

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPLICATION NO. 4144 OF 2009

1. Ram s/o. Baburao Shinde
Age : 59 yrs, Occu: Pensioner,
R/o F-91, N/4, CIDCO
Aurangabad.
2. Mahadev s/o. Laxman Ghule
Age : 47 yrs, Occu: Service,
R/o. 59, Survey No. 69,
Jai – Bhavaninagar,
N-2, CIDCO Aurangabad.
3. Akshay s/o. Prakash Shinde
Age:26 yrs, Occ. Service,
R/o. C/o. Umesh Potdar
N-4, CIDCO Aurangabad.

... **Applicants**

VERSUS

1. The State of Maharashtra
(Copy to be served upon GP High
Court Bench at Aurangabad)
2. Sharda Sheshrao Tayade
Age: 38 yrs, Occu: Service,
R/o. N-2, 10/7, CIDCO Aurangabad.

Respondents

...

ALONGWITH

CRIMINAL APPLICATION NO. 3304 OF 2010

1. Ram s/o. Baburao Shinde
Age : 62 yrs, Occu: Pensioner,
R/o N-4, F-91, Gopika Niwas, CIDCO
Aurangabad. Tq. & Dist. Aurangabad.
2. Mahadev s/o. Laxman Ghule
Age : 48 yrs, Occu: Service,
R/o. High Court Employees
Flat Owners Cooperative Society,
Parijat Nagar, N-4, CIDCO,
Aurangabad.
3. Dinesh s/o. Baburao Nawade
Age:42 yrs, Occ. Service,
R/o. As above,
4. Sudhir s/o. Pitambar Rane,
Age : 34 years, Occu: Service,
R/o. As above,
5. Swapnil s/o. Chogalal Sonawane,
Age: 30 yrs, Occu: Service,
R/o As above
6. Vinayak s/o. Dayaram Kolhe,
Age: 38 yrs, Occu: Service,
R/o As above
7. Akshay s/o. Prakash Shinde,
Age: 27 yrs, Occu: Service,
R/o As above
8. Milind s/o. Maruti Hatgal
Age : 33 yrs, Occu: Service
R/o. As above.
9. Maruti s/o. Tanaji Jadhav
Age: 43 yrs, Occu: Service,
R/o As above

10. Rangnath s/o. Laxman Jadhav
Age: 40 yrs, Occu: Service,
R/o. As above.
11. Mangesh s/o. Haribhau Katkar
Age: 38 yrs, Occu. Service,
R/o. As above.
12. Atmaram s/o Dhondiba Gadekar
Age : 38 yrs, Occu: Service,
R/o. As above.

... **Applicants**

VERSUS

1. The State of Maharashtra
(Copy to be served upon GP High
Court Bench at Aurangabad)
2. Sujitkumar s/o. Uttamrao Phulware
Age: 39 yrs, Occu: Service,
R/o. N-2, Q 10/7, Tathagat Colony,
CIDCO Aurangabad.

... **Respondents**

ALONGWITH

CRIMINAL WRIT PETITION NO.630 OF 2011

1. Ram s/o. Baburao Shinde
Age : 61 yrs, Occu: Retired
2. Mahadeo s/o. Laxman Ghule
Age : 48 yrs, Occu: Service
3. Dinesh s/o. Baburao Nawade
Age:44 yrs, Occ. Service
4. Sudhir s/o. Pitambar Rane,
Age : 34 years, Occu: Service
5. Swapnil s/o. Chogalal Sonawane,
Age: 30 yrs, Occu: Service
6. Vinayak s/o. Dayaram Kolhe,

- Age: 38 yrs, Occu: Service
7. Akshaya s/o. Prakash Shinde,
Age: 28 yrs, Occu: Service
 8. Milind s/o. Maruti Hadgal,
Age : 30 yrs, Occu: Service
 9. Maruti s/o. Tanaji Jadhav
Age: 43 yrs, Occu: Service
 10. Rangnath s/o. Laxmanrao Jadhav,
Age: 42 yrs, Occu: Service
 11. Mangesh s/o. Haribhau Katkar
Age: 38 yrs, Occu. Service
 12. Atmaram s/o Dhondiba Gadekar
Age : 41 yrs, Occu: Service

All R/o High Court Employees
Flat Owners Cooperative Housing
Society Limited, N-4, Parijatnagar,
CIDCO, Aurangabad, Dist.
Aurangabad.

... **Petitioners**

VERSUS

1. The State of Maharashtra
through the Deputy Inspector
General of Police, Mumbai (Copy to be
served on Public Prosecutor, High
Court, Bench at Aurangabad)
2. Shri Sujitkumar s/o Uttamrao Fulware
Age: 40 yrs, Occu: Service
3. Sau. Sharda Sheshrao Tayade/Fulware,
Age : 38 years, Occ. Service,

Both R/o. N-2, Q 10/7, Tathagat
Colony, CIDCO Aurangabad, Dist
Aurangabad.

... **Respondents**

...

Mr. Satej. S. Jadhav for the Applicants in Application Nos. 4144/2009, and 3304/2011.

Shri V. D. Hon senior Advocate h/f Mr. C. A. Jadhav for the Petitioners in WP No. 630/2011

Shri M. M. Nerlikar, APP for respondent No. 1 – State.

Shri. M. N. Deshmukh for Respondent No. 2 in Cri.Appln/3304/2010 and WP/630/2011.

...

CORAM : **T. V. NALAWADE AND
K. L. WADANE, JJ.**

DATE : **31st July, 2018**

JUDGMENT: (Per K. L. Wadane,J.):

1. The aforesaid proceedings are arisen out of the first information report and the complaint filed in respect of the same incident, therefore, the above applications and writ petition are taken together for its disposal. The Criminal Application No.4144/2009 is filed by three applicants challenging the first information report No.306/2009 registered in Police Station Mukundwadi for the offence punishable under Section 420, 406, 154 read with Section 34 of the Indian Penal Code and Section 3 (i) (x) and 2 (v) (11) of S.C. and S.T. (Prevention of Atrocities Act). The Criminal Application No.3304/2010

is filed by the twelve applicants including the applicants in Criminal Application No.4144/2009 challenging the proceedings of R.C.C. No.196/2010 filed by complainant Sujitkumar pending on the file of Judicial Magistrate, First Class, Railway at Aurangabad and Criminal Writ Petition No.630/2011 is filed by the twelve petitioners challenging the MCOCA complaint No. 3/2011 filed by complainant Sujitkumar and Sharda challenging the order dated 14.07.2011 passed by the Special Judge, MCOCA, Aurangabad.

2. The complainant namely Sharda lodged a complaint to the Police Station Mukundwadi on 15.10.2009 alleging that the applicants and the complainant – Sharda are the members of High Court Employees Flat Owners Co-operative Housing Society Ltd. N-4, Aurangabad (herein after referred as Housing Society). Its President is one Ramrao Baburao Shinde and Secretary is Mahadev Laxman Ghule.

3. On 03.01.2006, the complainant – Sharda, deposited an amount of Rs.50,000/- for the membership of the aforesaid Housing Society. On 15.02.2006 again she paid an amount of Rs.2,00,000/- by a cheque.

4. The society by its letter dated 01.08.2007 informed the complainant - Sharda that a plot admeasuring 154.73 sqr.mtr is allotted to

her and demanded remaining amount.

5. On 01.08.2008, the complainant - Sharda was allotted a plot No. A-8 admeasuring 146.90 R and the society informed to the complainant - Sharda that she has to deposit remaining amount otherwise her membership will be canceled. Since the price of the plot and the amount demanded by the society was different, so the complainant - Sharda did not deposit the amount. Subsequently, on behalf of the society, a proposal was sent to the Sub-registrar for cancellation of the membership of the complainant. However, the proposal of the society was turned down.

6. It is further alleged by the complainant, one of the applicant namely Akshay Shinde had constructed his plot No. 7 and he had kept windows towards the plot of the complainant and thereby obstructed the construction of the complainant. The applicants were knowing that the complainant - Sharda was belonging to SC and ST and therefore, purposely they have troubled the complainant. With these allegations, the offence came to be registered.

7. Second Application No.3304/2010 is filed by the twelve applicants – members of the Co-operative Society, challenging the Regular Criminal Case No.196/2010 presented by complainant

Sujitkumar who is the husband of complainant Sharda. It is alleged by the complainant Sujitkumar that the petitioners have gave false information on 26.07.2007, 27.07.2007 and 30.07.2007 to the Mukundwadi Police Station between 10.00 am to 5.00 pm and by this way, the petitioners have committed offence against the members of SC and ST community. On presentation of the complaint and considering the verified statement of the complainant the learned Judicial Magistrate, First Class, Railway, Aurangabad issued the process against the petitioners for the offence under Section 3 (i) (ix) of the SC and ST (Prevention of Atrocities Act) 1989 and the offence under Section 182, 195, 196, 109 and 120 (b) of the Indian Penal Code.

8. Writ Petition No.630/2011 is filed by the applicants challenging the private complaint filed by complainants Sujitkumar and Sharda. It is a private complaint. According to the complainants, the petitioners being members of the organized syndicate, they have purposefully troubled the complainants. The petitioners have not allotted the plot and caused wrongful loss to the complainant. The petitioners have accepted an amount of Rs.6,65,000/- from the complainants and a construction of the plot up to the plinth level is only completed. So the amount deposited by the complainants have been misused by the

petitioners and the plot of the larger size were retained by the petitioners. The quality of the construction of the plot of the complainant is inferior. With these allegations the complainants have prayed to take the cognizance of the offence against the petitioners for the offences punishable under Section 3 and 4 of Maharashtra Control of Organised Crime Act, 1999 (MCOCA), Section 420, 406, 504, 465, 120 - B read with Section 34 of the Indian Penal Code and Section 3 and 6 of Maharashtra Protection of Interest of Depositor, Act, 1999. On presentation of this complaint, the learned Special Judge forwarded the complaint to the Deputy Inspector General of Police, Mumbai for the investigation and submission of its report by the appropriate officer.

9. We have heard the arguments of the learned counsel for the petitioners as well as the respondents.

10. The challenge in the above matters is mainly on the ground that no offence has been *prima facie* established, even accepting the allegations made by the complainants as it is in their first information report, and the private complaint before the JMFC, Railway, Aurangabad and the MCOCA Court. Even taking into account the face value of all the material which is placed on record, no offence can be said to be committed by the petitioners. As against these, the learned

counsel for the respondents submits that the complainants namely Sharda and her husband Sujitkumar are belonging to SC and ST whereas the applicants are not belonging to SC and ST and knowing this fact the applicants humiliated, insulted and thereby committed an offence as alleged under the provisions of SC and ST Act and MCOCA.

11. On perusal of the first information report and the private complaints the sum and substance of the grievance of both the complainants are that the complainant Sharda being a member of the housing society was given a plot having less area than agreed. Second grievance appears to be that the society has charged more than the actual price of the plot. Thus from the above allegations, nowhere, it is alleged that the applicants have humiliated the complainant because of her caste, nor it is alleged that the complainant was insulted or abused on her caste i.e. in public view and public place. The dispute between the complainant and the other members of the society appears to be of a civil nature for which already both of them have approached to the competent authority i.e. Co-operative Court and the litigation went up to Co-operative Appellate Tribunal i.e. in respect of membership of the complainant Sharda.

12. Further on perusal of the allegations in the private complaint

before the MCOCA same grievance are reproduced in the private complaint and the grievance in the private complaint is that the petitioners being a members of the housing society have not allotted the plot, they have accepted the excess amount and they have not made a quality construction of the plot allotted to complainant - Sharda. So even looking to the allegations in the private complaint, it appears that there is a civil dispute between the complainant and the petitioners about the entitlement of the plot and its area. There appears to be a difference between the parties regarding the price, charge for the allotment of the plot in favour of complainant - Sharda. But at any stretch of imagination it cannot be said that it is an organized crime committed by the petitioners in view of the provisions of Section 2 (e) punishable under Section 3 of the MCOC Act. Section 2 (e) defines organized crime.

Section 2.....

(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”

“Organized 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 an organised crime.

13. Nowhere it is alleged in the first information report or in the private complaint that the petitioners/applicants are indulged in the organized crime, nor it is alleged that previously the offence against the petitioners/applicants are registered, they are investigating and they are pending before any Criminal Court. Therefore, even accepting the allegations in the first information report as well as the private complaint, no offence is made out under the provisions of Section 3 Sub-section 1 to 4 of the MCOC Act.

14. From the record, it appears that the learned Special Judge on presentation of the private complaint by the complainants and considering the scope of Section 9, 23 and 25 of the Act forwarded a complaint to the Deputy Inspector General of Police, Mumbai, who is directed to appoint the police officer not below the rank of Deputy Superintendent of Police as mentioned in Section 23 B of MCOC Act for carrying out the investigation of the complaint by giving direction to submit final report about the same within a period of two months.

Looking to the order passed by the Special Court, it is necessary and useful to quote the observation reported in the case of *Ashok Gyanchand Vohra & etc. Vs. State of Maharashtra and Anr.*, reported in *2006 CrL. L. J. 1270*.

“Majority view (per D. B. Bhosale and V. K. Tahiramani, JJ.) - A plain reading of S.9 (1) of MCOCA would show that it is not controlled by any other provisions of MCOCA much less S. 23 which primarily deals with the powers of the police machinery. S. 9 (1) is an independent section which confers powers on the special Court and they are not made subject to supervision/control of the police. The police machinery cannot decide whether the Special Court should take cognizance if it receives private complaint. By using the expression 'may take cognizance' in S.9 (1) the Special Court is empowered to 'take or not to take' cognizance of any offence under MCOCA without the accused being committed to it for trial, upon receiving a 'private complaint' of facts which constitute such offence or upon a police report of such facts forwarded, after completing the investigation under S. 173 (2) of the Code. In other words, S.9 (1) of MCOCA does away with the requirement of committing the accused to the Special Court for trial and states that cognizance can be taken upon receiving a complaint of facts which constitute such offence or upon a police report of such facts. The word 'may' in S.9 (1) in any case cannot be construed to mean 'must' and it retains its meaning 'may' for the reasons recorded earlier. As against this, s.23 deals with the cognizance of and investigation into an 'information' recorded by a Police Officer after strict compliance of the conditions stipulated therein. S.9 (1) and S.23 are independent of each other and work in a totally different sphere. A Special Judge under S.9 (1) of MCOCA is a Magistrate and has powers to proceed

under Ss.156 (3) and 190 of the Criminal Procedure Code. S.9 (1) of MCOCA does away with the requirement of committing the accused to the Special Court for trial and states that cognizance can be taken upon receiving a complaint of facts which constitute such offence or upon a police report of such facts. On fair reading of the provisions of MCOCA it appears that the Court of Special Judge is a Court of original criminal jurisdiction. In order to make it functionally oriented, some powers are conferred on it by MCOCA which has set it up. Under S.9 (1) a Special Court can, therefore, not only entertain a 'private complaint' but can also take recourse to S.156 (3) of the Code. To sum up it can be said that a private complaint under S.9 (1) of MCOCA is tenable. The Special Court, on receipt of a private complaint under S.9 (1) of MCOCA, has the power to order an investigation under S.156 (3) of the Code and upon receipt of a police report may or may not take cognizance of any offence under MCOCA. It can also reject such complaint outright if it does not disclose offence under MCOCA. Any officer-in-charge of a police station or Police Officer superior in rank to such officer, as the case may be, can investigate any offence under MCOCA as and when such investigation is directed by the Special Court under S.156 (3) of the Code and forward a report to the Special Court as provided for under S.173 (2) of the Code.

Compliance of the conditions mentioned in cl. (a) and (b) of sub-sec. (1) of S.23 are not the conditions precedent for investigating a private complaint pursuant to the directions of the Special Court. The Special Court will have the power to take cognizance of any offence under MCOCA either upon receipt of a private complaint of facts which constitute such offence or upon a police report forwarded under S.173 (2) of the Code after completion of the investigation pursuant to the directions under S.156 (3) of the Code and for which previous sanction under S.23 (2) of MCOCA shall not be a condition precedent. In other words, the sanction

under S.23 (2) of MCOCA is not a sin-qua-non for taking cognizance of a 'private complaint'. The Special Court, while dealing with a private complaint under sub-sec. (1) of S. 9, has the powers of the Magistrate and while trying the accused it will have all the powers of the Court of Session under sub-sec. (4) of S.9 of MCOCA. In other words, the Special Court for taking cognizance of any offence is a Court of original jurisdiction and for trying the accused it functions as a Court of Session.

Minority view (Dissenting) Per V. G. Palshikar A.C.J.

If it is said that sanction under S.23 is not sine qua non for taking cognizance of private complaint. It would substitute or alter provisions of S. 9 (1) and 23. It nullifies S.23 and permits special court to take cognizance inspite of embargo put by S.23 (2). It can be said that (i) A complaint as contemplated by S.2 (d) of Cr.P.C. that can be filed by any individual before Special Court designated under the Act; (ii) on receipt of such complaint the learned Special Court would transmit the same to the Deputy Inspector General of Police of the range from which the complaint emanates for appropriate action under S.23 (1); (iii) Deputy Inspector General of Police to whom such complaint is forwarded will then apply his mind and grant approval to appropriate officer mentioned in S.23 (1) (a) to record information about commission of offence as it emanates from the complaint and then order investigation by an officer not below the rank of Deputy Superintendent of Police as contemplated by S.23 (1) (b); (iv) On completion of investigation the report shall be placed before the Additional Director General of Police for consideration of the question regarding grant of sanction to take cognizance, who on application of his mind to the report and the facts as disclosed thereby will grant or refuse as the case may be previous sanction to take cognizance of the matter under S.9 (1) of the Act; (v) It is on receipt of such police report accompanied by sanction under S.23 (2) that the Court will take

cognizance under S.9 (1). From the above it will be seen that being the procedure prescribed under the Act S.9 (1) says that a Special Court may take cognizance. To illustrate a Special Court cannot take cognizance if the report placed before it is not accompanied by a sanction.”

15. Considering the divergent views, the State Government has approached to the Hon'ble Supreme Court in case of ***Jamiruddin Ansari Vs. Central Bureau of Investigation and Anr.***, reported in ***(2009) 6 Supreme Court cases 316***. We have gone through the facts and observations of the case cited (supra) from which it appears that the minority view taken in the case of Ashok Gyanchand Vohra (supra) has been accepted and uphold by the Hon'ble Supreme Court with the following observations.

“Section 9 (1) of MCOCA contemplates filing of complaints both by the investigating authorities and also by private parties and the Special Judge is, therefore, entitled to take cognizance of offences under MCOCA even on a private complaint, but after due compliance with Section 23(2) thereof. The wording of Section 23(2) leaves no room for doubt that the Special Judge cannot take cognizance of any offence under MCOCA unless sanction has been previously given by the police officer mentioned therein. In such a situation, even as far as a private complaint is concerned, sanction has to be obtained from a police officer not below the rank of Additional Director General of Police, before the Special Judge can take cognizance of such complaint. The bar of Section 23(2) continues to remain operative

in respect of complainants, either of a private nature or on a police report.

The provisions of Section 23 of MCOCA are the safeguards provided against the invocation of the provisions of MCOCA which are extremely stringent and far removed from the provisions of the general criminal law. If it is accepted that a private complaint under Section 9(1) is not subject to the rigours of Section 23, then the very purpose of introducing such safeguards lose their very *raison d'être*. At the same time, since the filing of a private complaint is also contemplated under Section 9(1) of MCOCA, for it to be entertained it has also to be subject to the rigours of Section 23.

Accordingly, Section 9 of MCOCA cannot be read or invoked independent of Section 23 of the said Act. The provisions of Section 9(1) will have to be read in harmony with the provisions of Section 23(2) as far as private complaints are concerned. Upon receipt of such private complaint, the Special Judge has to forward the same to the officer indicated in Section 23(1) (a) to have an inquiry conducted into the complaint by a police officer mentioned in Section 23(1) (b) and only thereafter take cognizance of the offence complained of, if sanction is accorded to the Special Court to take cognizance of such offence under Section 23(2).

Further, in view of the provisions of Section 25 of MCOCA, the provisions of the said Act would have an overriding effect over the provisions of CrPC and the Special Judge would not, therefore, be entitled to invoke the provisions of Section 156(3) CrPC for ordering a special inquiry on a private complaint and taking cognizance thereupon, without traversing the route indicated in Section 23 of MCOCA. In view of the bar under Section 23(2), the Special Judge is precluded from taking cognizance on a private complaint upon a separate inquiry under Section 156(3) CrPC.”

16. So looking to the observations of the Hon'ble Supreme Court, it appears that taking cognizance of the private complaint has to be after due compliance with Section 23(2) thereof. The provisions of Section 23 of MCOCA are safeguards provided against invocation of the provision of MCOCA which are extremely stringent and far removed from the provision of general criminal law. If it is accepted that a private complaint under Section 9 (1) is not subject to the rigours of Section 23 then the very purpose of introducing such safeguard lose their very importance. So the cognizances of the private complaint under Section 9 (1) is subject to the proviso of Section 23. Looking to the order passed by the Special Judge, it appears that it has not taken the allegations made in the private complaint itself and he has not formed its opinion based upon the allegation in the private complaint as to whether there are sufficient and material allegations against the petitioners to *prima facie* constitute the offence under MCOCA, and mechanically, he has forwarded the complaint to the Deputy Director General of Police, Mumbai. Looking to the aforesaid aspect we are of the opinion basically there is no material and sufficient ground to proceed against the petitioners in reference to the alleged offence. Hence the Criminal Application No.4144/2009 and Criminal Application No.3304/2010 are

allowed in terms of prayer clause (B) and the Criminal Writ Petition No. 630/2011 is allowed in terms of prayer clause (C) and the first information report 306/2009, RCC No.196/2010 pending on the file of Judicial Magistrate, First Class, Railway at Aurangabad and MCOCA Complaint No. 3/2011 pending on the file of Special Judge, Aurangabad are hereby quashed and set aside. Rule is made absolute in those terms. Petitions are disposed of.

(K. L. WADANE, J.)

(T. V. NALAWADE, J.)

habeeb