

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL APPLICATION [ABA] NO. 232/2020.

Vijay Jawaharlal Chug

-VERSUS-

The State of Maharashtra

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders

Shri R.K. Tiwari, Advocate for the Applicant.
Shri N.B. Jawade, A.P.P. for the Non-applicant.

CORAM : VINAY JOSHI, J.

CLOSED FOR ORDERS ON - 14.08.2020
ORDERS PRONOUNCED ON - 18.08.2020

Hearing was conducted through Video Conferencing and the learned Counsel agreed that the audio and visual quality was proper.

2. Registration of Crime No. 295/2019 at Police Station Hudkeshwar, Nagpur for the offence punishable under Sections 302, 365, 201, 120-B, 212 read with 34 of the Indian Penal Code, Section 3[1][i][ii], 3[2], 3[4] of the Maharashtra Control of Organised Crime Act, 1999 (MCOC Act), Section 4/25 of the Arms Act and Section 135 of the Maharashtra Police Act, provided a reason for the applicant to

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believe that he may be arrested in said crime containing non-bailable offences. Perceiving such apprehension, the applicant initially approached to the Special Judge, Nagpur designated under MCOC Act, for grant of pre-arrest bail in terms of Section 438 of the Code of Criminal Procedure, however, the same came to be rejected vide order dated 18.06.2020. Being aggrieved by the said order, the applicant has invoked the concurrent jurisdiction of this Court for grant of pre arrest bail in said crime.

3. Beside usual grounds, the applicant claimed bail by contending that statutory bar created under Section 21[3] of the MCOC Act would not apply, since there is no prima facie material against him to connect him with the alleged crime. On merits, the impugned order is challenged by submitting that besides mere charge of harboring the main offender, which is punishable under Section 212 of the Indian Penal Code, there is no other allegation against the applicant. The learned Counsel would submit that though the applicant allegedly took the main accused and another assailant by his car to Amravati, however, he was totally unaware about the commission of murder of one Vijay Mohod by the co-accused. He would stress that there is total absence of *mensria* in the act of the applicant of transporting assailants to some other place, and therefore, the provisions of MCOC Act would not apply against him.

4. The State resisted the bail application vide reply-affidavit

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dated 17.07.2020. While putting stiff resistance, the State initially opposed the bail on the premise of statutory bar created under Section 21[3] of the MCOC Act. Learned A.P.P. would submit that the applicability of Section 438 of Code of Criminal Procedure has been specifically excluded to the persons who are facing accusation of committing the offence punishable under the Special Act, namely MCOC Act. Secondly, it is argue that the Special Court has issued proclamation against the present applicant in terms of Section 82 of the Cr.P.C., and therefore, in view of the decision of Hon'ble Supreme Court in case of **State of Madhya Pradesh .vrs. Pradeep Sharma – (2014) 2 SCC 171**, the application for grant of anticipatory bail is not maintainable.

5. On facts it is argued that there is ample material on record to show that the applicant was a member of organized crime syndicate. The applicant with conscious knowledge has facilitated the assailants soon after the commission of murder. In other words, the applicant knowingly facilitated the commission of organized crime by way of harboring the main accused. According to him, the accused being a member of the organized crime syndicate, he is not entitled for pre arrest bail. Learned A.P.P. has also produced a chart showing that in past the applicant was involved in 4 other offences. Certainly antecedents of the applicant is one of the relevant factor as per Section

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438[ii] of the Code, which is to be looked into in context with other material. The learned A.P.P. has placed reliance on some decisions to state that there is no necessity to have two charge sheets against each member of the organized crime. However, the said point has not been agitated on behalf of the applicant, hence, it requires no consideration.

6. The first objection raised by the State is about non-applicability of the provisions of Section 438 of Cr.P.C. relating to cases registered under the MCOC Act by virtue of Section 21[3] of the said Act. The learned A.P.P. submitted that mere accusation of committing an offence punishable under the Special Act itself excludes the applicability of Section 438 of the Code. Per contra, the learned counsel for the applicant would submit that since prima facie ingredients to attract provisions of MCOC Act are absent, the statutory bar would not come into his way. Learned counsel has relied on the decision of **Dr. Subhash Kashinath Mahajan .vrs. The State of Maharashtra and another – 2018 All MR (Cri) 1773 (SC)**, to support his stand. In said case the Hon'ble Supreme Court has observed that there is no absolute bar to grant anticipatory bail, if no prima facie case is made out despite insertion of Section 18 into the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. Though the said decision relates to the statutory bar created under the 1989 Act, however, the said provision is *pari materia* to Section 20[3] of the MCOC Act. Therefore,

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basically on facts one has to see whether prima facie case is made out against the applicant to involve him in connection with the charge under the MCOC Act. If the material collected by the investigating agency does not show any nexus or even remote connection of the applicant relating to the organized crime, then the bar would not apply.

To impress the point of maintainability, learned counsel for the applicant sought to rely on the decision of this Court in case of **Surjitsingh Bhagatsingh Gambhir .vrs. The State of Maharashtra and others** 2019 All MR (Cri) 4550. Basically in said case sanction accorded under Section 23[1][a], and the MCOC Act was the subject matter of challenge. In that context, while entertaining the challenge in writ jurisdiction, Division Bench of this Court has issued directions that the accused shall not be arrested, which was in the sort of pre arrest protection. Learned counsel for the applicant would submit that though such directions were issued under writ jurisdiction, however, nomenclature under which the order has been passed is of less significance. To buttress said contention, he relied on the decision in case of **M/s. Pepsi Foods Ltd. .vrs. Special Judicial Magistrate and others** – AIR 1998 SC 128. Lastly, to uphold the maintainability, he has relied on the unreported decision of this Court in case of **Sham Jalindar Gaikwad .vrs. State of Maharashtra** (ABA No. 1642/2015 dt. 11.12.2015), wherein pre arrest bail was granted.

7. Another technical objection raised by the learned A.P.P. on

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the point of maintainability is about the applicants status as proclaimed offender. For this purpose, he placed heavy reliance on the decision in case of State of Madhya Pradesh .vrs. Pradeep Sharma [supra], wherein the Hon'ble Supreme Court having regard to its earlier decision in case of **Lavesh .vrs. State (2012) 8 SCC 730**, has ruled that if any one is declared as an absconder/proclaimed offender in terms of Section 82 of the Code, he is not entitled to the relief of anticipatory bail.

In response, learned counsel for the applicant would submit that mere issuance of proclamation would *ipso facto* does not bar the applicant from claiming pre arrest bail. In this regard he has relied on off quoted decision of the Hon'ble Supreme Court in case of **Gurbaksh Singh Sibbia .vrs. The State of Punjab – AIR 1980 SC 1632**, wherein the concept of anticipatory bail has been elaborately dealt with by the Hon'ble Supreme Court. Inasmuch as in recent pronouncement of the Hon'ble Supreme Court in case of **Sushila Agrawal .vrs. State (NCT of Delhi) 2012 All MR (Cri) 497 (SC)**, it is ruled that there is no restriction on the Court while deciding the pre arrest bail which pertains to personal liberty. To counter, the decision rendered in case of Pradeep Sharma [supra], learned counsel for the applicant sought to rely on the decision of Madhya Pradesh High Court in case of **Balveer Singh Bundela .vrs. State of Madhya Pradesh (M.Cr.C.No. 5621/2020 dated 12.05.2020)**. In said case, the Single Judge of the Madhya Pradesh High Court having regard to the law laid down by the Constitutional

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Bench of the Hon'ble Supreme Court in case of Gurubksh Singh [supra], and the later decision in case of Lavesb and Pradeep Sharma [supra], has expressed that there is no absolute bar for deciding the anticipatory bail application of proclaimed offender. The Madhya Pradesh High Court has explained that the ratio laid down in case of Lavesb and Pradeep [supra], would only indicate that if the accused/applicant is an absconder, then on merits he is not entitled for anticipatory bail, but, the application is certainly maintainable. The analogy applied by the Madhya Pradesh High Court is that one of the parameter for grant of pre arrest bail set out in Section 438[iii] of the Code is that the possibility of the applicant to flee from justice. It is explained that in that context, the Hon'ble Supreme Court in case of Lavesb and Pradeep [supra], has observed that the applicant who is proclaimed offender is not entitled to bail on merits, but, bail application is maintainable.

8. Section 438 of the Code undoubtedly points out 5 key factors to be considered while granting the discretionary relief of pre arrest bail. One of the factor is about the consideration relating to possibility of the applicant fleeing from justice. The issuance of proclamation against the applicant would vouch that there is possibility of applicant of fleeing from justice. Therefore, as the applicant has not met with the test laid down under clause [iii], hence, on merits pre arrest protection cannot be granted. True, merely because proclamation has been issued against the applicant, his application cannot be termed

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as not maintainable, but, having regard to the history of issuance of proclamation, his entitlement has to be decided.

9. To get over the decision of Hon'ble Supreme Court in case of Lavesb and Pradeep [supra], it is submitted that in true sense there was no proclamation against the present applicant, and therefore, those decisions would not apply in case at hand. The applicant has produced copy of application dated 11.02.2020, sent by the investigating officer to the concerned Court for issuance of proclamation in terms of Section 82 of the Code. He has pointed out that this application was simply allowed without application of mind. He would contend that the order of proclamation was not preceded by an order of issuance of warrant. Moreover, it is submitted that the proclamation was not published as per requirement of Section 82 of the Code. Precisely, it is his effort to show that the issuance of proclamation itself is faulty, and therefore, it cannot be considered at all.

10. To negate this submission, learned APP submitted that the proclamation was issued by following prescribed procedure. Copy of the proclamation dated 11.02.2020 is already produced by the applicant. It is apparent that the proclamation was issued in terms of Section 82 of the Code read with Section 20[3] of the MCOC Act. Learned A.P.P. submitted that issuance of proclamation in terms of Section 20[3][a] is a specific provision which does not require issuance

of warrant at earlier point of time. He took me through the non-obstante clause incorporated under Section 20[3][a] of the Act which provides that - notwithstanding anything contained in Section 82 of the Code, a Court may publish a written proclamation requiring attendance of the accused. Therefore, prima facie it reveals that the non-obstante clause employed in the section itself gives overriding effect on the general provisions of Section 82 of the Code when the proclamation is issued by the Special Court in terms of Section 20[3] of the MCOC Act. Therefore, issuance of proclamation under Section 20[3] of the MCOC Act would prima facie meet compliance to hold that the applicant is a proclaimed offender. Having been held so, though pre arrest bail application is maintainable, however, as one of the major factor incorporated under Section 438 [iii], being totally against the applicant, in view of the ratio laid down in case of Laves and Pradeep [supra], the applicant would not be entitled for pre arrest protection.

11. Apart from that, I have also considered the rival submission of the parties on merits of the application in context with the statutory bar created under the Act. Before that relevant reference can be made that the Additional Director General of Police has duly accorded sanction under Section 23[2] of the MCOC Act on 09.12.2019 for invoking the provisions of the Act, against 15 accused including the present applicant. The said sanction order has not been challenged till

date which also carries significance.

12. On facts, the entire episode arose out of gaining supremacy in two rival groups, one led by the deceased Vijay Mohod and other by gang leader namely Abhay Raut. Prima facie it appears that Vijay Mohod was eliminated with an object of gaining pecuniary benefits from gambling business. At this stage, one should be mindful of the fact that the scope of appreciation of evidence and other material is very limited. A roving enquiry is to be avoided, but, the material on its fact has to be considered. The Court is not expected to indulge into critical analysis of the material collected by the investigating agency.

13. The facts are such that deceased Vijay Mohod was initially kidnapped and later on he was murdered. Soon after the occurrence, the applicant carried the assailants by his vehicle, took them to Amravati and facilitated them to stay in a lodging house. There is statement of witness (HW 59) who has specifically stated that soon after the occurrence, the applicant was summoned by the assailants along with his car. Thereafter, applicant took all of them to Amravati, booked a room in the lodging house in his own name and facilitated them to stay there. Statement of another witness (HW 74) prima facie discloses that the applicant was well acquainted with the gang members, including the gang leader. The definition of the term “continuing unlawful activity” as defined in Section 2[d] of the Act, gives primacy to

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direct as well as indirect role played by the syndicate. It is argued that there was no conscious knowledge to the applicant about the earlier act of the co-accused, i.e. murder of deceased Vijay Mohod. According to the applicant, at the most he can be booked under Section 212 of the Indian Penal Code for harboring offenders. The learned counsel for the applicant would submit that the element of *mensria* is totally absent, and therefore, he cannot be hauled for the act of organized crime.

14. Infact what is important is nexus or a link of the person with the organized crime syndicate. The link with the organized crime syndicate is a characteristic of the term 'continuing unlawful activity'. The statement of two hidden witnesses prima facie discloses that the applicant was well acquainted with the gang members and at their instance, he immediately rushed to the desired place and facilitated the assailants to flee away by his own car. It is revealed that the applicant has taken active part in facilitating continuing unlawful activity and commission of organized crime. The probable defence would not weigh much while considering the prima facie case made out against the applicant.

15. Section 3[2] of MCOC Act, specifically provides a punishment for abettor or a person who knowingly facilitate the commission of organized crime. Likewise Section 3[3] of the MCOC Act provides punishment to a person who harbors a member of an

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organized crime syndicate. In short, though Indian Penal Code prescribes a penal consequence for harboring the offender, however, the provisions of MCOC Act provides a specific penal consequence to a person who harbors the member of organized crime. Likewise, mere membership of a organized crime syndicate also attracts a punishment under Section 3[4] of the Act. Thus, the facilitator as well as a harborer is made punishable under the Special Act for which there appears to be a prima facie material against the applicant.

16. The investigation paper contains a receipt showing that the applicant in his own name booked the lodging house as well as provided his aadhar card for the purpose of booking. Apart from that two confessional statements of co-accused were pressed into service to show role of the applicant. Therefore, certainly this is not a case to say that absolutely there is no material against the applicant to establish his nexus with the organized crime syndicate. Particularly, when the matter is viewed from the angle of existence of statutory bar, unless there is very exceptional circumstance, debarring provision enacted in the Special Statute, cannot be brushed aside. In view of above, no case made out on merits also for grant of pre arrest protection on the canvass of statutory bar created under Section 20[3] of the Act. Thus, the applicant being merit-less, stands rejected.

17. This order be communicated to the counsel appearing for

Order

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the parties, either on the e-mail address or on WhatsApp or by such other mode, as is permissible in law.

JUDGE

Rgd.