rajshree

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.63 OF 2023

WITH

INTERIM APPLICATION NO.451 OF 2023

IN

CRIMINAL APPEAL NO.63 OF 2023

Jamiruddin Gulam Rasul Ansari			
@ Jambo @ kalya	]	..	Applicant
vs.			
Union of India & Ors.	]	..	Respondents

WITH

CRIMINAL APPEAL NO.140 OF 2023

WITH

INTERIM APPLICATION NO.519 OF 2023

IN

CRIMINAL APPEAL NO.140 OF 2023

Jagdishprasad Mohanlal Joshi	]		
@ J M Joshi	]	..	Applicant
vs.			
Union of India & Ors.	]	..	Respondents

Mr.Aabad Ponda, Senior Advocate a/w Dr.Sujay Kantawala, Subhash Jadhav, Veerdhawal Deshmukh, Chandansingh Shekhawat and Prasanna Kumar i/b Parinam Law Associates for the Applicant in IA No.519/2023.

Mr.Nitin Sejpal a/w Pooja Sejpal for the Applicant in IA No.451/2023..

Mr.Pradeep Gharatp, Spl. PP for Respondent No.1.

Ms.P.N. Dabholkar, APP for the State.

CORAM : BHARATI DANGRE, J

RESERVED ON : 03rd May, 2023.
PRONOUNCED ON: 10th July, 2023.

P.C.

1] Two Appeals, filed under Section 374 (2) of the Code of Criminal Procedure read with Section 12 of the Maharashtra Control of Organised Crime Act, 1999 (for short 'MCOCA), assailing the Judgment dated 09.01.2023, passed by the Special Judge under MCOCA, are admitted by this court on 21.03.2023.

On the Appeals being admitted, the Appellants therein have taken out distinct Interim Applications viz. IA No.451/2023 and IA No.519/2023 under Section 389 of the Code, seeking suspension of the sentence imposed upon them, pending the hearing and final disposal of the Appeals and praying for their release on bail.

2] Heard learned senior counsel Mr. Ponda, for the Applicant in IA No.519/2023, who has preferred Criminal Appeal No.140/2023, and Mr.Sejpal for the Applicant in IA No.451/2023 who has filed Criminal Appeal No.63/2023.

Respondent No.1-Union of India is represented by Special PP Mr.Pradeep Gharat.

The learned senior counsel Mr. Ponda representing the Applicant, Jagdish Prasads Mohanlal Joshi (IA No.519/2023) would submit that the Applicant was never ever arrested during the course of trial and he was on bail throughout the trial and has been taken into custody upon his conviction under the impugned Judgment, but in no case, he is at flight risk. He would submit that the Applicant attended the entire trial and since he is having a permanent residence in Mumbai, there is no reasonable basis for harboring any apprehension, that he shall abscond or evade the process of law.

As far as, Applicant Jamiruddin Gulam Rasul Ansari(IA No.451/2023) is concerned, it is urged by the learned counsel Mr.Sejpal, that he was on bail during the trial and never misused the liberty conferred upon him and hence awaiting the outcome of the Appeal, even he seek his release on bail.

Both the respective counsel have invited my attention to the impugned Judgment, which according to them has failed to appreciate the evidence placed before the learned Judge and has resulted in serious error, in awarding the conviction under the provisions of MCOCA. It is specifically asserted that the provisions of MCOCA against the Applicants have been applied in mechanical manner without application of mind and, therefore, the bar specified under Section 21(4) of the MCOCA for releasing the Applicants on bail, cannot be attracted. Further, it is also the submission that other offence under IPC i.e. extortion, kidnapping are also not made out.

3] The crux of the arguments of Mr. Ponda, in support of his client is to the effect that the prosecution has failed to establish direct nexus between the Applicant and the organized crime syndicate, allegedly lead by Accused Nos.3 and 7 and there is no charge-sheet filed against the Applicant in preceding 10 years, wherein, the Court had taken cognizance of such offence.

Apart from this, it is also argued by him that from the reading of the impugned Judgment, it is clearly evident that the prosecution has failed, beyond reasonable doubt to establish that the Applicant has derived any pecuniary gain or benefit as a part of continuing unlawful activity and hence the necessary ingredient of establishing an offence of

MCOCA not being fulfilled by the prosecution, the conviction cannot be sustained.

Mr.Sejpal would adopt the argument of Mr.Ponda, as even according to him the most essential factum of the Applicant being a member of organized crime syndicate, is not established by the prosecution and this aspect is completely ignored by the Special Judge.

4] Before I appreciate the arguments advanced in support of both the Applicants, it is necessary for me to refer to the accusations faced by the Applicants and as laid before the learned Special Judge during in the course of the trial.

The charge-sheet filed by the prosecution has crystalized the charages against the accused as under :

> "*During the period of 1999 and 2004 Accused No 1 Jamiruddin Ansari, Accused No 2 Rajesh Pancharia, Accused No 3 Anees Ibrahim Kaskar, Accused No 4 Farooque Mohammad Ahmed Mansoori, Accused No 5 i.e. the present applicant J.M. Joshi, Accused No 6 i.e. R.M. Dhariwal (now Deceased) Accused No 7 Dawood Ibrahim Kaskar, Accused No 8 Abdul Hamid Antulay and Accused No 9 Salim Mohammad Ghaus Shaikh have entered in to criminal conspiracy amongst themselves and in pursuance thereof, through their acts of commission and omission, abetted the continuous unlawful activities of the organized crime syndicate headed by the Accused No. 7 and Accused No. 3 with common objective of deriving stable and continuous pecuniary financial and material gain/advantage to the organized crime syndicate of the Accused No. 7 and 3 and also to derive pecuniary gain to themselves.*
>
> *The prosecution emphasis that in the year 2002 accused*

No. 1 assisted the organized crime syndicate by arranging the export of five machines used for the Gutka Packing worth of Rs.2,64,000/- obtained by way of extortion by putting the complainant in fear of death and said machines were manufactured by the Accused No 2 and were delivered to Dubai from where the said machinery were cleared for onward delivery to Karachi by Accused No.3.

The prosecution's further emphasis that the accused No. 5 and 6 have also settled their financial dispute with the help of the members of the organized crime syndicate. Hence the above accused thereby have committed the offence punishable u/s 120 B r/w 363,384,387, and 506 of IPC r/w 3(1(ii),3(2) and 3(4) of the MCOC Act."

5] As far as Accused No.5 is concerned, the prosecution case which could be gleaned from the charge-sheet can be summarized as under:-

a) That there was a settlement outside India by which R.M. Dhariwal (Accused No.6) (since deceased) gave Rs.11 crores to the accused J.M. Joshi (Accused No.5) and in return, Shri J.M. Joshi provided assistance to Accused No.3 in establishment of Gutkha factory in Pakistan;

b) That J.M. Joshi (Accused No.5) forced Biju Jose @ Babu to go to Pakistan for providing necessary services for setting up of Gutkha factory at Pakistan.

c) That there was an export of Gutkha pouch packaging machines for a princely sum of Rs.2.64 lakhs for setting up of Gutkha factory in Pakistan

As far as the Accused No.1 Jamiruddin is concerned, the prosecution has relied upon the following circumstances :

a) Accused No.1 alongwith Accused no.5, Accused No.3 and other unknown associates, in the year 2002, rendered assistance to Accused No.7 in installation of machinery to bring gutkha plant into operation and in furtherance of the common intention of all, agreed to do or caused to be done alongwith others, the illegal acts to approach the complainant and his partner at the instance of Accused Nos.3 and 7.

Accused No.1 is alleged to have forcibly procured from the complainant Gutka pouch packaging machines and made them to explore to Dubai on their way to Pakistan.

b) Accused No.1 in connivance with the other accused, in furtherance

> of the common intention and in order to give effect to the conspiracy, committed extortion by putting the complainant in fear of death and inducted him to deliver 5 Gutka pouch packaging machines, and thus committed offence under Section 386 r/w 34 of the IPC.
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> c) Accused No.1 in connivance with other accused persons, in furtherance of the common intention, kidnapped --- from India to Karachi via Dubai and facilitated his concealment and confinement, thereby committed offence under Section 363, 368 read with 120B and 34 of the IPC.
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> d) Accused No.1 alongwith the other accused persons is charged for being the member and co-conspirator of the organized crime syndicate headed by absconding Accused No.7 and being party to the continuing and unlawful activity undertaken by the members of the organized crime syndicate, with an object of gaining illegal and undue pecuniary benefits."

6] Four accused persons faced the trial in three MCOCA Special Cases, clubbed together alongwith four wanted accused. The prosecution examined 44 witnesses in order to establish the charge levelled against them, resulting into the Judgment pronounced by the Special Judge under the MCOCA for Greater Mumbai at Mumbai, on 09.01.2023.

During the course of trial, in order to establish the charges, the prosecution exhibited around 94 documents and produced a list of 19 articles.

At the conclusion of the trial, Accused No.1 came to be convicted for committing offence under Section 386, 387, 506(ii) read with 120B of the IPC. He also stand convicted for committing offence under Section 3(1)(ii), 3(2), 3(4) of the MCOCA and has been sentenced to suffer RI for a period of 10 years and to pay fine of Rs.5 Lakhs in default to undergo SI for 6 months.

Applicant, Jagdishprasad Joshi stood convicted under Section 363, 368, 344 of the IPC and also under Section 3(1)(ii), 3(2) and 3(4) of the MCOCA and sentenced to undergo RI for 10 years with fine of Rs.5 Lakhs.

The substantive sentences imposed have been directed to run concurrently.

The Judgment record that Accused No.1 had undergone detention of 4 years, 4 months and 22 days and hence he was accorded set off for the said detention period against the substantial sentences imposed against him.

At the end of the trial, the Investigating Officer was permitted to file separate charge-sheet against Accused No.3 and 7 who were alleged to be the leaders of the gang, but absconding, as well as against Accused Nos.8 and 9.

7] The legality of the Judgment is assailed in two distinct Appeals filed by Accused No.1 as well as Accused No.5 and Appeals are admitted.

The Appeals have raised various issues involving appreciation of the evidence as well as applicability of the provisions of MCOCA as against the accused persons.

8] The impugned Judgment is based on the analysis of the evidence placed before the Special Judge through the witnesses of the prosecution and the initiating point is the First Information Report lodged by one Mustafa Abdul Hussain Kabira (PW 31) with JJ Marg Police Station, Mumbai on 10.10.2004 which invoked Section 384, 387, 34 and 120B of the IPC and Section 3 and 25 of the Arms Act. The offence came to be registered against Accused Nos.1, 2, 3(absconding) and 4.

The investigation of the case was transferred to Crime Branch, CID, which registered a new CR and during the course of investigation, provisions of MCOCA came to be invoked after obtaining prior approval under Section 23A of the Act. The DCB CID carried out investigation and arrested Accused Nos.1 and 2 and filed charge-sheet against Accused Nos.1, 2 and 4 and the absconding Accused No.3.

The investigation was transferred to the CBI, as the investigation so far carried out, lead to the alleged nexus between the Gutka manufacturers and the underworld. As a result, the CBI registered the case and carried out further investigation under Section 173(8) of the Code.

9] The prosecution case which unfolded from the evidence of PW 31 a key witness, against the Accused No.1, is to the following effect :

PW 31, the complainant, who lodged the complaint deposed that he alongwith PW 10, his partner, was in the business of export under the name and style Alif International. He was approached by accused No.1 for exporting Gutka filing and pouch packing machines and he was informed that Accused No.3, resident of Karachi, Pakistan, required five machines and they were to be exported to a person in Dubai. When PW 31 turned down the offer, he was threatened and was compelled to transport the machines. He was introduced to a person, a partner in a Gutka factory at Karachi with accused No.3 and when he disclosed the price of the machine, he was reminded about the person to whom the machines were being exported and he was even told to arrange for the money for purchasing the machines from Raj International by giving a Demand Draft. When there was delay, he was made to talk on phone to a person, who was described to be accused No.3 who threatened him with consequences of death, in case the machines are not exported. Thereafter, a Demand Draft was issued in the name of Raj International from his current account.

It is pertinent to note that the accused who was alleged to be the owner of Raj International is discharged, during the trial proceedings.

Thereafter, the machines were exported to Dubai, though this fact was not disclosed by PW 31 to anyone for two years but only when he was called by the police regarding enquiry of shipment of those machines, the FIR was lodged. PW 31 identified accused No.1 in the witness box.

10] As far as accused No.5 is concerned, the case against him surfaced through the evidence of PW 32 and PW 28 and is crystalized to the following effect in the impugned Judgment :-

(a) It is the case of the prosecution that R.M. Dhariwal (A6) was associated with the front company of the organized crime syndicate of wanted accused Dawood Ibrahim Kaskar (A7) in the name and style of Golden Box Trading Company from 1995. This company was apparently owned by Abdul Hamid Antulay (A8) brother- in-law of wanted Accused Dawood Ibrahim Kaskar (A7), Anis Ibrahim Kaskar (A3) and Salim Mohd. Gaus Shaikh (A9). Golden Box Trading Co. entered into an agreement with M/s. Dhariwal Tobaco Products ltd. on 1.10.1995 for purchase and sale in number of products. Gutka was not mentioned as a commodity in this Agreement, but export invoices and ledger accounts show that only one produce was supplied to M/s Golden Box Trading Co. by M/s Dhariwal Tobacco Products Ltd. i.e. Manikchand Gutka. It is the case of the prosecution that between 22.2.1996 to 27.3.2001 R.M. Dhariwal (A6) supplied gutka to M/s. Golden Box to the tune of Rs.461,159,009/- of which 217,515,7720 alone was supplied between 24.2.1999 to March 2001.

(b) It is the case of the prosecution that A6 with the help of organized crime syndicate wanted to sort out his business dispute with J.M. Joshi (A5). R.M. Dhariwal (A6) used his nexus with the organized crime syndicate of Dawood to arrive at a settlement with Accused J.M. Joshi (A5). In August 1999, J.M.

Joshi (A5) was called in the office of Golden Box Trading Company where he was told by R.M. Dhariwal (A6) in presence of Saleem Ghaus Shaikh (A9) and Abdul Hamid Antulay (A8) to handover all the shares of him in Dhariwal Tobacco Products Ltd. to R.M. Dhariwal (A6) and not to demand further shares. Upon refusal, J.M. Joshi (A5) was abused and threatened by them and subsequently assaulted and told to cooperate with R.M. Dhariwal (A6). Subsequently J.M. Joshi (A5) received threatening call from Anis Ibrahim (A3). Complaint to this effect was made by J.M. Joshi (A5) to police are at Exhibit 302. Fed up by the threats, J.M. Joshi (AS)asked his distributors from Hyderabad (PW-28) to find out any person who could settle the matter with Anis Ibrahim. Syed Hamiddudin (PW28) introduced another distributor (PW-15) Iqbal who was his childhood friend and knew a person who was relative of Anis Ibrahim (A3). PW-15 Iqbal then introduced J.M. Joshi (AS) to (PW-24) Shamim Qureshi a childhood friend and relative of Anis Ibrahim (A3). PW 24 spoke to Anis Ibrahim (A3) as to why he was threatening J.M. Joshi (A5). Anis Ibrahim (A3) denies threatening J.M. Joshi (A5) and ask him to send J.M. Joshi (A5) to Dubai.

(c) It is the case of the prosecution that J.M. Joshi (AS) along with Shamim Qureshi (PW-24) arrived at Dubai on 8.09.1999 met Anis Ibrahim (A3) in his office. J.M. Joshi (A5) told Anis (A3) about his problem and dispute with R.M. Dhariwal (A6). He also told them about the incident between R.M. Dhariwal (A6), Abdul Hamid Antulay (AS) and Salim Ghaus Shaikh (A9) and complained that Dhariwal (A6) did not give his rightful share in Dhariwal Tobacco Products Ltd. Anis (A3) then called R.M. Dhariwal (A6) to his office. R.M. Dhariwal (A6) came along Abdul Hamid Antulay (A9) and Salim Ghaus Shaikh (A9). Heated exchanges took place with R.M. Dhariwal (A6) and J.M. Joshi (A5). R.M. Dhariwal (A6) was not prepared for a settlement and wanted Accused Dawood Ibrahim Kaskar (A7) in Karachi to intervene and settle. At the instance of R.M. Dhariwal (A6), Anis (A3) spoke to his brother Dawood (A7), who told them to bring both J.M. Joshi (A5) and R.M. Dhariwal (A6) to Karachi.

(d) It is alleged that R.M. Dhariwal (A6) and Abdul Hamid Antulay (A8)left Karachi on the same evening and travelled to Karachi, Pakistan without any visa. On the next date, i.e. 9.09.1999 J.M. Joshi (A5) travelled to Pakistan vide a valid Pakistan visa. Dawood talked about the settlement and as a result thereof, R.M. Dhariwal (A6)gave 11 crores to J.M. Joshi (A5). It is the case of the prosecution that out of these 11 crores, J.M. Joshi (A5) gave 92 lakhs in 92 instalment to Shamim Qureshi (PW-24).

(e) The passport of J.M. Joshi (A5) (Z-1299522) shows exit Dubai on 09.09.1999 with corresponding entry stamp of Karachi, Pakistan of same day and exit stamp of Karachi on 11.09.1999 and corresponding entry stamp in Dubai on 11.09.99. The passport of R.M. Dhariwal (A6) (A-4507086) shows only exit stamp of Dubai on 08.09.1999 and reentry to Dubai on 09.09.1999 but does not show to which country he has travelled.

The prosecution allege that Accused No.6 derived pecuniary gain of Rs.248 Crores by settling the demand from Accused No.5 for only Rs.11 Crores instead of Rs.259 Crores and this gain was for and on behalf of the organized crime syndicate, headed by wanted accused No.7.

11] It is the case of the prosecution that this act and omission of

Accused No.6 was instrumental in Accused No.5 providing technical assistance to the organized crime syndicate of Dawood and Anis in establishing Gutka factory in Pakistan. The prosecution allege that Accused No.5 became part of the settlement and in order to help the syndicate, he is alleged to have send PW 32 to work for Accused No.3 in the Gutka factory from June, 2000 to December, 2000. It is alleged that under the pretext of working in Gutka facotry in Bangkok, he was made to travel to Karachi and he was confined there.

The prosecution alleged that Accused No.3 in consultation with Accused No.1 extorted from the complainant five Gutka packaging machines for the use of newly established Gutka factory in Pakistan and PW 32 was engaged in the process, by Accused No.5, but he managed to return to India via Dubai on 08.03.2005.

12] The learned senior counsel Mr.Ponda would submit that accused No.5 was not named as accused in the first charge-sheet filed by Mumbai Crime Branch, but the CBI applied for warrant against him as well as accused No.6, however, the warrants were ultimately recalled.

The submission advanced by Mr. Ponda in favour of accused No.5, based on the evidence of key witness PW 32 needs to be appreciated in the light of the deposition that has come before the Court.

13] PW 32 was acquainted to accused No.5 when he was working in Gutka Company in Hyderabad. He deposed that he was offered a job in a Company in which Accused No.5 was a partner, but the Company closed subsequently.

Thereafter, he continued to work in the production unit of Gutka company and was sent to Nairobi in relation to his work, where he continued to stay for 7-8 months. At the instance of Accused No.5, he was sent to Dubai on a job and he continued to wait for the job as he was informed that the factory shall be operated from Bangkok. He went to meet the owner in Dubai and his travel was arranged to Bangkok via Karachi.

PW 32 further deposed that under coercion, he was made to work at Hyderabad in Pakistan. He further deposed that under coercion he was taken to Hyderabad, where the installation work of the factory was ongoing and the five machines imported from accused No.1 were to be installed there. He made reference to one Seth who is disclosed by him to be Anis Ibrahim (Accused No.2).

In cross-examination, PW 32, categorically admit that when he was offered a job in Karachi, he was not aware of any connection of Accused No.5 with Karachi. The version of PW 32 is that he was coerced and pressurized to work in the factory. In the meantime, he established contact with Accused No.5, who asked him to return to the job and he went to Hyderabad and fixed the machines and also received instructions from Accused No.5. He further deposed that Accused No.5 visited him for teaching mixing of supari and tobacco and he was accompanied by Accused No.3.

As per this witness, he was even permitted to return to Cochin as his wife was to deliver a child and the fare was arranged by accused No.2.

Thereafter, he travelled to Mumbai and stayed in Mumbai and returned to Hyderabad (Pakistan), where he fixed all the machines, where tobacco and supari was processed and formula of which was allegedly given by accused No.5, pursuant to which the produce Gutka, named as Fire Gutka was supplied at Karachi.

14] The witness is subjected to extensive cross-examination and on its perusal, I find substance in the submission of Mr. Ponda that the act of PW 32 of accepting the job is voluntary, as despite he being permitted to return to India on two occasions, he went back to his job and due to threat, he continued to render his assistance, is a version which creates doubt, about he being confined and coerced to render assistance in manufacturing Gutka, in a factory set up by Accused No.3, the gang leader as surfaced through the cross-examination. In cross-examination, he admit that merely because, he had gone to Karachi, without reason would not be an offence and there was apprehension that he would get arrested. However, ultimately he conceded to the fact that he was aware that there was no Visa needed for travelling to Pakistan.

It is on the basis of these facts disclosed by PW 32, that Accused No.5 stand convicted, as having nexus with organized crime syndicate of Accused No.7.

15] It has surfaced through the evidence on record, that Accused No.6 had nexus with the organized crime syndicate as Dhariwal Tobacco Factoy supplied Gutka to Golden Box Trading Company owned by Accused Nos. 3, 7, 8 and 9, all absconding accused. There appear to be some dispute between Accused No.6 and Accused No.5 and on account of this, when Accused No.5 was threatened to hand over his share and he even faced threats for his life, at hand of Accused No.3 and this finally resulted in forcing him to settle his claim of Rs.259 Crores to Rs.11 Crores.

The evidence on record fail to establish any connection of Accused No.5 with the Organized Crime Syndicate and on the other hand what is evident, is he received threats to hand over his shares and he ultimately settled his disputes by accepting Rs.11 Crores, under threat and coercion, but he is in fact a victim at the hands of Accused No.3, the Gang leader. Except the version of PW 32 that Applicant Mr.Joshi visited Karachi for offering him guidance after June 2000 is not brought on record by the prosecution. PW 32 time and again frequented to and fro to Dubai and Karachi, but there are no corresponding endorsement on the Passport of Applicant No.5.

16] The submission of Mr. Ponda is that settlement took place in Pakistan and it is not disputed by Accused No.5 that he travelled there and this is proved by his travel documents, as there is stamping on his Passport with regard to his entry and exit in Pakistan. But as far as engagement of PW 32 with Gutka manufacturer is concerned, during the course of hearing, the documents i.e. Passport of PW 32 is placed before me, but there are no endorsements evidencing his travel to Dubai/Karachi, to be left to assumption that every time he was taken clandestinely without stamping.

In contract as per the learned SPP Mr. Gharat, there is no stamping found on the Passport of PW 32 as accused NO.7 managed his entry into and from Pakistan so that he would aid him in manufacturing Gutka in Pakistan.

In the light of the said argument, in absence of any documentary evidence to show the entry and exit of PW 32 out of Pakistan, what is left is only his own deposition with no corroboration. The Special Court ought to have scrutinized his evidence with utmost caution, in the wake of the admissions given by him and which therefore need ot be looked at while the Appeals are being heard.

The prosecution has, also failed to lead any conclusive evidence to show that Accused No.5 had knowledge about acquisition of Gutka filing pouch machines through Accused No.1, as per the version of PW 31, the complainant. Further, there is no material to establish the link between Accused No.5 and export of machines from Mumbai to Dubai and its further travel to Pakistan. PW 31, the complainant has proved the export of machines, but the prosecution has failed to establish that these are the very same machines which further travelled from Dubai to Pakistan, as the invoice regarding purchase of machines is dated 10.04.2002 and they left, as per export bill around end of April 2022 and this is more than one and half years after the alleged visit of Accused No.5 to Pakistan and to the Gutka factory. The evidence of PW 32 clearly fail to establish that Accused No.5 was involved in manufacturing Gutka in the name of Goa Gutka and in fact, PW 32 had himself worked in various Gutka factories including the one of Accused No.5 and 6. His veracity and truthfulness of his statement ought to have been assessed before the conviction was based on the same as it can be seen that as per his version, he was sent to Hyderabad (Pakistan) instead of being taken to Bangkok, but when he returned to India, he never made any attempt to lodge complaint for his alleged illegal confinement, but returned back to his job, when asked to return.

Even the prosecution case if looked from the point of view that Accused No.5 is instrumental in sending PW 32 for the job work, from his evidence it is apparent that he willingly accepted the job and in any case, this engagement of his, do not conclusively establish the pecuniary interest of Accused No.5 in the Gutka factory in Pakistan.

The evidence of PW 32, was, hence, required to be carefully scrutinized as he is a key witness of the prosecution, but he has given very glaring admissions, which are attempted to be relied upon by the learned counsel for the accused persons. Ultimately, the evidence will have to be appreciated in the light of connect between the evidence of

PW 31 and 32 in order to conclusively indict Accused Nos.1 and 5.

17] The offence under Maharashtra Control of Organized Crime Act clearly warrant establishing any activity prohibited by law, on the undertaking either singally or jointly by a member of organized crime syndicate i.e. acting as a syndicate or gang or on behalf of such syndicate.

The burden is also on the prosecution to establish that the activity is undertaken by violence or threat of violence or intimidation, coercion or other unlawful means, with an object of gaining pecuniary benefits or gaining undue or other advantage for himself or any other person or with an object of promoting insurgency.

The impugned Judgment has accepted the evidence to the extent of settlement of disputes between Accused Nos.5 and 6 through mediation of wanted Accused No.7 and 3 in relation to the shares of Accused No.5 in the company of Accused No.6, but it has further concluded that as a consideration for settlement of the dispute, Accused No.5 extended help to Accused No.3 in establishing the Gutka factory in Hyderabad (Pakistan) and the Court held that extending help in establishing the factory, by itself amounted to offence, knowing very well that Accused No.7 and 3 are terrorists, and this is sufficient to establish the offence under MCOCA.

The conclusion so derived, is permitted to be drawn only when it is established through convincing and reliable evidence that accused no.5 played an active role in assisting establishment of the Gutka factory. PW 32 who is alleged to have been sent by Accused No.5, from the evidence appears to be a person known to the process of Gutka manufacturing as his past experience reveal so and though it was possible for him to escape from the place, where he forcibly dragged, clutches, but he never made an attempt, but on the other hand, received his salary in the bank account without any demur and was permitted to travel back to his own country and return to his job without his Passport being stamped for entry and exit.

18] The Special Judge has failed to appreciate this glaring aspect, which will ultimately be considered at the time of hearing of athe Appeals as by considering the entirety of evidence and evaluating the same, as the Court under Section 374 of the code is empowered to evaluate the evidence on record independently and to arrive at its own findings, regards culpability or otherwise of the accused on the basis of the evidentiary material.

With the aforesaid glaring perversity in the impugned Judgment pointed out to me, I deem it appropriate to release the Applicants on bail, despite the conviction being awarded to them under the impugned Judgment on two grounds, firstly I am persuaded to find substantial merit in the Appeal, presented before me and since ground in the Appeal is perversity, of the finding rendered without appreciating the evidence in its right perspective and the second ground being, Accused No.1 was released on bail during the trial and has not misused his liberty and similarly Accused No.5 was never arrested and he had attended the trial, with his deep roots in the society, his presence in the country shall be ensured by imposing appropriate condition till the Appeal is finally heard and the grounds in the Appeal will be appreciated on their merit and the case of the prosecution as well as the impugned Judgment shall be subject to test of the alleged perversity in the wake of said arguments.

19] While considering the Application for grant of bail and suspension of sentence under Section 389 of the Code, Post conviction, the law is well settled, that though presumption of innocence is not available to the accused, post conviction, the Court will have to consider prima-facie merits of the Appeal coupled with other factors and there should be strong compelling reasons notwithstanding the order of conviction.

The Apex Court in the case of ***Pritpalsingh vs. State of UP, 2020 (8) SCC 645*** has summarized the principles as under :-

> *"25 Section 389 provides that, pending any appeal by a conviction person, the appellate court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against, be suspended and, also, if he is in confinement, that he be released on bail. Of course, in view of the mandate of Section 389(3) CrPC, the principles are different in the case of sentence not exceeding three years and/or in the case of bailable offences. In this case, of course, none of the offences for which Respondent 2 has been convicted are bailable. Moreover, Respondent 2 has, interalia, been given life imprisonment for offence under Section 304-B IPC and imprisonment for five years for offence under Section 3 of the Dowry Prohibition Act.*
>
> *26 As the discretion under Section 389(1) is to be exercised judicially, the appellate court is obliged to consider whether any cogent ground has been disclosed, giving rise to substantial doubts about the validity of the conviction and whether there is likelihood of unreasonable delay in disposal of the appeal, as held by this Cour tin Kashmira Singh vs. State of Punjab and Babu Singh vs. State of U.P.*
>
> *38 In considering an application for suspension of sentence, the appellate court is only to examine if there is such patent infirmity in the order of conviction that renders the order of conviction prima facie erroneous. Where there is evidence that has been considered by the trial court, it is not open to a court considering application under Section 389 to reassess and/or re-analyse the same evidence and take a different view, to suspend the execution of the sentence and release the convict on bail."*

20] In the wake of the above authoritative pronouncement, since I have arrived at a conclusion that the impugned Judgment suffer from patent, illegality and infirmity which render the conviction prima facie erroneous and coupled with the fact that both the Applicants have not misused their liberty and it is not the case of the prosecution that they would not make themselves available to undergo the sentence, in case the Appeal is dismissed, I deem it appropriate to grant the Applications, by the following order :

O R D E R

(1) Interim Application Nos.451/2023 and 519/2023 are allowed.

(2) Pending hearing and final disposal of Appeal Nos.63/2023 and 143/2023, the sentence imposed upon both the Applicants by the Impugned Judgment and order dated 09.03.2023 passed by the learned Special Judge under MCOC Act, in MCOC Special Case No.01/2005 and MCOC Special Case No.16/2016 stands suspended.

(3) The Applicants are entitled to be enlarged on bail, subject to the following conditions:-

(a) Applicant/Accused No.1 Jamiruddin Gulam Rasul Ansari @ Jambo @ Kalya is directed to be released on furnishing bail on PR Bond of Rs.50,000/- with one or more sureties in the like amount.

(b) The Applicant/Accused No.5, Jagdishprasad Mohanlal Joshi @ J M Joshi shall be released on bail by furnishing fresh bail bond, by continuing the surety furnished by him, pursuant to the order passed by the Hon'ble Apex Court on 20.02.2023 in Criminal Appeal No.550/2023 arising out of SLP Cri. No.2418/2023.

(c) The Applicants shall mark their presence with the CBI, BKC Office, Mumbai on 1st Monday of every trimester between 3.00 to 5.00 p.m.

(d) The Applicants shall not leave the country without prior permission of this Court.

[BHARATI DANGRE, J]