# IN THE HIGH COURT OF JUDICATURE AT BOMBAY
## CRIMINAL APPELLATE JURISDICTION
## WRIT PETITION NO. 1959 OF 2021

Shabhana Parveen Inayatullah Shaikh
Age : 42 years, Occu. Grocery Shop,
Residing at : B Sector, K Line, Room
No.12, Chitacamp, Trombay, Mumbai
400 088. ...**Petitioner**
**(Ori.Accd.No.9)**

**Versus**

The State of Maharashtra
[At the instance of Trombay Police
Station C.R.No.332 of 2020] ...**Respondent**

Ms. Misbaah Solkar, for the Petitioner.
Mrs. A. S. Pai, PP for the State/Respondent.

CORAM: **S. S. SHINDE &**
**N. J. JAMADAR, JJ.**
RESERVED ON: **20th JULY, 2021.**
PRONOUNCED ON: **13th AUGUST, 2021.**

**JUDGMENT:-** PER : N. J. JAMADAR, J.

**1.** Rule. Rule made returnable forthwith and, with the consent of the Counsels for the parties, heard finally.

**2.** The petitioner, who is arraigned in CR No.332 of 2020, registered with Trombay Police Station, for the offences punishable under Sections 302, 504, 506, 427, 143, 144, 147, 148, 149 of the Indian Penal Code, 1860 ("the Penal Code") read with Section 142 of the Maharashtra Police Act, 1951 and

Section 4 read with Section 25 of the Indian Arms Act, 1959 and Sections 3(1)(i), 3(2) and 3(4) of the Maharashtra Control of Organized Crimes Act, 1999 ("the MCOC Act"), has preferred this petition for the following reliefs:

> (a) To quash and set aside the impugned order passed by the Ld. Special Judge in Anticipatory Bail Application No.1523 of 2020, dated 27.4.2021;
>
> (b) To quash and set aside the sanction order, dated 9.2.2021 under Section 23(2) of Maharashtra Control of Organized Crime Act, 1999 passed by the Director General of Police;
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> (c) To release the petitioner on suitable bail in the event of her arrest pertaining to the case registered at C.R. No.332 of 2020 with Trombay Police Station, on such terms and conditions.

**3.** We have extracted the prayers in the petition, at the outset, on purpose. Mrs. Pai, the learned PP, assailed the tenability of the petition for the afore-extracted prayers. In the writ petition, according to the learned PP, the legality, propriety and correctness of the order passed by the learned Special Judge in Anticipatory Bail Application No.1523 of 2020 cannot be legitimately questioned. Secondly, prayer for quashing and setting aside the sanction order dated 9$^{th}$ February, 2021 issued by the competent authority under Section 23(2) of the MCOC Act is also misconceived since the competent authority has not passed an order of sanction under Section 23(2) of the MCOC Act, qua the petitioner, as she is absconding and has yet not been arrested. The said sanction order is passed against the co-accused in respect of whom charge-sheet has been lodged on 12th February, 2021.

**4.** We have considered the aforesaid preliminary objections to the maintainability of the petition, in the present form. In our view, the issue which really arises for consideration is the invocation of the provisions contained in MCOC Act, qua the petitioner. Indisputably, the competent authority had granted prior approval as envisaged by Section 23(1)(a) of the MCOC Act on 30th November, 2020, wherein the petitioner herein was named as an active member of the organized crime syndicate headed by Rashid Rehman Shaikh (A1). We thus propose to examine the core issue of justifiability of the invocation of the provisions of MCOC Act against the petitioner and, consequently, the relief of pre-arrest bail sought by the petitioner.

**5.** To start with, it may be apposite to note the gravamen of indictment against the accused, especially the petitioner, in CR No.332 of 2020.

(a) The law was set in motion by Smt. Hasina Banoo Shaikh, the first informant. She reported that her brother Khudabaksh has two sons, namely, Abdul Rehman @ Wasim ("Wasim") and Abdul Karim @ Dubai Akram ("Akram"). Six months prior to the occurrence there was a quarrel between her abovenamed nephews and Rashid (A1), resulting in a prosecution. With a view to avoid further confrontation, her brother Khudabaksh had shifted to Ulve, Navi Mumbai. Yet, there was animosity between the family of the first informant and her brother, on the one side, and Rashid (A1) and his relatives, on the other side. The petitioner Shabhana @ Shabbo, who is the aunt of Rashid (A1) runs a grocery shop in the lane in which the house of the first informant is located at B-Sector, Chitacamp, Trombay.

(b) Around the midnight of 17th November, 2020, Rashid (A1) had abused and threatened informant's son Abdulla. A report was lodged at Trombay Police Station vide CR No.2179 of 2020. AT about 00.30 am. her nephew Akram, who occasionally visited the said locality, came thereat and an altercation had then ensued between him and the relatives of Rashid (A1), including the petitioner. As an attempt was made to catch him, Akram had fled away. Thereafter, at about 3.30 am. Wasim and Akram again came in the lane of the informant. They went in front of the grocery shop of the petitioner and started hurling abuses at her. As petitioner's son Arbaj used to sleep in the grocery shop, Wasim and Akram were banging the shutter of the said shop. The informant and her daughter Ruksana were trying to pacify Wasim and Akram.

**(c)** At that time, the first informant alleged, Rashid (A1) and his associates came thereat armed with weapons. Rashid (A1) assaulted Akram by means of the sword. Rashid (A1) also inflicted a sword blow on the head of Wasim. Jahid Ali Sayyad @ Salman (A5) gave a blow by means of an iron rod and the other assailants assaulted Wasim by means of sticks and fist and kick blows. When she and her daughter tried to rescue, Wasim and Akram, the assailants charged upon her, and, therefore, they rushed back to their home. After sometime, the police arrived at the spot. Wasim was found lying in a pool of blood. Wasim was shifted to hospital. However, he succumbed to the injuries.

**(d)** It would be contextually relevant to note that on 17$^{th}$ November, 2020 itself, a supplementary statement of the first informant came to be recorded wherein the first informant stated that after the assault was mounted by Rashid (A1) and the other assailants, a second group of assailants comprising of Atik, Sakib – the younger brother of Rashid (A1), Fajjo and Shabbo - the petitioner, and two unknown assailants came thereat and they assaulted the deceased Wasim. The petitioner

Shabbo allegedly assaulted the deceased by means of fist and kick blows.

**6.** During the course of investigaton, it transpired that Rashid (A1) heads an organized crime syndicate. Numerous offences were registered against Rashid (A1). More than one charge-sheet in respect of cognizable offences punishable with imprisonment of three years or more were filed against Rashid (A1) and the Courts have taken cognizance thereof, in the preceding ten years. Having found that Rashid (A1) and his associates formed an organized crime syndicate and were indulging in continuing unlawful activity singly or jointly either as members of the said organized crime syndicate or on behalf of such syndicate by use of violence with the objective of gaining pecuniary benefits or undue economic or other advantage for the members of the said syndicate, the Additional Commissioner of Police East Region, Mumbai, granted approval under Section 23(1)(a) of the MCOC Act, on 30th November, 2020. The petitioner's name was included therein as a member of the said organized crime syndicate.

**7.** The petitioner preferred an application for anticipatory bail before the learned Special Judge. By an order dated 27th April, 2021, the learned Special Judge was persuaded to reject the application as it was filed after invocation of the provisions contained in the MCOC Act. The learned Special Judge was also of the view that the material on record indicated that the petitioner was a member of the unlawful assembly, in the prosecution of the common object of which, the murder and other offences were committed.

**8.** The petitioner has invoked the writ jurisdiction of this Court.

**9.** We have heard Ms. Solkar, the learned Counsel for the petitioner and Mrs. Pai, the learned Public Prosecutor, for the State, at length. With the assistance of the learned Counsels we have perused the material including the original record tendered by the learned PP.

**10.** Ms. Solkar, the learned Counsel for the petitioner strenuously urged that there is no material to rope in the petitioner for the alleged offences punishable under the Penal Code and the Arms Act much less for the offences punishable under MCOC Act. Amplifying the submission Ms. Solkar laid emphasis on the fact that the petitioner was not at all named in the first information report. Even, the role attributed to the petitioner in the supplementary statement recorded on 17th November, 2020, is that of having allegedly assaulted the deceased Wasim by means of fist and kick blows. The first informant, who claimed to be present at the scene of occurrence when the murderous assault was allegedly mounted by Rashid (A1) and his associates, could not have missed to name the petitioner had she been present, in the first instance. The implication of the petitioner subsequently betrays the intent to rope in the relatives of Rashid (A1). The only reason for which the petitioner has been implicated is the fact that Rashid (A1) happens to be her relative, urged Ms. Solkar.

**11.** On the aspect of invocation of the provisions contained in MCOC Act, Ms. Solkar urged with a degree of vehemence that there is not a shred of material to show that the petitioner is involved in any unlawful activity. No crime has been registered against the petitioner. Nor there is any material to establish the nexus of the petitioner with the alleged continuing unlawful activity. In the circumstances, the invocation of the provisions contained in MCOC Act is wholly unsustainable and suffers from the vice of a complete non-application of mind. The petitioner cannot be deprived of her personal liberty on the basis of such bald and unsubstantiated allegations, submitted Ms. Solkar.

**12.** Mrs. Pai, the learned Public Prosecutor, on the other hand, would urge that the fact that the name of the petitioner does not find mention in the first information report is of no consequence. It is trite that FIR is not an encyclopedia. Mere non mentioning of the names of the accused does not detract materially from the veracity of the prosecution. Taking the Court through the number of cases registered against the Rashid (A1), who heads an organized crime syndicate, Mrs. Pai submitted with tenacity that no fault can be found with invocation of the provisions of MCOC Act, in the case at hand. In any event, according to Mrs. Pai, the question as to whether the approval under Section 23(1)(a) or for that matter the sanction under Section 23(2) of the MCOC Act has been justifiably granted is a matter for trial. At this stage, the Court would not be justified in delving into this aspect of the matter. Since the offences punishable under MCOC Act have been *prima facie* made out, according to the learned PP, the learned Special Judge was justified in negativing the prayer to grant pre-arrest bail as the interdict contained in sub-section (3) of Section 21 which excludes the application of Section 438 of the Code of Criminal Procedure, 1973 ("the Code"), came into play.

**13.** We have given our anxious consideration to the submissions canvassed across the bar. The submission on behalf of the prosecution that Rashid (A1), the alleged leader of the organized crime syndicate, presents himself as a history-sheeter seems to be factually impeccable. During the preceding ten years as many as 25 prosecutions for the offences under the Penal Code seem to have been lodged against Rashid (A1). The Courts have taken cognizance of the offences. To the extent the competent authority recorded the satisfaction for invocation of the provisions of MCOC Act on the basis of the continuing unlawful activity, in the context of the cognizable offences registered against Rashid (A1), *prima facie,* no fault can be found therewith. The question that however wrenches to the fore is whether the invocation of the provisions of the MCOC Act against the petitioner as a member of the organized crime syndicate is justifiable?

**14.** It is imperative to note that the prosecution does not claim that the petitioner has been arraigned in any of the offences registered against Rashid (A1) or other alleged members of the organized crime syndicate as a co-accused. Nor is it a case of the prosecution that offences have been registered against the petitioner individually. We are conscious of the proposition that in view of the definition of continuing unlawful activity under Section 2(1)(d) of the MCOC Act it is not the requirement of law that two charge-sheets for the cognizable offences punishable with imprisonment for three years or more need be filed against each of the members of such syndicate. It is the membership of the organized crime syndicate which makes a person liable under the MCOC Act. What is of significance is the nexus or the link of the person with organized crime syndicate. The linchpin of the offence of organized crime is the nexus with the organized crime syndicate.

**15.** In the case at hand, apart from the alleged participation of the petitioner in the subject offence, we do not find that the prosecution has attributed any role to the petitioner which would, *prima facie,* indicate that the petitioner is the member of the organized crime syndicate which Rashid (A1) allegedly heads. Such material is not forthcoming either in the form of the antecedents of the petitioner or the subject FIR and the statements of the witnesses recorded during the course of investigation. In contrast, the tenor of the FIR is that the genesis of the offence was the feud between the informant party and Rashid (A1) and his relatives. Undoubtedly, numerous cases have been registered against Rashid (A1).

However, apart from the fact that the petitioner is the relative of Rashid (A1), at this juncture, *prima facie,* there is next to no material to establish the nexus between the petitioner and the organized crime syndicate.

**16.** A useful reference in this context can be made to the judgment of the Supreme Court in the case of ***State of Maharashtra vs. Lalit Somdatta Nagpal,***[1] wherein the Supreme Court emphasized the necessity of strict interpretation of the provisions of MCOC Act in view of the stringent nature thereof. It was in terms observed that as the provisions of MCOC Act seek to deprive a citizen of his right to freedom at the very initial stage of the investigation and make it extremely difficult for him to obtain bail, it is necessary to examine whether the investigation from its very inception has been conducted strictly in accordance with the provisions of the Act. The observations of the Supreme Court in paragraphs 62 and 63 are instructive and thus are extracted below:

> "**62.** However, we are in agreement with the submission that having regard to the stringent provisions of MCOCA, its provisions will have to be very strictly interpreted and the authorities concerned would have to be bound down to the strict observance of the said provisions. There can be no doubt that the provisions of the MCOCA have been enacted to deal with organized criminal activity in relation to offences which are likely to create terror and to endanger and unsettle the economy of the country for which stringent measures have been adopted. The provisions of the MCOCA

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**1** (2007) 4 SCC 171.

seek to deprive a citizen of his right to freedom at the very initial stage of the investigation, making it extremely difficult for him to obtain bail. Other provisions relating to the admission of evidence relating to the electronic media have also been provided for. In such a situation it is to be seen whether the investigation from its very inception has been conducted strictly in accordance with the provisions of the Act.

**63.** As has been repeatedly emphasized on behalf of all the parties, the offence under MCOCA must comprise continuing unlawful activity relating to organized crime undertaken by an individual singly or jointly, either as a member of the organized crime syndicate or on behalf of such syndicate by use of coercive or other unlawful means with the objective of gaining pecuniary benefits or gaining undue economic or other advantage for himself or for any other person or for promoting insurgency. In the instant case, both Lalit Somdatta Nagpal and Anil Somdatta Nagpal have been shown to have been involved in several cases of a similar nature which are pending trial or are under investigation. As far as Kapil Nagpal is concerned, his involvement has been shown only in respect of CR No.25/03 of Rasayani Police Station, Raigad, under Sections 468, 420 and 34, Indian Penal Code and Sections 3, 7, 9 & 10 of the Essential Commodities Act. In our view, the facts as disclosed justified the application of the provisions of the MCOCA to Lalit Nagpal and Anil Nagpal. However, the said ingredients are not available as far as Kapil Nagpal is concerned, since he has not been shown to be involved in any continuing unlawful activity. Furthermore, in the approval that was given by the Special Inspector General of Police, Kolhapur Range, granting approval to the Deputy Commissioner of Police (Enforcement), Crime Branch, C.I.D., Mumbai to commence investigation under Section 23(1) of MCOCA, Kapil Nagpal has not been mentioned. It is only at a later stage with the registering of CR No.25/2003 of Rasayani Police Station, Raigad, that Kapil Nagpal was roped in with Lalit Nagpal and Somdatta Nagpal and permission was granted to apply the provisions of the MCOCA to him as well by Order dated 22-8-2005."

**17.** The aforesaid exposition of law, in our considered view, is on all four with the facts of the case at hand. Qua the petitioner, there is hardly any material which justifies her designation as a member of the organized crime syndicate. The rule of strict interpretation merits full application to the facts of the case.

**18.** Mrs. Pai, the learned PP, attempted to salvage the position by inviting our attention to the observations of the Supreme Court in the case of ***Vinod G. Asrani vs. State of Maharashtra,***[2] wherein in the context of the submission that the petitioner therein was not included in the first information report lodged in that case and even in the approval order passed under Section 23(1)(a), the Supreme Court has held that the non-inclusion of the petitioners name in the approval order was not fatal to the investigation as far as the petitioner therein was concerned. It was further observed that;

> "**9**. ..... There is no hard-and-fast rule that the first information report must always contain the names of all persons who were involved in a commission of an offence. Very often the names of the culprits are not even mentioned in the FIR and they surface only at the stage of the investigation. The scheme under Section 23 of MCOCA is similar and Section 23(1)(a) provides a safeguard that no investigation into an offence under MCOCA should be commenced without the approval of the authorities concerned. Once such approval is obtained, an investigation is commenced. Those who are subsequently found to be involved in the commission of the organised crime can very well be proceeded against once sanction is obtained against them under Section 23(2) of MCOCA."

**19.** There can be qualm with the aforesaid proposition. In fact, in the case at hand, the name of the petitioner finds

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**2**(2007) 3 SCC 633.

mention in the approval order as a member of the organized crime syndicate. Nor the invocation of MCOC Act against the petitioner is assailed on the count that her name does not find mention in the subject FIR. In our view, the prosecution faces an insuperable impediment in the nature of absence of material which establishes the nexus between the petitioner and the organized crime syndicate, *prima facie.* In the facts of the instant case, if we take any other view then it would be in teeth of the caution administered by the Supreme Court in the case of ***Lalit Nagpal*** (supra) and the cherished personal liberty of the petitioner would be the casualty.

**20.** This propels us to the consideration of the prayer of the petitioner to exercise the discretion to grant pre-arrest bail. Once we record a *prima facie* satisfaction that the invocation of the provisions under MCOC Act qua the petitioner is not justifiable, then the embargo under Section 21(3) of the MCOC Act may not come into play and the entitlement of the petitioner for the grant of the relief of pre-arrest bail would hinge upon considerations which generally weigh in the exercise of the discretion to grant pre-arrest bail.

**21.** We have adverted to the FIR lodged by the informant, elaborately. It is pertinent to note that in the FIR, the petitioner was not named as one of the assailants or even the person who accompanied the assailants. In the supplementary statement recorded on 17th November, 2020, the petitioner was named as the member of the second group which rushed to the scene of occurrence after Rashid (A1) and his associates mounted the murderous assault upon the deceased Wasim. Second group also allegedly assaulted Wasim, the deceased. In a further supplementary statement of the first informant recorded on 6th December, 2020, the first informant named two persons who were stated to be the unknown members of the second group in the first supplementary statement dated 17th November, 2020. In the second supplementary statement dated 6th December, 2020, the petitioner was again attributed the role of having assaulted the deceased by fist and kick blows.

**22.** In addition, the learned PP, invited the attention of the Court to the statement of a witness recorded on 6th December, 2020 (W05), whose identity has been protected. The said witness stated that he had witnessed the occurrence by concealing his presence. After the first group of assailants led by Rashid (A1) assaulted the deceased Wasim, another group comprising of the petitioner came thereat. One of them namely, Atik was armed with stump. Another namely, Fajjo was armed with a bamboo stick. The petitioner was part of the second group. Atik and Fajjo assaulted the deceased by means of their respective weapons. The petitioner and two unknown members of the second group assaulted the deceased Wasim by means of fist and kick blows.

**23.** The aforesaid statements, even if taken at their face value, *prima facie* do not indicate that the petitioner entertained the common object with which the unlawful assembly was animated. The time and place of the occurrence cannot be lost sight of. Nor the prelude thereto can be ignored. From the own showing of the first informant, the deceased Wasim and Akram, had gone in front of the grocery shop of the petitioner at the dead of night i.e. 3.30 am. and started hurling abuses at the petitioner; the reason being the petitioner's relationship with Rashid (A1). Since the son of the petitioner Arbaj used to sleep in the said grocery shop, Wasim and Akarm banged the shutter of the grocery shop. The first informant and her daughter were trying to pacify the Wasim and Akram. At that time, the assailants led by Rashid (A1) allegedly came thereat armed with the weapons and assaulted Wasim and Akram.

**24.** It is not the case of the first informant or witness no.5 that the petitioner was a part of the first group and assaulted and abused the deceased Wasim and Akram. Both, the first informant and witness no.5 claimed that the petitioner was part of the second group. Indisputably she was unarmed. Furthermore, before the second group could reach the scene of occurrence, the deceased Wasim was already assaulted by Rashid (A1) by means of sword and other assailants by means of iron rod and sticks. The presence of petitioner at the scene of occurrence, after the commotion, does not incriminate her for the reason that from the own showing of the prosecution the deceased and Akram were banging the shutter of her grocery shop, where her son Arbaj used to sleep.

**25.** The upshot of aforesaid consideration is that we are *prima facie* satisfied that no case for invocation of stringent provisions under MCOC Act qua the petitioner is made out. In the context of the prelude, time and place of the occurrence and the role attributed to the petitioner, in our view, a *prima facie* case for grant of relief is made out. The petitioner is a woman. In the light of the nature of occurrence and the role attributed to the petitioner therein, the custodial interrogation of the petitioner is not warranted.

**26.** Hence, the following order;

: **ORDER :**

**(i)** The petition is partly allowed.

**(ii)** In the event of the arrest of the petitioner – Shabhana Parveen Inayatullah Shaikh in CR No.332 of 2020, registered with Trombay Police Station, the petitioner be released on bail on furnishing a PR Bond in the sum of Rs.25,000/- (Rupees Twenty-five thousand only) and one or two sureties in the like amount.

**(iii)** The petitioner shall not tamper with the prosecution evidence and give threat or inducement to any of the prosecution witnesses.

**(iv)** The petitioner shall cooperate the investigating agency and attend Trombay Police Station on every alternate Monday from 10.00 am. to 12.00 noon. and also as and when directed by the Investigating Officer, till filing of the charge-sheet against her.

**(v)** The petitioner shall furnish her current permanent address and the contact number to the Investigating Officer.

**(vi)** The petitioner shall not leave India without the prior permission of the learned Special Judge.

**(vii)** By way of abundant caution, we clarify that the observations hereinabove are made for the limited purpose of determining the justifiability of invocation of the provisions contained in MCOC Act against the petitioner and her entitlement to the relief of pre-arrest bail and they may not be construed as expression of opinion on the merits of the matter and the trial Court shall not be influenced by any of the observations hereinabove while determining the guilt or otherwise of the petitioner and co-accused.

Rule made absolute in aforesaid terms.

**[N. J. JAMADAR, J.]** **[S. S. SHINDE, J.]**