IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.202 OF 2022

Prashant Dnyandeo Varal,
Age 32 yrs., Occ. Business,
R/o Nighoj, Tq. Parner,
Dist. Ahmednagar.

… **Petitioner**

… **Versus** …

The State of Maharashtra,
Through Police Station, Parner,
Tq. Parner, Dist. Ahmednagar.

… **Respondent**

...

Mr. Shirish Gupte, Senior Counsel i/b Mr. Abhishek R. Avachat, Advocate for petitioner

Mr. S.J. Salgare, APP for respondent

Mr. N.B. Narwade, Advocate for intervener

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CORAM : SMT. VIBHA KANKANWADI
ABHAY S. WAGHWASE, JJ.

DATE : 27th SEPTEMBER, 2023

ORDER : **(PER : SMT. VIBHA KANKANWADI, J.)**

1 By this petition, the petitioner (original accused No.2 in Special MCOC Case No.2/2017 pending before Special Court, under MCOC Act,

Ahmednagar (the present situation and at the time of filing petition it was before Special Court, under MCOC Act, Nashik); by invoking the constitutional powers of this Court under Article 226 read with 227 of the Constitution of India for following prayers.

> a) For issuance of a writ of certiorari, or a writ, order or direction in the nature of certiorari quashing the application/proceedings of MCOCA in C.R. No.19/2017 of the Partner Police Station (Special MCOC Case No.2/2017);
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> b) For issuance a writ of Prohibition, or a writ order or direction in nature of Prohibition, thereby prohibiting the Police and the trial Court from taking coercive steps under the provisions of MCOCA as well as IPC in Special MCOC Case No.2/2017 (C.R. No.19/2017 of Parner Police Station);
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> c) For issuance a writ of Prohibition, or a writ order or direction in nature of Prohibition, thereby prohibiting the Police from arresting the petitioner in connection with Special MCOC Case No.2/2017, and for issuance of any other appropriate Writ;
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> d) For grant of pre-arrest bail in connection of Special MCOC Case No.2/2017;

2 Heard learned Senior Counsel Mr. Shirish Gupte instructed by learned Advocate Mr. Abhishek R. Avachat for the petitioner, learned APP Mr.

S.J. Salgare for respondent No.1/State and learned Advocate Mr. N.B. Narwade for intervener (original informant) who was allowed to intervene by order dated 05.07.2018 passed in the application for intervention filed before the Division Bench at Principal Seat.

3 The learned senior counsel has taken us through the charge sheet which was filed on 20.04.2017. The First information Report is filed by one Rangnath Kisanrao Varal on 21.01.2017 in respect of murder of his nephew Sandip @ Gondya Machchhindra Varal on 21.01.2017 around 2.10 p.m. He submitted that name of the present petitioner has been mentioned in the First Information Report stating that he along with others were helping by giving finance and other activity to main accused Pravin Varal. However, as regards the day of incident is concerned, it is not stated that the present petitioner was present at the spot. Thereafter, the charge sheet was filed before Judicial Magistrate First Class, Parner, Dist. Ahmednagar and offence under MCOC Act was not included in the same. Thereafter, it appears that proposal was sent by Deputy Superintendent of Police, Nagar, Rural Division, Ahmednagar through Superintendent of Police, Dist. Ahmednagar on 02.07.2017 for according sanction to prosecute under Section 23(2) of the Maharashtra Control of Organized Act, 1999 against Pravin Varal and other 10 persons. The Director General of Police accorded the sanction on

19.07.2017 even against the present petitioner and thereafter it appears that further investigation was done and charge sheet was filed before the Special Court under MCOC Act, Nashik in July, 2017. The said order passed by the Director General of Police is illegal. In fact, in the said sanction some other accused persons, who were the accused in Crime No.44/2017, have been left out, because the charge sheet shows that it is filed against 27 persons, but the sanction under MCOC Act has been given against 11 persons only. Either the Deputy Superintendent of Police or the Director General of Police cannot pick and choose while seeking permission/sanction or while according sanction.

4 The learned senior counsel instructed by the learned Advocate for the petitioner tried to demonstrate that the sanction order dated 19.07.2017 is illegal and without application of mind. On the said date, according to the learned senior counsel, no other case/charge sheet was filed against him. Only one charge sheet was considered by the sanction authority as it can be seen from the sanction order. Here itself, we would point out that learned APP has then submitted that Crime No.159 of 2014 under Section 307, 323, 504, 506, 143, 147, 148, 149 of the Indian Penal Code and under Section 4 punishable under Section 25 of the Indian Arms Act was filed against the petitioner and others on 05.07.2014 with Parner Police Station, Dist. Ahmednagar. After going through the said charge sheet learned senior

counsel submitted that the said First Information Report does not show in any manner that the petitioner is the member of a crime syndicate. The said charge sheet was not considered by the sanctioning authority as there is no reference.

4.1 The learned senior counsel has then relied on the decision in **Prafulla Uddhav Shende vs. State of Maharashtra through the S.D.P.O., Nagpur (Rural)** in **Criminal Appeal No.664 of 2002** with companion matters decided by the Hon'ble Single Judge of this Court (Bench at Nagpur) on 18.11.2008, wherein decisions of this Court were referred, wherein it was observed that - "*Mere proof of filing charge sheets in the past is not enough, it is only one of the requisites for constituting offence of organized crime. If only the past charge sheets were to be enough to constitute offence of organized crime, it could have offended the requirement of Article 20(1) of the Constitution and possibly Article 20(2) as well.*" It was also observed that - "*There is no overt act or omission, which would amount to continuation of unlawful activity carried out by use of force for the purpose of pecuniary gain, with which the appellants are charged.*" And, therefore, the convictions were set aside by allowing the appeals. Prior to that the learned senior counsel by taking us through the contents of the charge sheet i.e. the statements of witnesses tried to demonstrate that name of the present petitioner has been stated by some of the witnesses, who want to interpret that the petitioner was one of the conspirators. Witness Yogesh Lanke, Namrata Harde, Sunil Varal and Sangita Sandip Varal (widow of the deceased) have taken the name of the petitioner. But all of them have tried to say that the petitioner was seen with other accused persons and even at that time also the accused Baban Kawad had told accused No.1 Pravin Rasal that deceased Sandip should be eliminated. No overt act has been attributed to the present petitioner and, therefore, he has relied upon the observations in the aforesaid authority.

4.2 The learned senior counsel has also relied on the decision in **State of Maharashtra vs. Shiva alias Shivaji Ramaji Sonawane and others** [AIR 2015 SC 2947], wherein it has been held that - "The competent authority is required to apply its mind to the attendant facts while permitting registration of an offence under MCOCA or granting sanction for prosecution." What was important was the commission of an offence by the accused that would constitute "continuing unlawful activity". Only on the basis of filing of previous charge sheets were not enough for invoking Section 3 of the MCOC Act.

4.3 Further, the learned senior counsel has relied on paragraph

No.82 of the decision in **Prasad Shrikant Purohit vs. State of Maharashtra and another** [(2015) 7 SCC 440] which reads thus -

> "82 The next submission made on behalf of the appellants was that in order to constitute the earlier two offences to fall within the definition of "continuing unlawful activity" for invoking the provisions of MCOCA after the third occurrence, the involvement of the accused must have been by the same gang. In other words, even if it were to be held that a member of an "organized crime syndicate" singly or jointly participated or on behalf of an "organized crime syndicate" singly or jointly participated or on behalf of an "organized crime syndicate" with reference to such participation taken place, what is to be ensured is that in all the three cases the same gang, namely, the "organized crime syndicate" must have been involved."

The decision in **State of Maharashtra and others vs. Lalit Somdatta Nagpal and another** [(2007) 4 SCC 171] was also referred and distinguished on the facts of the case. No doubt, in this case it was also observed that - "*The analysis to be made to ascertain the invocation of MCOCA against a person need not necessarily go to the extent for holding a person guilty of such offence and that even a finding to that effect need not be recorded.*" However, it was observed that there should be necessary material to arrive at the conclusion that the accused persons/person are/is/was member of organized crime syndicate. Learned senior counsel, therefore, reiterated that since the impugned sanction order dated 19.07.2017 has been passed without application of mind and it does not confirm to the basic requirements to show that the petitioner is member of the crime syndicate, it deserves to be set aside and necessary protection deserves to be given to the petitioner.

5 To refute the said submissions, learned APP vehemently submitted that the impugned order would show that the material was placed before the Director General of Police and after going through the entire material he was satisfied that the petitioner is the member of the gang/member of the organized crime syndicate. Merely because some other persons are not included, he cannot say that the entire order is illegal. In fact, the petitioner is one of the accused in Crime No.159/2014 which is the another crime involving Section 307 of the Indian Penal Code and other Sections and the said case is still pending. Even in that case the present petitioner is absconding. The petitioner is successfully avoiding the arrest and, therefore, he cannot challenge the impugned order and cannot pray for pre-arrest bail. The involvement of the petitioner is stated by more than three witnesses and they have heard that the conspiracy was going on between the accused persons including the petitioner to eliminate deceased Sandip.

6 Learned APP has relied on the recent decision of Hon'ble Supreme Court in **Zakir Abdul Mirajkar vs. The State of Maharashtra and others** [2022 LiveLaw (SC) 707], wherein it has been held after taking account of catena of judgments including the decision in **Govind Sakharam Ubhe vs. State of Maharashtra**, a Two Judge Bench of this Court reported in 2009 3 Bom.CR (Cri.) 144 that - "*persons who are alleged to be members of an organized crime syndicate need not have more than one charge sheet filed against them in an individual capacity. Rather, charge sheets with respect to the organized crime syndicate are sufficient to fulfil the condition in Section 2(1)(d) of the MCOC Act.*" Therefore, consideration of the single First Information Report by the competent authority was also sufficient and non reference of Crime No.159/2014 cannot give any advantage to the petitioner. If we consider the said First Information Report accused Pravin Varal and some other co-accused were also the accused in that case also. Therefore, there is no merit in the present petition.

7 Learned Advocate for intervener has also made similar submissions to the submissions by learned APP and it was impressed that murder of the nephew of the intervener/informant is by the members of the crime syndicate and it was their organized activity which can be spelt from the statements of the witnesses under Section 161 of the Code of Criminal

Procedure.

8 In reply, learned Advocate Mr. A.R. Avachat has relied on the decision in **Lalit Somdatta Nagpal** (supra) which was already referred in **Prafulla Uddhav Shende** (supra). He stressed on words "continuing unlawful activity" used in Section 2(i)(d) of the MCOC Act and submitted that the provisions of MCOC Act are stringent and, therefore, those are required to be very strictly interpreted when the basic ingredients were not attracted the sanction ought not to have been granted.

9 Here, in this case, the petitioner though made a reference of Crime No.159/2014 which appears to be the Sessions Case No.241/2015 and annexed the First Information Report at Exh.'B' it was tried to be submitted that there is only one charge sheet against him. It has been tried to be distinguished that the said offence i.e. Crime No.159/2014 had taken place on account of enmity and the offence was not considered for any monetary, economic or any other allied advantage. Such interpretation cannot be allowed to be put at a premature stage and on that point there cannot be a challenge by the accused stating that the sanctioning authority has not applied its mind, when he admits that he was an accused in earlier case also, then it is for him to prove that two cases are different having no connection

with each other. It would be the duty of the prosecution to prove that it is part/act of the organized crime syndicate. Absence of reference of said First Information Report in the impugned order cannot give advantage to the accused to seek quashing of charges of MCOC Act at a premature stage. Further, the most important point is that the accused/petitioner is absconding in both the cases almost since the inception. In other words, though offence is alleged to have been committed, in which the petitioner has role to pay, but the investigating agency is not able to trace out the petitioner. The petitioner approached this Court and there is no interim relief of any kind in favour of the petitioner, still he is avoiding his arrest. Under the said circumstance, none of his prayers can be considered on merits as the petitioner is invoking the constitutional powers of this Court.

10 Even on merits if the points raised on behalf of the petitioner are to be discussed, then, the decision in **Zakir Abdul Mirajkar** (supra) would clarify the position. In the said case **Lalit Somdatta Nagpal** (supra) and **Govind Sakharam Ubhe** (supra) have been considered. Therefore, when the said position of law has been clarified even recently by Hon'ble Supreme Court, the earlier decisions by this Court cannot be considered i.e. in **Prafulla Uddhav Shende** (supra). In **Shiva Sonawane** (supra) the facts of the case were different and the prosecution had come with a specific case about the

object of unlawful activity was “gaining pecuniary advantage” and, therefore, at the end it has been observed that it would be unnecessary for the Hon’ble Court to examine whether the expression “any other advantage” appearing in Section 2(e) can be read *ejusdem generis*, then it was left open to be decided in an appropriate case. Here, if we consider the statements of the witnesses what they had heard was that deceased Sandip’s reputation in the village and the vicinity is going high and, therefore, it has to be brought down. The parties have political background and, therefore, it is still open in the present case to the prosecution that the organized activity was for “any other advantage”. Therefore, the said ruling is not applicable. Further, in **Prasad Shrikant Purohit** (supra) the facts were altogether different and it was arising out of Malegaon bomb blast case and interpretation of organized crime was then tried to be made. We would like to rely on the decision of Division Bench of this Court in **Govind Sakharam Ubhe** (supra), wherein it has been held that -

> “35 It is now necessary to go to the definition of `continuing unlawful activity'. Section 2(1)(d) defines `continuing unlawful activity' to mean 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 organized crime syndicate or on behalf of such syndicate in respect of which more than one charge-sheet have been filed before a

competent court within the preceding ten years and that court have taken cognizance of such offence. Thus, for an activity to be a `continuing unlawful activity' -

a) the activity must be prohibited by law;

b) it must be a cognizable offence punishable with imprisonment of three years or more;

c) it must be undertaken singly or jointly;

d) it must be undertaken as a member of an organized crime syndicate or on behalf of such syndicate

e) in respect of which more than one charge-sheet have been filed before a competent court.

36 The words `in respect of which more than one charge-sheet have been filed' cannot go with the words `a member of a crime syndicate' because in that case, these words would have read as `in respect of whom more than one charge-sheet have been filed'."

As aforesaid, this authority has been referred in **Zakir Abdul Mirajkar** (supra) and, therefore, we would say that it is not necessary that more than one charge sheets should have been filed against each member of the gang or crime syndicate in a whole. If the offence has been committed to achieve or establish supremacy or political hold, then it is still open to the prosecution to prove the same, therefore, at this stage the constitutional powers of this Court cannot be used. We reiterate that when the petitioner is absconding, we do not want to protect such accused in any manner. We also further say that it may be still open to the petitioner, if he surrenders, at the time of framing charge when he would be heard in view of Section 226 of the Code of Criminal Procedure to show that the charge for provisions under MCOC Act should not be framed against him. Thus, still an alternative remedy is available to him and, therefore, also there is no question of using constitutional powers of this Court.

11 In the nutshell, for the reasons stated above, the writ petition stands dismissed.

(ABHAY S. WAGHWASE, J.) **(SMT. VIBHA KANKANWADI, J.)**

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