

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.8 OF 2021

Lawrence S/o Dorai Swamy,
Age: Major, Occu: business,
R/o R/o Bunflow No.1,
Nagar-Parishad Road, Barbabli
Tq. and Dist. Ahmednagar

Appellant

versus

1. The State of Maharashtra
through Sub-Divisional Police Officer,
Shevgaon Sub-Division,
Shevgaon Office,
Ahmednagar

2. The Police Inspector,
Bhingar Camp Police Station,
Ahmednagar

3. Ajay Sughand Shinde
Age: 35 years, occu: Supervisor,
R/o Kinetic Chowk,
Priyanka Colony,
Ahmednagar,
Dist. Ahmednagar

Respondents.

...

Ms. P.S. Talekar advocate for appellant
Mr. R.V. Dasalkar APP for respondent Nos.1 and 2.
Mr. Niteen V. Gaware advocate for respondent No.3

...

CORAM: RAVINDRA V. GHUGE & B. U. DEBADWAR, JJ.

Date: 19-01-2021

ORAL ORDER (Per: Ravindra V. Ghuge, J.)

1 We have heard the learned advocates for the appellant and respondent No.3 and the learned Prosecutor for respondent Nos.1 and 2, on 18.1.2021 and 19.1.2021.

2 On 18.1.2021, we had passed the following order:-

" 1. We have considered the extensive submissions of the learned Counsel for the respective sides. We are granting time to the learned Prosecutor to consider the effect of the principles culled out by the Hon'ble Apex Court under paragraph No.31 from 31.1 to 31.4 in **Pradeep Ram Vs. State of Jharkhand and Another, (2019) 17 SCC 326**. The learned Prosecutor is expected to be prepared to address us on this issue.

2. Stand over to 19-01-2021 as part-heard."

3 The learned Prosecutor has relied upon the Judgment delivered by the Honourable Apex Court in the matter of **CBI Versus Anupam J. Kulkarni, (1992) 3 SCC 141**. The learned counsel for the appellant has relied upon **MITHABHAI PASHABHAI PATEL & OTHERS versus State of Gujrat (2009) 6 SCC 332** and **MANOJ SURESH JADHAV AND OTHERS Versus STATE OF MAHARASHTRA (2019) 17 SCC 362**, which have been considered in Pradeep Ram (Supra).

4 Considering the controversy before us and the order that we are passing today, we deem it appropriate to refrain from adverting to the merits of the charges and the reasons to arrest the appellant based on the added charges under the MCOC Act in the FIR bearing Crime No.2827/2020. We would advert to those features of this case which are necessary for deciding the controversy before us which is primarily, 'whether the learned Special Judge (MCOC Act) Ahmednagar could have passed the

impugned order in the light of the law laid down by the Honourable Apex Court in **Pradeep Ram** (supra)' and 'whether the State was required to approach the Court which had granted bail to the appellant in the same Crime No.2827/2020, for production of the accused.' We are also informed that the learned Judge, who has passed the impugned order, as a Special MCOC Court, is the same learned Judge, who had granted bail to the appellant earlier in the capacity of being the Additional Sessions Court.

5 The FIR was registered at 2 a.m. on 21.11.2020. The name of the appellant does not figure in the list of accused persons. On 21.11.2020, one injured person claimed that the driver of the appellant was present when the offence of dacoity allegedly took place. The said driver Arjun Dubey was arrested on 24.11.2020. On 09.12.2020, a large force of Police-men reached the residence of the appellant at 6 a.m. and arrested him on the ground that Arjun Dubey was his driver. Sections 395, 397, 324, 323, 504, 506(2) read with 120-B of the IPC and sections 4 and 25 of the Arms Act were invoked. By order dated 09.12.2020, Criminal Misc.Application No. 1479 of 2020 filed by the present appellant was rejected, as it had become infructuous since the appellant was taken into custody. By a subsequent order dated 23.12.2020, the learned Additional Sessions Judge, Ahmednagar allowed the Bail Application filed by the appellant

for seeking regular bail under section 439 of the Criminal Procedure Code with regard to Crime No. I-2827/2020.

6 On 30.12.2020, the SDPO, Shevgaon, addressed the Special Judge, MCOC Court by tendering a report, setting-out therein that as the appellant has been granted bail in the same case, permission be granted to take the appellant into custody and arrest him since the MCOC Act has been made applicable in the said case. By the impugned order dated 31.12.2020, the learned Special Judge passed an order issuing production warrant against the appellant and granted permission to arrest him. That order has been implemented on 01.01.2021 and the appellant is in PCR even today. The PCR is said to end tomorrow subject to the investigating agency, seeking further extension of the PCR, keeping in view that such PCR can extend to a maximum period of 30 days.

7 The issue raised for our consideration is on the basis of prayer clauses 'A' 'B' and 'C' put-forth in the appeal, which read as under:-

" A. *The Record and Proceedings in application be called for the report filed by SDPO dated 30.12.2020 in crime no.2827 of 2020 u/s 395, 397, 324, 323, 504, 506(2), 120B of IPC 4 and 25 of Arms Act and 3(1)(ii), 3(2) and 3(4) of MCOC Act.*

B. *To quash and set aside the impugned order dated*

31.12.2020 passed by the Ld. Special Judge, MCOCA Court below report filed by SDPO dated 30.12.2020 in crime no.2827 of 2020 u/s 395, 397, 324, 323, 504, 506(2), 120B of IPC 4 and 25 of Arms Act and 3(1)(ii), 3(2) and 3(4) of MCOC Act in respect of grant of permission to arrest the accused Lawrence Durai Swamy for his custody.

C. To grant stay to the impugned order dated 31.12.2020 passed by the Ld. Special Judge, MCOCA Court below report filed by SDPO dated 30.12.2020 in crime no.2827 of 2020 u/s 395, 397, 324, 323, 504, 506(2), 120B of IPC and 4 and 25 of Arms Act and 3(1)(ii), 3(2) and 3(4) of MCOC Act in respect of grant of permission to arrest the accused Lawrence Durai Swamy for his custody, pending hearing and final disposal of the appeal. "

8 The impugned order indicates that the learned advocate on behalf of the appellant was heard along with the learned Prosecutor before the Special Court. Both the parties had placed heavy reliance on **Pradeep Ram** (supra). The appellant had tendered ten citations and had placed heavy reliance on **Mithabai** (supra) and **Manoj** (supra) along with **Pradeep Ram** (supra).

9 In **Pradeep Ram** (supra), the Honourable Apex Court has set-forth specific conclusions in respect of a circumstance wherein, after grant of bail to an accused, further cognizable and non-bailable offences are added and as to the legal course for seeking production or custody or arrest of an accused who was earlier granted bail with reference to the same FIR. The

Honourable Apex Court formulated the issues from paragraph 9.1 to 9.5 which read as under:-

“ **9.** From the submissions of the learned counsel for the parties and the pleadings on the record, following are the issues, which arise for consideration in these appeals:

9.1. (i) Whether in a case where an accused has been bailed out in a criminal case, in which case, subsequently new offences are added, is it necessary that bail earlier granted should be cancelled for taking the accused in custody?

9.2. (ii) Whether re-registration of FIR No. RC-06/2018/NIA/DLI is a second FIR and is not permissible there being already an FIR No. 2 of 2016 registered at Police Station Tandwa arising out of the same incident?

9.3. (iii) Whether NIA could conduct any further investigation in the matter when investigation in PS Case No. 2 of 2016 having already been completed and charge-sheet has been submitted on 10-3-2016 with regard to which cognizance has already been taken by the Chief Judicial Magistrate, Chatra on 11-3-2016?

9.4. (iv) Whether the order dated 25-6-2018 passed by the Judicial Commissioner-cum-Special Judge, NIA, Ranchi remanding the appellant to judicial custody is in accordance with law?

9.5. (v) Whether the power under Section 167 CrPC can be exercised in the present case, where the cognizance has already been taken by the Chief Judicial Magistrate on 11-3-2016 or the accused could have been remanded only under Section 309(2) CrPC? ”

10 The law crystallized by the Honourable Apex Court with regard to the circumstance set out in paragraph 31, reads as under:-

“ **31.** In view of the foregoing discussions, we arrive at the following conclusions in respect of a circumstance where after grant of bail to an accused, further cognizable and non-bailable offences are added:

31.1. The accused can surrender and apply for bail for newly added

cognizable and non-bailable offences. In event of refusal of bail, the accused can certainly be arrested.

31.2. The investigating agency can seek order from the court under Section 437(5) or 439(2) CrPC for arrest of the accused and his custody.

31.3. The court, in exercise of power under Section 437(5) or 439(2) CrPC, can direct for taking into custody the accused who has already been granted bail after cancellation of his bail. The court in exercise of power under Section 437(5) as well as Section 439(2) can direct the person who has already been granted bail to be arrested and commit him to custody on addition of graver and non-bailable offences which may not be necessary always with order of cancelling of earlier bail.

31.4. In a case where an accused has already been granted bail, the investigating authority on addition of an offence or offences may not proceed to arrest the accused, but for arresting the accused on such addition of offence or offences it needs to obtain an order to arrest the accused from the court which had granted the bail.

32. Issue (i) is answered accordingly.”

11 We find that the facts of the case in **Pradeep Ram** are quite similar to the facts in the case in hands. For the sake of brevity, we are comparing the facts hereunder:-

(A) In **Pradeep Ram**, FIR No.2/2016 was registered with Police Station Tandava on 11.1.2016 and offences under the IPC and the Arms Act and Criminal Law Amendment Act were attracted. In the present case, the FIR was registered on 21.11.2020 and the provisions of the IPC and the Arms Act were invoked.

(B) The High Court of Madhya Pradesh granted regular bail to **Pradeep Ram** and the additional sessions Judge granted regular bail to the present appellant.

(C) Subsequently, on 9.4.2017, offences under the provisions of the Unlawful Activities (Prevention) Act, 1967 were added against **Pradeep Ram**. In the instant case, provisions of the MCOC Act were made applicable on 25.12.2020.

(D) In **Pradeep Ram**, FIR No.2/2016 was re-registered, after the Central Government permitted the National Investigation Agency to take over the investigation on 13.2.2018, as a new FIR dated 16.2.2018. In the instant case, the FIR was not required to be re-registered after applying the provisions of the MCOC Act to the present appellant.

(E) The NIA moved the Special Judge, NIA Ranchi, to which the case was transferred, for issuance of a production warrant. In the instant case, by the report dated 30.12.2020, the SDPO acting under the MCOC Act, sought permission to arrest the appellant.

(F) By the order dated 25.06.2018, passed by the Special NIA Court, **Pradeep Ram** was directed to be produced and that order was under challenge before the Honourable Apex Court in the Judgment (supra) delivered on 1.7.2019. In the case in hand, by the impugned order dated 31.12.2020, the Special Court granted permission to arrest the present appellant.

(G) The Honourable Apex Court in **Pradeep Ram** concluded that the order of the Special Judge permitting production of **Pradeep Ram**, was sustainable. In the instant case, though the original case

is still with the Additional Sessions Judge, the Special Court, vide the impugned order, granted permission to arrest the present appellant.

12. In Mithabhai (supra) the Honourable Apex Court concluded that the power of remand is to be exercised when investigation is not complete and after cognizance of an offence is taken, the accused who are not in custody as having been released on bail, could be remanded to custody only in terms of section 309 (2) of the Cr.P.C. While drawing the conclusion, the Honourable Apex Court concluded in **para 18** as under:-

"18. The appellants had been granted bail. They are not in custody of the court. They could not be taken in custody ordinarily unless their bail was cancelled. The High Court, in our opinion, was not correct in holding that as further investigation was required, sub-section (2) of Section 167 of the Code gives ample power for grant of police remand. "

13 In the case before us, the investigation in FIR No.2827/2020 is being undertaken by the same Police station and the charge sheet is yet to be filed before the trial Court (Additional Sessions Judge). The appellant is already released on bail. In one other offence registered vide Crime No. I-2880/2020 punishable under sections 387 and 341 of the IPC read with sections 3 and 25 of the Arms Act, the appellant has been granted bail on 15.1.2021.

14 In this backdrop, we are called upon to consider whether the impugned order dated 31.12.2020 passed by the Special Court issuing production warrant against the present appellant and granting permission to arrest him, could have been sustained only because the same learned Judge, who is the Additional Sessions Judge and also designated as a Special Judge for cases under MCOC Act, has passed the said order being under the impression that she is the same Judge and therefore, the law laid down in **Pradeep Ram** (supra) could permit her to pass an order as a Special Court.

15 In **Pradeep Ram**, we find that the Honourable Apex Court considered the case of **Manoj** (supra) and concluded in paragraphs No.28, 29 and 30 as under:-

“ **28.** The learned counsel for the appellant has relied on an order of this Court dated 7-5-2018 in *Manoj Suresh Jadhav v. State of Maharashtra*. In the above case, the petitioners were granted bail for the offence punishable under Section 509 read with Section 34 IPC. During the course of investigation, the police added another offence under Section 376 IPC and re-arrested the accused. The petitioners filed writ petition before the High Court, which was dismissed. This Court in the above case while disposing of the special leave petition observed as under : (*Manoj Suresh Jadhav case*, SCC pp. 362-63, paras 3-7)

“3. We have heard the learned counsel appearing for the parties and perused the record.

4. It is not permissible for the respondent State to simply re-arrest the petitioners by ignoring order dated 2-6-2016 passed by the

learned Additional Sessions Judge, Pune, which was in force at that time.

5. We direct that the petitioners shall be released on bail on the same condition(s) as imposed in the aforesaid order dated 2-6-2016 by the learned Sessions Judge, Pune.

6. Having regard to the provision of Section 439(2) of the Code of Criminal Procedure, the respondent State is at liberty to apply for cancellation of bail and seek the custody of the petitioner-accused.

7. With the aforesaid directions, the special leave petition is disposed of."

29. Relying on the abovesaid order, the learned counsel for the appellant submits that the respondent State ought to get first the order dated 10-3-2016 granting bail to the appellant cancelled before seeking custody of the appellant. It may be true that by mere addition of an offence in a criminal case, in which the accused is bailed out, investigating authorities itself may not proceed to arrest the accused and need to obtain an order from the court, which has released the accused on the bail. It is also open for the accused, who is already on bail and with regard to whom serious offences have been added to apply for bail in respect of new offences added and the court after applying the mind may either refuse the bail or grant the bail with regard to new offences. In a case, bail application of the accused for newly added offences is rejected, the accused can very well be arrested. In all cases, where the accused is bailed out under orders of the court and new offences are added including offences of serious nature, it is not necessary that in all cases earlier bail should be cancelled by the court before granting permission to arrest an accused on the basis of new offences. The powers under Sections 437(5) and 439(2) are wide powers granted to the court by the legislature under which the court can permit an accused to be arrested and commit him to custody without even cancelling the bail with regard to earlier offences. Sections 437(5) and 439(2) cannot be read into restricted manner that order for arresting the accused and to commit him to custody can only be passed by the court after cancelling the earlier bail.

30. Coming back to the present case, the appellant was already into

jail custody with regard to another case and the investigating agency applied before the Special Judge, NIA Court to grant production warrant to produce the accused before the Court. The Special Judge having accepted the prayer of grant of production warrant, the accused was produced before the Court on 26-6-2018 and remanded to custody. Thus, in the present case, production of the accused was with the permission of the Court. Thus, the present is not a case where investigating agency itself has taken into custody the appellant after addition of new offences rather the accused was produced in the Court in pursuance of production warrant obtained from the Court by the investigating agency. We, thus do not find any error in the procedure which was adopted by the Special Judge, NIA Court with regard to production of the appellant before the Court. In the facts of the present case, it was not necessary for the Special Judge to pass an order cancelling the bail dated 10-3-2016 granted to the appellant before permitting the appellant-accused to be produced before it or remanding him to the judicial custody."

16 It was thus settled that a bail application of the accused upon being rejected with the regard to newly added offences, would empower the investigating authorities to arrest him. It was further held that in all cases where the accused is bailed out under the orders of the Court and grave charges as regards new offences which are non-bailable having been added, would not make it necessary in all such cases, to cancel the Bail before granting permission to arrest an accused on the basis of new offences.

17 To summarize, the Honourable Apex Court concluded in paragraph No.31 that *firstly*, in the above circumstances, an

accused may surrender and apply for bail. If bail is refused, the accused can be arrested.

Secondly, the investigating agency can seek from the Court, an order for arresting the accused under section 437 (5) or 439 (2) of the Cr. P.C. and where an accused has already been granted bail, the investigating authority, on addition of grave offences, will have to obtain an order to arrest the accused, from the Court which had granted the bail.

Thirdly, in such circumstances, the investigating agency may be granted custody of the accused by the Court in exercise of its powers under section 437 (5) or 439 (2) of the Cr.P.C. after cancellation of his bail. Alternatively, the Court can exercise its said powers to order arrest of the accused and cancellation of the earlier bail may not be necessary.

18 Reading the principles set out in 31(2) and 31(3) conjointly, it is apparent that the Honourable Apex Court has crystallized the law in clause 31.4 that the Court which passes the order of cancellation of bail and arrest or simply directs the arrest of the accused, has to be the same Court which had earlier granted bail.

19 In the case in hands, it is undisputed that the Court which passed the impugned order which would fit in the principle laid down in part II of Clause 31.3 of **Pradeep Ram** (supra), was

not the Court which was empowered to pass the said order in the light of clause 31.4. It is obvious that, as the learned Additional Sessions Judge, who had granted bail to the appellant, was also the learned Judge / Presiding Officer of the Special MCOC Court, the distinction carved out in law by clause 31.4 in **Pradeep Ram**, was overlooked.

20 In view of the above, this appeal is allowed. The impugned order dated 31.12.2020, passed by the learned Special Judge, MCOC Act, is quashed and set aside. The appellant is set at liberty, if not granted PCR or MCR in any other offence.

21 The learned Prosecutor submits that it be left to the investigating agency to deal with the accused after addition of offences punishable under the MCOC Act in the light of clause 31.2 and 31.3 of **Pradeep Ram** (supra). The learned counsel for the appellant submits that if fresh steps are initiated by the authorities as suggested by the learned Prosecutor, and if the appellant is placed under arrest, in view of the added provisions from the MCOC Act, the time spent by the appellant by virtue of the impugned unsustainable order, of about 20 days, be set off against the fresh remand as a PCR under the provisions of MCOC can last for a maximum period of 30 days.

22 Considering the above, we deem it appropriate to record

that if the authorities deal with the appellant in the light of the principles set out in paragraph No.31 of **Pradeep Ram** (supra) and if the appellant is to suffer arrest and PCR, the time spent by the appellant after his arrest from 01.01.2021, behind bars, will be set off against the period of PCR which is a maximum of 30 days. Needless to state that all the contentions of the respective sides in this context are kept open and the learned Court dealing with the issue is expected to decide the contentious issues between the parties.

23 The parties shall act on the print out copy of this order obtained from the official website of this Court.

(B. U. DEBADWAR, J)

(RAVINDRA V. GHUGE, J)

vbd