

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
WRIT PETITION NO.913 OF 2019

Surjitsingh Bhagatsingh Gambhir
at Post Tarakpur, Ahmednagar .. Petitioner

Vs.

The State of Maharashtra
(through MIDC Police Station,
Ahmednagar) & Ors. .. Respondents

...

Mr. Abad Ponda with Mr. Pranav Avhad, Mr. Aakash Nilay, Mr. Gaurav Dua, Ms. Niddhi Chedda, Ms. Aarti Deodhar i/b Mr. Nilesh Tribhuvan for the Petitioner.

Mr. Deepak Thakare, Public Prosecutor with Mr. A.D. Kamkhedkar, A.P.P. for the State.

**CORAM : SHRI RANJIT MORE &
SMT. BHARATI DANGRE, JJ.**

RESERVED ON : 31st JULY, 2019

PRONOUNCED ON : 13th SEPTEMBER, 2019.

JUDGMENT:- [Per: Smt. Bharati Dangre, J.]

1. On 12/02/2017, two candidates who were contesting election of Zilla Parishad and Panchayat Samiti being the nominated candidates of a political party arranged a dinner party

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for their supporters and voters and what transpired in the said party has resulted into registration of FIR No.36 of 2017 at the instance of Baban R. Avhad. It is alleged that in the said party, liquor was served along with dinner and two brothers of the complainant who attended the party started feeling uneasiness in the night of 12/02/2017 and since their condition deteriorated, they were hospitalized in a private hospital at Ahmednagar. They came to be shifted to the City Civil Hospital and while undergoing the treatment, they breathed their last. As an outcome of the consumption of liquor, 9 people died and 13 people took seriously ill and were required to be offered treatments. The complainant, whose brothers met with the untimely death lodged a complaint with MIDC Police Station and an offence punishable under Section 304, 328 read with Section 34 of the IPC came to be registered. Relevant sections vide Sections 65A, 65B, 65C, 65D, 65E, 68A and 68B and Section 18(1) and (2) of the Maharashtra Prohibition Act, 1949 were also added to the crime and the accused came to be arrested.

During investigation, it was revealed that the alcohol, which was supplied in the party was manufactured in one 'Sai Bhushan canteen' of the City Civil Hospital, District Ahmednagar. It is this canteen of the Civil Hospital which fell within the loop of investigation and the present Petitioner, on a nexus being established, came to be roped in.

2. While investigating the crime, a proposal was made to invoke provisions of Maharashtra Control of Organized Crime Act, 1999 (“**MCOCA**”) on 05/02/2017.

In the said proposal total 20 accused persons were named and the Petitioner was shown to be an absconding. On receipt of the proposal, the Special Inspector General of Police, CID, Pune, accorded his approval under Section 23(1)(a) of the MCOCA on 13/07/2017. The approval order brought out that A-8 Jagjitsingh Gambhir had formed an Organized Crime Syndicate and engaged in continuing unlawful activities with the object of gaining pecuniary benefits for himself and other members of the gang. Two offences registered with Tofkhana Police Station under the provisions of the Maharashtra Prohibition Act, 1949 of which the competent court has taken cognizance and one offence registered with the State Excise under the relevant provisions of the Maharashtra Prohibition Act, were relied on.

The name of the Petitioner came to be arraigned as a member of the syndicate headed by A-8 Jagjitsingh Gambhir and it was alleged that the present crime registered was also similar to the offences considered for establishing continuing unlawful activities and on satisfaction being recorded, the prior approval for application and invocation of Sections 3(1)(i), 3(1)(ii), 3(2), 3(4) and Section 4 of the MCOCA came to be granted against the accused persons including the Petitioner.

3. The next step taken was the sanction under Sub-Section (2) of Section 23 of the MCOCA for the prosecution of the aforesaid offences granted by the Additional Director General of Police, CID, Pune, by his Order dated 10/08/2017 in which the Applicant was assigned the role of a Member of the Syndicate and was covered under the MCOCA. Pursuant to this, a Charge Sheet came to be filed on 11/08/2017 and the contention of the Petitioner is that he has been falsely implicated in the said crime and while granting the approval/sanction by the Respondents, there was complete absence of application of mind and according to the Petitioner, there is no nexus established between the crime registered and the Petitioner nor any incriminating evidence or proof of commission of any illegal act either individually or collectively has been attributed to the Petitioner and the Petitioner questions the very act of the Respondents in arraigning him as a member of the Organized Crime Syndicate and the filing of the Charge Sheet against him under the relevant provisions.

4. To complete the narration of sequence of events, it is to be noted that the Petitioner moved an Application seeking Anticipatory Bail on 13/12/2018 which came to be rejected by the Special Judge and the Additional Sessions Judge at Nashik on 17/01/2019 in view of the bar contained in Section 21 of the MCOCA and while rejecting the said Application, the Special Judge held that the said Application for grant of Anticipatory Bail

is not maintainable and rejected the same.

5. The Petitioner has, therefore, invoked the writ jurisdiction of this Court by filing the present Criminal Writ Petition where he seeks a relief of protection of his fundamental rights enshrined in Article 21 of the Constitution and has prayed for protecting him from being arrested. He has also prayed for striking down the provisions contained in Section 21(3)(iii) of the MCOCA being arbitrary and unconstitutional and being violative of Articles 14, 19 and 21 of the Constitution. The Petitioner also prays for quashing and setting aside the order of rejection of his Anticipatory Bail Application dated 17/01/2019.

6. In support of the Petition, we have heard Mr. Ponda, learned counsel, who would place reliance on the judgments of the Apex Court in *Ku. Hema Mishra v. State of U.P.* reported in *AIR 2014 SC 1066* and he would submit before us that the High Court while exercising its writ jurisdiction would weigh and decide as to whether such proceedings are to be quashed or not and this is distinct from the grant of interim protection against arrest.

On the merit of the matter, Mr. Ponda would submit that the Petitioner had applied in pursuance of a Tender Notice which was published and invited bids to run the canteen in the Civil Hospital and this tender was invited in the year 2011-12. He

would submit that the Petitioner being the successful bidder, was awarded the tender to run the said canteen. However, he would also submit that since Condition No.3 of the tender document viz. Security Deposit Amount and the Bank Guarantee was never complied with by the Petitioner, the possession of the canteen was never made over to him. He would further submit that the tender which was floated was only to operate the canteen for a period of 12 months and the period mentioned in the Tender Notice expired in the year 2013.

Mr. Ponda would further submit that there was no compliance on the part of the Petitioner of Condition Nos.15, 16 and 17 of the Tender and the Petitioner has never installed any electric meter nor paid any electricity bill, property tax, etc. which would establish any connection between himself and the canteen which was being run in the Civil Hospital. He would further submit that on a letter being addressed to the Civil Hospital Authorities, it has come on record during the course of investigation that rent for four months approximately Rs.80,000/- was deposited by another accused Zakir Shaikh and the attempt of Mr. Ponda is to convince us that the Petitioner was not at all connected to the Civil Hospital nor he was involved in the conduct of its day-to-day affairs. He would rely upon several statements recorded during the course of investigation and in particular two statements recorded under Section 18 of the MCOCA and he would then make a reference to the statement of

Mr. Mohan Duggal and Mr. Sonu Duggal, who had stated that one Jithu Gambhir, a distant cousin of the Petitioner had made over the canteen to him to be run in the year 2013 itself and a positive assertion is made that they had paid the money to Zakir Shaikh. Based on the confessional statement and the other statements recorded during the course of investigation, Mr. Ponda would submit that it is apparent that since 2013, the licence issued under the Shops and Establishments Act, 1948 of Sai Bhushan canteen was in the name of one Jagjitsingh Gambhir and the canteen which was allotted on a tender process to the Petitioner was sub-let to Mr. Jagjitsingh Gambhir and the Petitioner was never part of the day-to-day business of the canteen. He would also submit that on the basis of the statements, the position that emerges is that the canteen premises were run by three persons viz. Mohan Duggal, Zakir Shaikh and Jagjitsingh Gambhir along with Sonu Duggal. He would take us through the relevant portions of the said statements of Mohan Duggal and Sonu Duggal and also of Savita Duggal. He also relied upon the statement of Sanjay Dongre recorded on 07/04/2017 stating clearly that the canteen was in the name of Surjeet Singh Gambhir and it was run by Jittu Gambhir and Zakir Shaikh and Mohan Duggal was managing the canteen.

In sync with the said witnesses, one Nagnath Dongre's statement is also recorded along with Sudhakar Bade, Santosh Choudhary and Sanjay Hamkare. Based on the aforesaid

statements, Mr. Ponda would make an assertion that even assuming for a moment that the canteen was allotted to the Petitioner in the year 2013, whether he could be held guilty for commission of an offence as serious as Organizing a Crime Syndicate by virtue of simple act of sub-letting the premises and can he be attributed a role as a member of an Organized Crime Syndicate in absence of any positive act being traced to him.

7. Mr. Ponda would rely upon a *catena* of judgments to submit that *mens rea* is an essential ingredient for commission of a crime and having knowledge of commission of crime and in a serious offence like the one under the MCOCA, he would submit that *mens rea* must be established besides the fact of an agreement to commit a crime. Mr. Ponda would take his argument further by submitting that in the charge-sheet the Petitioner is shown to be absconding but it is not so and he would submit that it is apparent that there is no evidence to show that he was running the canteen premises and it is rather for the prosecution to prove ultimately that he was directly connected to the act or omission and a mere bald allegation is not sufficient.

8. In support of the respondents, the Public Prosecutor Shri Deepak Thakare would invite our attention to the charge-sheet and he would emphasize on the seriousness of the charges levelled against the accused persons. Shri Thakare would submit that the

charge-sheet specifically alleged that Sai Bhushan canteen was in possession of the present petitioner and inspite of having knowledge of the fact that Accused nos.7, 8 and 9 are carrying out a trade of illicit liquor in the said canteen, the petitioner had permitted the running of canteen at the hands of these accused and therefore a very serious charge is attributed to the petitioner. Shri Thakare would submit that the use of the illicit liquor on the particular day has caused 9 deaths and had placed several other persons in a precarious state of life. He also points out that charge-sheet is filed against the present petitioner under Section 299 of the Code of Criminal Procedure since he is absconding and a provision is made for filing the supplementary charge-sheet under Section 173(8) of the Cr.P.C. Shri Thakare would lay emphasis on the seriousness of the offence with which the petitioner is charged and he would rely on several documents placed on record along with the charge-sheet and would submit that the petitioner was *de jure* in charge of the canteen from which the illicit liquor was supplied. According to Shri Thakare, it is not in dispute that the canteen was allotted to the petitioner since he complied with the terms and conditions and he would also place reliance on the statement of Shri Sonawane, Civil Surgeon of the Civil Hospital who had issued a letter to continue the canteen contract till further instructions. He would also submit that Dr.Sonawane has been placed under suspension for issuing such a letter and continuing the said contract inspite of

the fact that the term of the contract had expired. In these peculiar facts, Shri Thakare submits that the petitioner has been a participant in the Organized Crime Syndicate and he cannot deny that in the canteen, illicit liquor was being brewed and was supplied and by remaining a mute spectator to the entire happenings in the canteen which was given to him after following the tender process, he has become the active participant in the crime syndicate and according to Shri Thakare, the approval was rightly granted by the superior officers to prosecute the petitioner under the provisions of MCOCA.

9. With the assistance of learned counsel for the parties, we have perused the Writ Petition which also contains the charge-sheet filed in the relevant C.R and we have also heard respective counsel who have advanced and put before us their rival claims. In order to ascertain the role attributed to the petitioner by the prosecution, we would be required to rewind the clock and go back in the year 2011 and in specific to 26th December 2011 when an advertisement came to be issued in the local newspapers inviting bids for running a canteen in the civil hospital at Ahmednagar. The tender document set out the terms and conditions and invited bids for running of the canteen of the civil hospital for a period of 12 months. The tender stipulated that the bidder would specify the rent amount and the minimum rent amount was specified as Rs.16,600/-.

It also stipulated as a condition of tender that as soon as the tender is allotted, a deposit of Rs.50,000/- is to be mandatorily made and a bank guarantee of Rs. One lakh to be deposited. It also stipulated that unless and until an agreement is reduced in writing accepting all the terms and conditions on a stamp paper of Rs.100/-, the canteen would not be started. Another condition of the tender was that the electricity bill, municipal corporation tax and the water bill would be borne by the successful bidder. Pursuant to the said tender notice, the tender was allotted to the Petitioner who offered an amount of Rs.18,181/- which was the highest bid received. The work of running a canteen was, therefore, allotted in favour of the Petitioner by the Civil Surgeon, General Hospital, Ahmednagar by his order dated 11th June 2012. The terms and conditions of the tender documents were included in the said allotment letter and the Petitioner executed an affidavit on 14th November 2013 accepting the terms and conditions. It is the specific case of the Petitioner that though he was allotted the said canteen, he never actually run the same and though the tender of the Petitioner was accepted, he did not comply with the stipulations in the tender notice and in particular, the condition of the deposit of security deposit of Rs.50,000/- and the bank guarantee of Rs.1 lakh was never complied by the Petitioner nor did he file an affidavit on a stamp paper of Rs.100/- accepting the terms and conditions of the contract and he also did not comply with the condition of

installation of an electricity meter in his name and payment of water tax, electricity bill or property tax nor did he pay the monthly rent or ever received notice about payment of such rent. The case of the prosecution is that the Petitioner was allotted the licence to run the canteen in the civil hospital on 11th June 2012 and he continues to run the same when the incident occurred on 12th February 2017. The basis of the prosecution case is based on an erroneous premise since the tender itself stipulated that the permission to run the canteen is for a period of 12 months and therefore, we find substance in the argument of Mr. Ponda that in any case, after a period of five years, the Petitioner cannot be said to run a canteen, even assuming for a moment that he started running the canteen after allotment of tender in his favour.

In order to establish the said facts, the prosecution has placed reliance upon several statements recorded during the course of investigation, apart from the confessional statement of one Mohan Duggal and his son Sonu Duggal. The statements recorded during the course of investigation bring on record a completely different saga. The confessional statement of Mohan Duggal recorded on 6th August 2017 is perused by us. In the said statement, he proceeds to state that the canteen at the civil hospital was taken by Surjit Singh, the brother of one Jitu Sheth. However, since the canteen was not running smoothly, he was called by Jitu Sheth through one Zakir Shaikh prior to four years and his willingness was sought to run the canteen on a condition

that he would be required to deposit an amount of Rs.50,000/- and would be required to pay an amount of Rs.6000/- by way of loan to Zakir Shaikh. Agreeing to these conditions, Mohan Duggal started running the canteen and he has stated that he and his son Sonu were collectively running the canteen. The statement further disclose that there was no profit in the said business of running the canteen. He had further stated that in the year 2016, Jitu Sheth and Zakir Shaikh told him that they would bring the liquor from Daman and store it in the canteen and start selling it from there to which he had objected. After some period of time, Jitu Sheth introduced Mohan to one Bharat Joshi and told him that he is an expert in preparing illicit liquor and he used to bring the said liquor in the kitchen and also carry out the mixing of the liquor in his canteen. Shri Mohan Duggal further state that when he was coerced to consent to such an arrangement, on account of fear, he permitted the illicit liquor to be prepared in the canteen and to be sold therefrom. The statement thus named Jitu Sheth as the main person who was assisting him financially and who was in control of the entire business run in the canteen. The statement then makes a reference to the incident of supplying the liquor to Bhimraj Avhad who was supplied with three boxes of liquor which came to be delivered for an advance of Rs.5,000/- paid to Zakir Shaikh.

The confessional statement of Sonu Duggal is somewhat similar on the lines of the statement of Mohan Duggal. The wife

of Mohan Duggal i.e. Sarita also produced one receipt from the police when the keys of the canteen being run by her husband Mohan Duggal was returned to her. Her statement recorded on 28th February 2017 discloses that her husband was running a canteen and in his venture he was assisted by her son. She had further stated that prior to five years, the canteen was handed over to her husband by one Zakir Shaikh and Jitu Gambhir. She also stated that whatever profit was earned out of the said canteen was shared by her husband with Zakir Shaikh and Jitu Gambhir. Statement of one Sanjay Thombre, Nagnath Dongre and Santosh Chaudhary recorded by the Investigating Agency in sync disclose that the canteen was in the name of Surjeet Singh Gambhir but it was run by Jitu Gambhir and Zakir Shaikh and Mohan Duggal was looking after the canteen with the assistance of Sonu Duggal and Hamid Shaikh.

10. Perusal of the said statement clearly emulate that the canteen was run by Jitu Gambhir and Zakir Shaikh through Mohan Duggal, Sonu Duggal and Hamid Shiakh. Reliance is also placed on the statement of Dr. Shri Sonawane, Civil Surgeon of Civil Hospital, Ahmednagar. This statement makes an interesting reading as it proceeds to state that on 15th August 2013, the canteen in the vicinity of the Ciivl Hospital was handed over to Surjit Singh Gambhir by the then Civil Surgeon Dr. D.C. Athavale on complying with the procedural formalities for a

period of one year. He further proceeds to state that the term of the contract came to an end on 14th August 2014 and since the canteen was being run, till the further tender process was undertaken, he had issued orders on 2nd September 2014 permitting Surjit Singh Gambhir to continue to run the canteen and thereafter, tender notice came to be issued in the local newspaper inviting bids for running the canteen. In the mean time, since on 18th December 2014, the State Government took a policy decision to the effect that if a contract involved an amount of more than Rs. Three lakhs, an e-tender should be floated and thereafter, he put up a note for processing e-tender. However, on some technical count, the process was never implemented and that is how the canteen continued with Surjit Singh Gambhir. Dr.Sonawane proceeded to state that since no complaint was received from anyone, Surjit Singh Gambhir was never asked to close the canteen and he had never visited the said canteen nor did he receive any complaint about the illegal operation in the said canteen. This is the entire material that is collected by the Investigating Agency during the course of investigation and the prosecution has relied upon the said statements to connect the Petitioner to the incident of consumption of illicit liquor on 12th February 2017 which resulted into death of 9 persons and grievous injury to 13 other persons.

11. Perusal of the entire material relied upon by the prosecution

disclose that the canteen was allotted by tender process to the petitioner but since the Petitioner did not complete the formalities, he was never physically placed in possession of the canteen and at the most, the case of the prosecution can be believed to the extent that though the canteen was allotted to the Petitioner, he had sublet it in the year 2013 itself and from 2013, Jagjit Singh Gambhir, a distant cousin was running the canteen through Mohan Duggal who had made a statement that he had deposited an amount of Rs.50,000/- with Jitu and was paying rent of Rs.600/- to Zakir Shaikh. The prosecution has not collected any evidence in form of any statement leading to a conclusion and establishing that in the year 2017 when the incident took place in the month of February, the Petitioner was in any way connected to the running of Sai Bhushan canteen of the Civil Hospital at Ahmednagar. The specific stand of the petitioner is that he had no knowledge about the activity taking place in the canteen since he was neither paying the rent nor paying the electricity bill, corporation tax, water bill which could establish his connection to the canteen in the year 2017. The Investigating Officer had also addressed a letter to the civil authorities on 4th April 2019 seeking certain information and it is responded to by an authorized person from the civil hospital who categorically stated that Surjit Sigh Gambhir did not deposit the amount of Rs.50,000/- or the bank guarantee in the period between 15th August 2013 to 31st January 2016. He also

categorically stated that Surjit Singh Gambhir has never deposited any receipts of payment of water bill, electricity bill, corporation tax etc. As far as the deposit of the amount of rent of Rs.80,000/-, the information supplied is to the effect that one Razak Shaikh had deposited an amount of Rs.80,000/- towards rent for which a receipt was issued on 1st September 2014 and the said amount has been deposited through challan in the Government treasury. The aforesaid material thus irresistibly lead to a conclusion that Jitu Gambhir was running the said canteen through Mohan Duggal and his son Sonu Duggal and the petitioner was not in control of the affairs of the canteen either physically or financially. The Labour Department has also informed that the Sai Bhushan canteen registered under the Shops and Establishments Act is in the name of Jagjit Singh Gambhir. It can thus be seen that from the year 2013, the petitioner was not in control of the affairs of the canteen and we are satisfied with the contention of Mr. Ponda that the Petitioner cannot be held responsible for any of the misdeeds with which he is charged and in specific, the case of the prosecution to the effect that the petitioner who was in possession of Sai Bhushan canteen has allowed the canteen to be run by Mohan Duggal, Jagjit Singh Gambhir and Zakir Kadar Shaikh though he was aware that they are indulging in preparation of spurious liquor and its sale. The prosecution has no material to demonstrate that the liquor boxes which were purchased by accused no.4. Bhimraj Avhad from Sai

Bhushan canteen, was being run by Sujit Singh Gambhir. In absence of the material brought on record, during the course of investigation, sanction came to be granted by the Additional Director General of Police, CID, Maharashtra State, Pune to prosecute the petitioner under Section 3(1)(i), 3(1)(ii), 3(2), 3(4) and Section 4 of the MCOCA.

12. In the backdrop of the aforesaid material brought on record in the form of Charge-sheet filed on completion of investigation, we would examine the arguments advanced by Mr. Ponda as regards the absence of mens rea on his part and, therefore, it would be necessary to see the culpability of the Petitioner and his involvement in the commission of crime either directly or indirectly in the light of the material collected by the prosecution to be used and relied upon in prosecuting the present Petitioner.

13. The essence of criminal law has been said to lie in the maxim - "*actus non facit reum nisi mens sit rea*". There can be no crime without an evil mind and therefore the essence of an offence be it under the IPC or any other law for the time being in force, is the wrongful intent, without which an offence cannot be established. This examination of mental element or mens rea requisite for every crime, will have to be ascertained from the surrounding circumstances since the direct evidence of mens rea at times may not be readily available. Mens rea referred to a

person's knowledge and the concept was brought in the writings of English Author - Eugene J. Chesney who promoted the idea that the act itself does not make the person guilty of crime unless mind is also guilty. There is a vital difference between the individual who accidentally done something that turns into a crime and someone who sets out in his mind to do something to hurt either any person or his property. The mens rea is all about intent and the individual frame of mind when the crime is committed and this intent can be gathered from the surrounding circumstances.

14. The MCOCA is an enactment which contain special provisions for prevention and control of organized crime and the criminal activity by the organised crime syndicate or gang. The said Act is a special enactment which was brought on the statute book to deal with organised crimes which pose a serious threat to the Society and crossed the international boundaries when it was noted that the illegal wealth and black money generated by the organised crime being very huge, which has serious effect on the country's economy and in the State of Maharashtra, the existence of operation of organised criminal gang being noted, the need was felt to curb their activities and to achieve this purpose, the Maharashtra Act XXX of 1999 came to be enacted. The Petitioner is charged with Section 3(1)(i)(ii), 3(2), 3(4) and Section 4 of the said Act. Section 3 of the said Act provides for

punishment of organized crime and it reads thus:

“3. Punishment for organised crime-

(1) Whoever commits an offence of organised crime shall,

(i) if such offence has resulted in the death of any person, be punishable with death or imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees one lac;

(ii) in any other case, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees five lacs.

(2) Whoever conspires or attempts to commit or advocates, abets or knowingly facilitates the commission of an organised crime or any act preparatory to organised crime, shall be punishable with imprisonment for a term which shall be not less than five years but which may extend to imprisonment for life, and shall also be liable to a fine, subject to a minimum of rupees five lacs.

(3) Whoever harbours or conceals or attempts to harbour or conceal, any member of an organised crime syndicate; shall be

punishable, With imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees five lacs.

(4) Any person who is a member of an organised crime syndicate shall be punishable with imprisonment for a term which shall not be less, than five years but which may extend to imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees five lacs.

(5) Whoever holds any property derived of obtained from commission of an organised crime or which has been acquired through the organised crime syndicate funds shall be punishable with a term which, shall not be less than three years but which may extend to imprisonment for life and shall also be liable to fine, subject to a minimum fine of rupees two lacs.”

15. The MCOCA has assigned a specific meaning to the following terms in the following manner:

*“2(d) "**continuing unlawful activity**" means an activity prohibited by law for the time being in force, which is a cognizable offence punishable with imprisonment of three years or more, undertaken either singly or jointly, as a member of an organised crime syndicate or on behalf of such, syndicate in respect of*

which more than one charge-sheets have been filed before a competent Court within the preceding period of ten years and that Court has taken cognizance of such offence;

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

*(f) "**organised crime syndicate**" means a group of two or more persons who, acting either singly or collectively, as a syndicate of gang indulge in activities of organised crime;*
(g) "Special Court" means the Special Court constituted under section 5.

16. The Petitioner is charged with commission of offence of organised crime and since it has resulted into death of the person and in other case, grave injury to others, clauses (i), (ii) of sub-section (1) of Section (3) is invoked and applied. As far as invocation of Sub-section (2) of Section 3 is concerned, he is alleged to have conspired or abetted or knowingly facilitated the commission of an organised crime. By virtue of sub-section (4) of Section 3 the Petitioner is being charged as a member of the Organized Crime Syndicate. Perusal of the definition of the term

to which we have referred to above, clearly refers to a continuing unlawful activity undertaken by a group of two or more persons either acting singly or collectively either syndicate or gang of an organised crime. Organised crime for the purpose of the enactment means any continuing unlawful activity by an individual, singly or jointly, either as a member of an organised crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means, with the objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any person or promoting insurgency. Perusal of the scheme of the enactment with the specific meaning assigned to the term used in Section 3 would create no doubt in one's mind that before invoking and applying the offences under the said enactment, mens rea is a necessary ingredient for charging a person with an offence under the MCOCA. In *Ranjitsingh Brahmajetsing Sharma v. State of Maharashtra & Ors. reported in AIR 2005 SC 2277*, while dealing with an appeal filed by a former Commissioner of Police posted in the City of Pune, who was charged with the offence under Section 3 of the MCOCA, the provisions of the MCOCA were invoked against the accused persons, who were found with the huge quantity of stamps, printing machinery and the allegations against the Appellant were the Applicant knew the adverse antecedents of the Accused persons. Certain sequence of events were relied upon by the

prosecution.

While dealing with the said appeal, the Apex Court has observed that the allegations against the Appellant was abetting the two public servants and they may or may not have any direct role to play as regard to commission of an organised crime but unless and untill a nexus with the accused, who is a member of the organised crime syndicate or an offence in the nature of organised crime is established, the Apex Court concluded that the Appellant cannot be said to have abetted commission of an organised crime and, therefore, held that Section 3(2) of MCOCA is not attracted.

17. In the case of *Bharat Shantilal Shah & Ors. v. State of Maharashtra reported in 2003 Bom.C.R. (Cri.) 947*, which decided the constitutional validity of the MCOCA, the Division Bench of this Court while upholding the validity pronounced that the provisions of Sections 3 and 4 of the MCOCA contemplate the existence of mens rea inherently and shall always be read therein as a necessary ingredient of the offence. The said judgment was subsequently upheld by the Hon'ble Apex Court in the case of *State of Maharashtra v. Bharat Shantilal Shah reported in 2009 (1) ACR 924 (SC)*. As regards the argument of mens rea, the Apex Court observed thus:

19. Even otherwise when the said definitions as existing in Section 2 (d), (e) and (f) of the

MCOCA are read and understood with the object and purpose of the Act which is to make special provisions for prevention and control of organised crime it is clear that they are worded to subserve and achieve the said object and purpose of the Act. There is no vagueness as the definitions defined with clarity what it meant by continuing unlawful activity, organised crime and also organised crime syndicate. As the provisions treat all those covered by it in a like manner and does not suffer from the vice of class legislation they cannot be said to be violative of [Article 14](#) of the Constitution.

With respect to Section 3 of MCOCA, even before the High Court the attack was in particular in respect of the provisions of [Section 3](#) (3) and (5) on the ground that the requirement of mens rea is done away with, thus automatically rendering a person without any intention or knowledge liable for punishment. It is a well settled position of law insofar as criminal law is concerned that in such provisions mens rea is always presumed as integral part of penal offence or section unless it is specifically and expressly or by necessary intendment excluded by the legislature. No such exclusion is found in sub-sections (3) and (5) of [Section 3](#). As held by the High Court, if the provisions are read in the following manner no injury, as alleged, would be caused:

(3). Whoever (intentionally) harbours or conceals or attempts to harbor or conceal any member of an organized crime syndicate shall be punishable with imprisonment for a term which shall not be

less than five years but which may extend to imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees five lacs.

(5). Whoever (knowingly) holds any property derived or obtained from commission of an organized crime or which has been acquired through the organized crime syndicate funds shall be punishable with a term which shall not be less than three years but which may extent to imprisonment for life and shall also be liable to fine, subject to a minimum fine of rupees two lacs."

18. It is thus by now a settled proposition that the offence under MCOCA would necessarily require establishment of mens rea.

19. On marshaling the evidence collected by the Respondents during the course of investigation, we find that the said mens rea is conspicuously absent. The Petitioner, who was allotted a canteen in the year 2013 pursuant to a tender notice which was to operate for a period of one year is roped in with an allegation that he continues to control the affairs of the canteen of the Civil Hospital in the month of February, 2017 when the incident took place. There is no material brought on record to establish that the Petitioner had any knowledge of the activities which was being undertaken in the canteen at the instance of the persons who were

running and managing the canteen. On the contrary, the evidence collected during the investigation reflect to the contrary that, one Zakir Shaikh was running the canteen and it can be conclusively said so since he was the one who was paying the municipal taxes, water/electricity bills and even the shop and establishment registration is in his name.

20. The element of mens rea and intention must accompany the culpable act and conduct of the accused and to attribute a person a criminal act, it must be established that he possessed the mental state or degree of fault at the relevant time. The burden lies on the prosecution to prove that the accused satisfied the definition of actus reus of a particular crime which is coupled with mens rea which would vary depending on the nature of the crime and also would vary in the matter of degree. It would be appropriate to refer to the proposition of law put in by J.C. Smith and Brian Hogan in the following words:

“It is a general principle of criminal law that a person may be convicted of a crime unless the prosecution have proved beyond reasonable doubt both (a) that he caused a certain event or that responsibility is to be attributed to him for the existence of a certain state of affairs, which is forbidden by criminal law, and (b) that he had a defined state of mind in relation to the causing of the event or the existence of the state of affairs. The event, or state of affairs, is called the

actus reus and the state of mind the mens rea of the crime.”

In the words of Glanville Williams in Criminal Law -

“Although thoughts are free, the uttering of them is another matter. Speaking or writing is an act, and is capable of being treason, sedition, conspiracy or incitement; indeed, almost any crime can be committed by mere words, for it may be committed by the accused ordering an innocent agent (e.g., a child under eight) to do the act. But to constitute a criminal act there must be (as said already) something more than a mere mental resolution. Apparent, but not real, exceptions to this proposition are treason and conspiracy. It is treason to compass the King's death, but the law requires an overt act manifesting the intention; and this act must be something more than a confession of the intention. It must be an act intended to further the intention; perhaps, too, it must actually do so....”

21. Keeping this proposition in mind, we do not find any definite material contained in the Charge Sheet to prosecute the Petitioner under the MCOCA. The Petitioner had approached this Court seeking protection of his fundamental rights enshrined under Article 21 of the Constitution and seek protection from arrest. He had approached the Additional Sessions Judge seeking

Anticipatory Bail which came to be rejected on 17/01/2019 on the ground of bar contained in the MCOCA. He has invoked the writ jurisdiction of this court by filing a petition under Articles 226 and 227 of the Constitution and apart from praying for striking down Section 21(3) of the MCOCA being arbitrary, unconstitutional and violative of Article 14, 19 and 21 of the Constitution, he also seeks a relief of quashing and setting aside the Order passed by the Special Judge, Nashik in the Anticipatory Bail Application, rejecting his bail on the ground of maintainability. The grain of argument of the Petitioner is that in absence of any prima facie evidence suggesting his involvement in the alleged crime which has ultimately emerged in the Charge Sheet filed by the Investigating Agency, the Petitioner seeks protection of his fundamental rights enshrined in Article 21 of the Constitution.

22. Though Mr. Ponda has placed heavy reliance on the judgment in Ku. Hema Mishra's case (supra), we are of the opinion that the said judgment is not of any support to him for the reason that the Apex Court was dealing with the exercise of power by the High Court in the absence of an anticipatory bail/pre arrest bail provision in existence in the State of Uttar Pradesh and it is in the peculiar circumstances Their Lordships of the Apex Court have held that an Accused can approach the High Court under Article 226 of the Constitution for grant of relief of

anticipatory bail.

In absence of any provision similar to Section 438 applicable in the State of Uttar Pradesh, the Apex Court examined the power of the High Court to entertain the petition under Article 226 of the Constitution and reminded the Court of being cautious in its approach and has expressed that the provisions of Article 226 of the Constitution can be used as a device to advance justice and not to frustrate it.

23. It is no doubt true that the High Court has wide powers under Article 226 of the Constitution when a petition is filed invoking the writ jurisdiction of this Court, seeking protection of fundamental rights of the Petitioner. We have ascertained the claim of the Petitioner from the facts placed before us. The perusal of the overall material against the Petitioner taken at its face value, does not disclose any sufficient or tangible material which according to us would justify the invocation of the provisions of the MCOCA against the Petitioner. There is no material placed on record to establish him as a member of any crime syndicate nor it is established that he was a participant in the commission of an offence by establishing that he had the knowledge of the happenings in the Civil Hospital's canteen which was allotted to him on paper but which he never physically administered by him. The confessional statement attributes no role to the Petitioner and the chargesheet is bereft of any material

to establish that the Petitioner was in control of the canteen since the year 2013. In such circumstances, we are prima facie satisfied that the order granting sanction to prosecute the Petitioner by the Special Inspector General of Police, CID, Pune, suffers from non-application of mind as no material is brought on record in the form of Charge Sheet justifying invocation of the provisions of MCOCA against the Petitioner. In absence of any mens rea, knowledge or intention, if the Petitioner is subjected to the rigors of trial and with the stringent provisions of being incarcerated in the absence of a provision for anticipatory bail and the grant of bail being subjected to stringent condition enumerated in Section 23 of the Act, in our considered view the Petitioner is entitled for protection against his arrest in the said offence reserving the question of determination of validity of Section 21(3), in appropriate proceedings. In the result, in exercise of our writ jurisdiction to protect the fundamental rights of the Petitioner enshrined in Article 21 of the Constitution of India and to protect him from being arrested under the relevant C.R in respect of which a charge-sheet has been filed and the Petitioner has been shown to be an absconding accused, we direct that the Petitioner shall not be arrested in absence of any material being available against the Petitioner in the charge-sheet establishing his culpability under the provisions of the Maharashtra Control of Organized Crime Act, 1999.

24. We make it clear that the observations made in the judgment are restricted qua the allegation of culpability of the Petitioner. We have not gone into the case of other accused nor have commented upon their culpability.

25. The Petition is allowed in terms of prayer clause (a). No order as to costs.

(SMT. BHARATI DANGRE, J.)

(RANJIT MORE, J.)