rajshree

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.3207 OF 2021

Harish Rama Mandavikar	]	..	Applicant
vs.			
State of Maharashtra	]	..	Respondent

Mr.Milan Desai, for the Applicant.
Mrs.A.A. Takalkar, APP for the State.
API Vishal Patil, DCB CID, Unit XI present.

CORAM : BHARATI DANGRE, J

DATE : 13th OCTOBER, 2022.

P.C.

1] The Applicant seek his release on bail in Special Case No.472/2020 pending before the Special Designated Court constituted under MCOC Act, which has charged him for the offences under Section 3(1)(ii), 3(2), 3(4) of the MCOCA and Section 387, 120(b) read with 34 of the Indian Penal Code.

2] In the subject CR in which the provisions of MCOC are invoked being CR No. 60/2020 registered with DCB CID Unit XI, the Applicant came to be arrested on 27.02.2020 and he seek his release on bail on the ground of his false implication and also on the ground of the long incarceration.

3] Heard Mr.Milan Desai, the learned counsel for the Applicant and Mrs.Takalkar, APP for the State.

4] The case of the prosecution which could be revolve around the charge-sheet, can be briefly curled out as under :

a. The First informant after purchasing a restaurant premises from one Bhullan Gupta had given the same to said Bhullan Gupta on leave and license basis, and thereafter at the instance of son of said Mr. Gupta, he had given the said premises to one Aman Vijay Gupta, and since then Vijay Gupta was running the said restaurant.

b. That said Vijay Gupta was to vacate the said premises on 31.12.2019, however he failed and refused to do so and he further refused to pay license fees too.

c. That there was dispute between the aforesaid Bhullan Gupta and the first informant in respect of the consideration and the nature of agreement entered and executed by and between them.

d. That in connection with the aforesaid dispute, aforesaid Bhullan Gupta, sometime in the month of January 2020, had sent notice to the first informant through his Advocate, and in response to the same, the latter had replied through his Advocate stating that the aforesaid premise was handed over to the first informant by the aforesaid Aman Gupta and since then the first informant was in possession of the same.

e. That thereafter on 08.02.2020 and 18.02.2020 the first informant had submitted written complaint to the Kandivali Police Station and the Additional CP respectively, alleging therein to the effect that some person had called him claiming to be the person of the present Applicant and had demanded sum of Rs.10 Lakhs from him and had further threatened him not to trouble Vijay Gupta.

f. That thereafter on or about 26.02.2020, the first informant registered FIR with the Kandivali Police Station alleging therein to the effect that on 07.02.2020 the first informant allegedly received 2 separate calls on his mobile phone from numbers 91363 27820 and 90045 52731, and the caller allegedly identified himself as Harish Mandavikar and post threatening the first informant asked him to pay sum of Rs.10 Lakhs.

5] During the course of investigation, officers of DCB CID recorded statements of several witnesses and seized alleged Sale Deed, Leave and License Agreement etc. pertaining to the premises in issue and charge-sheet came to be filed.

6] The specific contention of the learned counsel for the Applicant and which has also specifically set out in the Application is that, in the year 2020, he was arrested by the officers of DCB CID Unit I in CR No.294/2009 and he came to be convicted by the trial Court and sentenced to suffer R.I. for life. He moved to Bombay High Court and was released on bail while was sentenced for life imprisonment and DCB CID Unit I being aggrieved by his release, had threatened that they should see to it that he remain incarcerated and they again sought to arrest him in connection with CR No.415/2014.

In this connection he preferred written complaint to the DGP, Commissioner of Police as well as Human Rights Commission and the allegation is that the investigating agency has maliciously arrested the Applicant in connivance with the first informant merely on the ground that threats are given at his instance and the case registered with Borivali Police Station invoking Section 387 of the Indian Penal Code is nothing but a part of his vindication.

7] The learned counsel would vehemently submit that this is a classic example of abuse and exercise of powers of the investigating agency. He would also vehemently submit that the rigors of MCOC are not made out and merely because MCOC has been invoked, attempt is to keep him detained.

8] Per contra, the learned APP would submit that the Applicant is a habitual offender and she would place reliance upon the Affidavit filed by the Assistant Commissioner of Police, DCB CID, dated 16.09.2022.

She would submit that CR No.83/2020 came to be registered with Kandivali Police Station, which was subsequently to DCB CID, Unit IX vide CR No.60/2020, in which the Applicant and two other persons were arraigned as accused. It is submitted that prior approval was received under Section 23(1) of the MCOC Act from the Joint Commissioner of Police, Mumbai .

9] Relying upon the Affidavit, the learned APP would submit that co-accused No.2 Gopal Singh, made phone call to the complainant giving threats in the name of Applicant and he is attributed the role as a member of the organized crime syndicate headed by the present Applicant. She would rely upon the statements of eye witnesses recorded during the course of investigation in which co-accused Vijay Gupta is alleged to have threatened the complainant as under :

> "हॉटेलचे भाडे देणार नाही किंवा हॉटेल खाली करणार नाही, हॉटेलचा व्यवहार हा हरीष मांडविकर भाई याचेकडे दिला असून आता भाई सर्व मॅटर पाहत आहे त्याचा तुम्हाला फोन किंवा मॅसेज येईल ".

The prosecution also rely upon the statement of one witness whom they refer to as eye witness, but actually he is the person who has heard the conversation when co-accused Gopal Singh threatened the complainant by calling through STD Both situated at Mira Road, who has uttered as under page 1129

"हरीष मांडविकर भाई का आदमी बोल रहा है. भाईने आपको फोन करने को बोला है, विजय गुप्ताने हमारे भाईके साथ व्यवहार किया है, आपको भाई को मिलना पडेगा, बोरसापाडामे जाके भाईसे मिलो, भाईने दस लाख रुपये लानेको कहाँ है, विजय गुप्ता जितने दिन हॉटेल चलाएंगा उसको चलाने दो, पुलिस को तक्रार कि तो अंजाम बुरा होगा. आपके घरमें छोट बच्चे हैं ध्यान रखना."

10] The Applicant also face accusation that co-accused No.3 sold a room at Shayamabai Chawl in the name of wife of the present Appilcant which was worth Rs.25 Lakh, only for Rs.10 Lakh and therefore, the present Applicant gave threatening calls to the complainant through accused No.2 Gopal Singh.

11] When repeatedly asked about actual participation of the Applicant in the offence which was registered under MCOC Act, the learned APP would rely upon a Chart contained in Para 11 of the Affidavit which is a list of 16 offences She would, however, submit that the chart is cited in order to show that the Applicant is habitual offender, but in order to invoke provisions of MCOC Act, it is stated that only three offences are relied, which are as under :

SR.NO.	Police Station	CR NO.	Sections
1	Kandivali	375/2012	387,34 IPC
2	Borivali	44/2013	353, 332, 504, 506(2) IPC
3	Borivali	415/2014	387,34 IPC

Similarly antecedents of co-accused No.2 are also placed on record in the form of 5 CRs registered from the year 2014 to 2019. Apparently, there is no common CR between the Applicant and aco-accused. On being confronted with the CRs on the basis of which the provisions of MCOCA are invoked and which is apparent from the statement made in the Affidavit, the learned counsel for the Applicant would submit that in CR No.375/2012 the Applicant is already acquitted and the learned counsel has placed on record the Judgment of the Metropolitan Magistrate dated 09.01.2017. It is admitted position of law that as regards MCOCA is concerned, it is not relevant to look into the aspect whether the crime registered against the accused in the past have resulted in acquittal or conviction, but since the learned counsel submits that the only role attributed to him every time in the CR is about calls being made in his name.

I have perused the case of the prosecution in the said CR.

The subject CR came to be registered when the informant reported that he received calls which were in the form of threat to his life and the said calls were received from one Poisar and Manish and the persons who were calling him insisted that he should visit Harish Mandavikar and settle the dispute. The applicant, as a person, who has called for extortion has never surfaced on record.

12] Another CR on which the learned APP rely upon, and which is the basis for invoking MCOCA is CR No.415/2014 and therefore I looked into the prosecution case as contained in the said CR and it is informed that the Applicant is released on bail in the said CR. The copy of order passed by the Sessions Case on 17.01.2019 is placed on record by the learned counsel for the Applicant in the compilation and my attention is drawn to the relevant observation in the said order to the following effect.

> "6. Heard both the side. Perused application, reply and charge sheet. It is not in dispute that at the time of registration of the offence, the applicant was undergoing sentence of life imprisonment at Kolhapur Jail. The police were having knowledge of it. During imprisonment period at no point of time, the Investigating Officer made any inquiry or investigation with the applicant. In my view, if really they would have been in need of custodial interrogation of the applicant, the Investigating Officer would have sought his custody at the relevant point of time.
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> 7. In entire charge-sheet, there is no substantive evidence to show that the applicant was also involved in extorting money from the first informant."

Not only this, but the learned Judge has also recorded about the previous antecedents which were attributed to him when he recorded as under :

> "8. As far as regarding the previous antecedents are concerned, the applicant filed order copy of earlier offences, wherein either he has been acquitted or on bail. In following crimes, the applicant is acquitted.

Sr.No.	Crime NO.	Police Station	Under Sections
1	375/2012	Kandivali	387, 120-B, 34 of IPC
2	446/1996	Kandivali	324, 34 of IPC
3	5/2000	Kandivali	452, 427, 324, 34 of IPC
4	30/2003	Kandivali	323, 326, 34 of IPC
5	311/2007	Kandivali	452, 323, 504, 506(2), 34 of IPC r/w 4, 25 of Arms Act.
6	105/2004	Charkop	379, 34 of IPC.

In following offences the applicant is on bail.

Sr.No.	Crime NO.	Police Station	Under Sections
1	44/2013	Borivali	353, 332, 504, 506(2), 224 of IPC
2	117/2007	Faraskhana Police Station, Pune	325, 326, 141, 147, 148, 149 of IPC.

In C.R. No.191/2007, registered by Vishrambaug Police Station, Pune for the offence punishable u/s. 143, 147, 148, 452, 392, 323, 506 of IPC, the Investigating Officer has filed report u/s. 169 of Cr.P.C."

13] As far as CR No.44/2013 is concerned, it invoke Section 353, 332, 504, 506(2), of the IPC and this CR in any case prima facie would not fall within the meaning of "organized crime" as the term is defined in Section 2(e) which means any continuing unlawful activity by an individual, singly or jointly, either as a member of an organized crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means, with the objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any other person or promoting insurgency.

Since, this offence is not of the criteria to which it should be belonging to and committed with an abject of gaining pecuniary benefit, even this CR could not have been taken into account to establish the continuing unlawful activity.

14] The present prosecution of offence came to be registered on

26.02.2020 and in order to invoke MCOCA, only those charge-sheets which have been filed within the preceding period of 10 years before the competent court and where the Court has taken cognizance, should be taken into consideration. As far as offence registered with Borivali Police Station is concerned, the learned APP graciously submitted that no charge sheet has been filed. As far as the other two offences in the form of CR No.165/2020 and 115/2021 are concerned, they are registered subsequent to the registration of subject CR in which MCOC has been invoked and therefore, they cannot be taken into account for invoking the provisions of MCOC Act. But when even accusation in the two CRs are perused, allegation is of threatening, in the name of Applicant.

This is the only material available against the applicant in the charge-sheet and and the Applicant continued to remain incarcerated on the ground of offence invoked under the special enactment, since 27.02.2020.

15] It is pertinent to note that Maharashtra Control of Organized Act is enacted for prevention and control of coping with criminal activity by organized crime syndicate or a gang and it definitely stands on a higher pedestal with more seriousness involved than normal offence under the provisions of Indian Penal Code. The enactment contains special provision for prevention and control of the activities undertaken by the organized crime syndicate and a definite connotation is assigned to the term “organized crime” and “organized crime syndicate”.

An organized crime syndicate means a group of two or more persons acting either singly or collectively, as a syndicate or gang which indulge in the activity of organized crime.

Organized crime is any continuing unlawful activity by an individual, singly or jointly, either as a member of an organized 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 and undue economic or other advantage for himself or any other person or promoting insurgency.

Continuing unlawful activity is also defined in the said Act to mean an activity prohibited by law for 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 organized 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 preceding period of 10 years and that Court has taken cognizance of such offence.

16] The charging Section which prescribe punishment for the organized crime would be punishable with death or imprisonment for life for the offence as resulted in death of any person and in any other case it is imprisonment for a term which shall not be less than five years, but which may extent to imprisonment for life and sub-section (2) (3) or (4) and (5) of Section 3 highlight different facets of organized crime syndicate, which invite punishment as grave as imprisonment for life. The special statute also contain special provisions like Section 18 which make certain confessions made to Police Officer as admissible in evidence as well as protection of witnesses in the form of Section 19. Section 21 of the said enactment prescribe the modified application of certain provisions of Code and creates an embargo on applicability of Section 438 of the Cr.P.C. to a person accused of having committed offence punishable under the Act.

The twin condition contained in Section 21 (4) make it imperative to record a satisfaction before releasing the accused of the offence under the Act, to be specified that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

17] The Offence under the MCOCA are, therefore, not to be lightly viewed, but what is expected on the part of investigating machinery is to invoke the provisions of the said enactment with higher responsibility and accountability.

In the present case, where the Applicant is attributed role of head of organized crime syndicate, it can be seen that it is merely because many offences are alleged against him in the last decade. But mere registration of offences, however serious they may be, do not by itself justify invocation of MCOCA, until and unless it is established that as an organized crime syndicate, the accused either individually or singly was a member of such syndicate and indulged in the type of activities which are contemplated under the Act, for gaining pecuniary advantage, by following the modes of violence, intimidation contemplated under the said Act. It is only when all the parameters are satisfied, it would justify invocation of provisions of MCOCA.

18] In the present case, in CR NO.60/2020 wherein the provisions of MCOC are invoked, would reveal that the threat was given in the name of the Applicant and attempt was made to extort money. The Applicant’s role do not surface directly in the entire investigation, as the phone calls received by the informant are from distinct numbers, where the caller has identified himself as Harish Mandavikar i.e. the Applicant who demanded the amount.

The material in the charge-sheet do not conclusively establish that the calls are made by the Applicant and from the Affidavit it is apparent that the witnesses have reported about the co-accused No.3 and 2 making the phone calls in the name of the applicant.

19] When earlier CRs on the basis of which provisions of MCOCA are invoked are perused, the accusations are again of similar nature of giving threats in the name of the present Applicant. Admittedly, the nature of accusations normally would not be gone into, when MCOCA is invoked, but this is a fit case where merely on the pretext that serious offence is revealed against the Applicant, it shall not be construed that the court would not lift the veil to find out whether its invocation was justifiable. Therefore, I have gone through the accusations levelled against the Applicant in the CRs on the basis of which prosecution under draconian law like MCOCA has been invoked, as submission of the learned counsel for the Applicant is the vindictive approach with which cases are fastened upon him. Needless to state that Applicant will take consequences of accusations at the time of trial, but at present, his further incarceration is unnecessary and he deserve his liberty.

20] The observations made above are prima facie in nature and limited for the purpose of determination of the present Application and the learned Judge trying the Applicant for the offences, with which he is charged, shall not in any manner be influenced by the above observations.

Hence, the following order.

O R D E R

(a) Application is allowed.

(b) Applicant – Harish Rama Mandavikar shall be released on bail in connection with Special Case No.472/2020 arising out of C.R.No.60/2020 registered with DCB CID, Unit XI on furnishing P.R. bond to the extent of Rs.50,000/- with one or more sureties of the like amount.

(c) The applicant shall report to the DCB CID, Unit XI on first Monday of every month between 04.00 p.m. to 06.00 pm till framing of charge.

(d) The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with facts of case so as to dissuade him from disclosing the facts to Court or any Police Officer and should not tamper with evidence.

(e) The Applicant shall regularly attend trial, on every date, unless exempted.

(f) The Applicant shall surrender his passport before the Investigating Officer.

(g) The Applicant shall not leave the jurisdiction of Mumbai and Thane City without permission of the Special Court.

[BHARATI DANGRE, J]