yagnik the understanding of the learned special Judge is that all members of the organised crime syndicate must have participated in the unlawful activity. That was not the conclusion reached by the learned special Judge. He proceeded on the footing that even one member involved in such activity could be enough. It ought to be performed or committed for and/or on behalf of the syndicate and that meets the requirement of law. Here the case is not whether there was involvement of all the members of the alleged gang, but the satisfaction of a very important and significant condition of the

objective of the organised crime. If that objective is not one which is specified or culled out in the provision, then, even if everything is assumed to be correct, the court cannot dismiss a discharge application. Therefore, all the observations and relied upon in *Govind Sakharam Ubhe's* case ought to be viewed in this backdrop. Paragraphs 25, 35, 44 and 45 have been relied upon from this decision.

48 Then, what remains for consideration is the reliance by Mr. Merchant on the judgment of the Hon'ble Supreme Court in the case of *Prakash Kumar @ Prakash Bhutto vs. State of Gujarat (2005) 2 SCC 409*.

49 There, what the Hon'ble Supreme Court was dealing with was a case of admissibility of a confession in terms of section 15 of the TADA. The argument was that the other provisions contained in sections 12 and 18 have to be read in order to assess the legislative intent therein. There was a difference of opinion and, therefore, the case was referred to a five-Judge Bench. The question posed was then considered in details by referring to the differences of opinion between the two and three-Judge Bench.

The Hon'ble Supreme Court made the observations, which have been relied upon by Mr. Merchant, in the backdrop of the primary question. The primary question was whether the confessional statement duly recorded under section 15 of TADA would continue to remain admissible for the offences under any other law which were tried along with the TADA offence under section 12 of the Act notwithstanding the fact that the accused was acquitted of offences under TADA in the said trial. The Hon'ble Supreme Court, therefore, concluded in *Prakash Kumar @ Prakash Bhutto* that the language is clear. The two statutory provisions, therefore, cannot be held as would rule out the admissibility of the confessional statements of those offences which were tried alongwith the TADA offences notwithstanding that the accused was acquitted of the offences under TADA in the same trial. Then came the argument on the rigours of section 18. The words "after taking cognizance" employed in section 18 of the Act would include any stage of trial, including the stage when the judgment is to be delivered. This argument was held to be misconceived. The legislature deliberately uses the words "after taking cognizance of any offence" to mean that section 18 would be attracted only at the stage where the Designated Court takes

cognizance of the offence, namely, after the investigation is complete and charge-sheet is filed. Therefore, section 209 of the Code of Criminal Procedure was held to be not in *para materia* with section 19 of TADA. To our mind this is not a controversy which should detain us.

50 In the Division Bench order passed in Criminal Appeal No.12 of 2014, the argument was that the application preferred for discharge was rejected. The order was challenged only on two grounds that there is no material at all on record for framing a charge against the accused and that there is a total non application of mind of the competent authorities while granting prior approval as contemplated by section 23(1)(a) and sanction as contemplated by section 23(2) of the MCOCA. The Division Bench referred to all the judgments in the field and concluded that a scrutiny of the materials in the form of statements and witnesses describe the role played by the appellant in commission of the crime. After these statements were referred in extenso, in paragraphs 9, 10 to paragraph 12, in paragraphs 13 and 14, the judgments referred by parties are set out. In paragraph 17, the Division Bench concluded that there was a proper application of

mind. It is not possible to interfere with the order granting sanction by re-appreciating and reappraising the same factual materials as if this Court has been conferred with a appellate power. The competent authority recorded its satisfaction while granting an approval and accorded sanction. The argument was that this material should be re-appreciated or reappraised or it must be referred to, to arrive at the conclusion that there is inherent lack of jurisdiction. On facts, that was not found to be the position.

51 This judgment is also distinguishable because before us, on facts, and circumstances as noted by the learned special Judge and which have been culled out from the materials produced by the prosecution itself, it is evident that he lacked the jurisdiction to take cognizance of the offences which were alleged to have been committed by the accused and punishable under MCOCA. This was clearly a case of inherent lack of jurisdiction and, therefore, the power to discharge was rightly invoked and properly exercised by the learned special Judge.

52 In the result, we do not find any serious legal infirmity

in the impugned order, warranting our interference in our appellate power. The appeal fails and it is dismissed. However, we clarify that we have referred to the materials only to the extent of satisfying ourselves whether the accused deserve a discharge from the offence punishable under the MCOCA. We have not referred to the materials in the context of the applicability of the Indian Penal Code or the offences punishable thereunder. The competent criminal court, therefore, is free to take note of these materials and proceed against the accused in accordance with law insofar as these offences are concerned. Those cases shall be decided, uninfluenced by any observations in the impugned order as well as our appellate order. All contentions of both sides in regard to these offences are kept open.

SMT. BHARATI H. DANGRE, J.

S.C. DHARMADHIKARI, J.