IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.257 OF 2024

Mandar Ajit Borkar .. Appellant

Versus

The State of Maharashtra .. Respondent

…

Mr.Rishi Bhuta a/w Ujjwal Gandhi, Ashish Dubey, K.R. Shah, Saakshi Jha, Prateek Dutta, Risha Rathod, Omer Farooq Khwaja, Vaishnavi Javheri, Bhavi Kapoor i/b Ankita Bamboli for the Appellant.
Mr.D.J. Haldankar, APP for the State.

CORAM: BHARATI DANGRE &
MANJUSHA DESHPANDE, JJ.
DATED : 25th NOVEMBER, 2024

<u>P.C</u>:-(Per BHARATI DANGRE J)

1. The present appeal is filed by the appellant Mandar Ajit Borkar, under Section 12 of the Maharashtra Control of Organized Crime, Act, 1999, (MCOCA), being aggrieved by the order dated 21/04/2023, passed by the Sessions Judge, Mumbai in MCOC Special Case No. 1276 of 2021, thereby rejecting his application for discharge, filed pursuant to filing of the charge-sheet.

We have heard Mr. Rishi Bhuta for the appellant a/w Mr. Ujjwal Gandhi, Ashish Dubey, KR Shah, and Ms. Sakshi Jha, whereas, Mr. Haldankar, the learned APP, has represented the State of Maharashtra.

2. The appellant came to be arraigned as accused no.12, in Crime No. 63 of 2021, registered with DCB- CID, Unit XI for

offences punishable under Sections 307, 120-B, 324, 326, 504, 506 (2), 143, 144, 147, 148 149, 188, 269 of IPC, 1860 r/w section 4 (25) of the Arms Act, 1959 r/w 37(1), 135 of Maharashtra Police Act, 1951 r/w section 51(B) of the National Disaster Management Act, 2005 r/w section 3(1)(ii), 3(2), 3(4) of Maharashtra Control of Organized Crimes Act, 1999 (MCOC). Initially the first information report was registered with MHB Police Station, which was subsequently transferred to DCB CID Unit XI, and the FIR came to be renumbered.

The Joint Commissioner of Police (Crime) granted approval under section 23(1)(a) of MCOC Act, 1999 and the sanction under section 23(2), was granted on 13/10/2021 for prosecution of 17 accused, including the present appellant by the Commissioner of Police, Brihanmumbai.

3. The complainant, Mr. Divyesh Rajendra Desai, recorded his statement which involved Plot No.301, situated at Dahisar (W), Mumbai, which was originally owned by Smt. Deubai Thakur and was purchased by Shri Taukir Khan in the year 1983, through a registered agreement, and since then the property continued to remain in possession of Taukir Khan.

In the year 1990, name of Smt. Kashibai Patil, sister of Deubai along with her legal heirs was mutated and their names were reflected in the 7/12 extract.

On a challenge raised by Taukir Khan, the Competent Authority set aside the mutation entries in favour of Kashibai Patil, which constrainted her to institute a suit in the year 2006, which was dismissed in the year 2016.

4. In July, 2021, the complainant along with Taukir Khan, established a company under the name and style of ‘Solaris’ with an intention to construct a school. Kashibai and her legal heirs in absence of title, sold the plot to one Mukesh Bhatia of ‘Icon Developers’ and Arun Upadhyay of ‘Shreeji Sharan Developers’.

On 8/07/2021, when the complainant went to visit his plot, Mukesh Bhatia and Arun Upadhyay were physically present and informed the complainant that they had purchased the property from Kashibai. They also made an attempt to display their board on the site, as owners and therefore, a dispute arose between the parties.

It is the case of the complainant that on 18/07/2019, the complainant along with his father, two advocates and other associates visited the said plot, when about 15 to 20 persons came there and tried to remove the board of the complainant on the property and asked them to leave the spot saying that the property belongs to Mukesh Bhatia and Arun Upadhyay.

When the complainant and his associates objected to that, the accused threatened to kill them, if they failed to leave. When the complainant refused to leave, some of the accused rushed towards an auto-rickshaw, waiting at the scene and pulled out deadly weapons like swords, bamboos and iron rods from it and assaulted the complainant and others.

The complainant and his associates were taken to the hospital for treatment and thereafter, offence came to be registered against 22 accused persons.

The appellant was arrested on 18/09/2021.

5. According to the prosecution, a syndicate headed by the Appellant (one of the accused) was involved in the commission of the offence, therefore, the Investigating Agency applied for sanction for invoking the provisions of the MCOC Act in the present case.

6. The charge-sheet came to be filed on 14/10/2021, against 17 arrested accused persons. Post arrest of accused no.10-Manoj Shinde, accused no.11- Akash Jagtap and accused no.7- Sanjay Nivetkar, the swords used by the accused in the commission of crime were recovered. The auto-rickshaw used in the commission of crime was found and from the said auto-rickshaw, 11 bamboo sticks were recovered. The auto-rickshaw is registered in the name of the accused no.14- Vikas Kamble.

7. Mr. Bhuta, counsel for the Appellant would urge before us that the he is innocent and is falsely implicated in the case, despite the fact that he has no concern with the alleged offence as well as the dispute involving the immovable property in respect of which the civil suit is filed. He would submit that the injuries sustained by the injured are simple in nature and even the presence of the appellant at the spot is grossly doubtful.

Upon the facts of the case, it is the specific contention of Mr. Bhuta, that *prima facie*, it can be inferred that Taukir Khan was not in possession of the property and the allegation that accused nos.2 and 3 engaged the services of the present appellant to dispossess him and the complainant from the suit property appear to be doubtful.

8. Mr. Bhuta, would submit that when in the first information report, which is recorded immediately after the alleged incident took place, informant has not attributed any role to the present appellant and similarly, the statements of the injured recorded under Section 161 also do not make any reference to his presence on the spot, when the incident is alleged to have occurred. However, it is only in the supplementary statement, of the informant recorded after the arrest of the appellant, he spoke about the presence of the appellant in an Innova car, which was parked near the alleged place of incident, and the other witnesses have repeated the said assertion. According to Mr.Bhuta, no explanation was given as to why the informant failed to mention the most relevant fact in the complaint, based on which the FIR was registered before he was arrested. In absence of any investigation and material brought on record establishing the connect of the appellant with other co-accused even to establish that he was in contact with them, it is his specific submission that there is no material against the appellant, sufficient enough to frame the charge and continuation of the proceedings against him would be abuse of process of Court.

According to Mr. Bhuta, the sanctioning authority had not applied its mind in granting approval under Section 23(1)(a) of the MCOC Act and has adopted a mechanical approach.

Mr. Bhuta, has relied upon a series of judgment to press into service his point that while deciding the discharge application the merits of the case cannot be taken into consideration and in the present case, the limited scope available is to challenge the sanction or approval accorded in absence of sufficiency of the material.

9. We have perused the sanction granted by the Commissioner of Police as well as the approval order passed by the Joint Commissioner of Police Mumbai. The order reflect that from the facts of the case and on going through the panchanamas, statement of witnesses, investigation papers, the authorities were satisfied that the arrested persons, along with 5 to 10 more unknown persons are members of Organized Crime Syndicate, headed by Mr. Mandar Ajit Borkar @ Bhai aged 40 years, i.e. the present appellant. On expressing satisfaction that more than 2 charge-sheets have been filed against the leader of the Organized Crime Syndicate, in the preceding 10 years, and the competent Courts have taken cognizance of the said offences, reflected that the activities of the syndicate were continuous and unlawful. The present offence was committed by the arrested and wanted accused persons and the offence is punishable with punishment of more than three years, it was noted from the investigation conducted from the arrested accused that accused no.2 Arun Upadhyay and accused no.3 Mukesh Bhatia had given money to accused no.12 Mandar Borkar to get the Plot No. 301, infront of the Zen Garden, Dahisar West, Mumbai, which was in possession of complainant to be vacated. The 13 accused persons are named as the one who have committed the crime as per instructions of the present appellant, the gang leader Mandar Borkar.

Since the motive of the crime was pecuniary gain and to terrorize the business community so as to extort money from them and to establish his supremacy through his nefarious and illegal activities, the ingredients of offence under MCOCA was held to be made out.

10. In light of the material compiled in the charge-sheet, when the appellant filed an application for discharge, it came to be rejected by the impugned order on 21/04/2023.

We are informed that on 27/07/2023, the appellant was enlarged on bail and presently he is on bail.

Mr.Bhuta, has relied upon the order passed on 27/07/2023, while hearing the bail applications of the accused persons, which included the applicant (Bail Application No.2423 of 2022) and he has taken us through the observations therein and in particular as regards the appellant to the following effect:-

> *"19. The facts and circumstances of the case prima facie reveal that the Applicants-Upadhyay and Bhatia as well as the First Informant and Taukir Ahmed are claiming right to the property under Survey No.301/6. The altercation and scuffle between the parties over the said dispute has been given a colour of an organized crime. The complicity of the Applicant-Mandar Borkar is prima facie doubtful and the Applicants – Upadhyay and Bhatia have no nexus with the crime syndicate. Hence, prima facie the bar under Section 21(4) of the MCOC Act is not attracted. It is also pertinent to note that the Applicants herein are in custody for over two years. The charge is not yet framed and considering the large pendency, there is no possibility of the trial being concluded within a reasonable period and prolonged detention of the Applicants would be in violation of their rights under Article 21 of the Constitution. Hence, the Applicants are entitled to be enlarged on bail."*

We must however express that the parameters for releasing an accused on bail is distinct from the one which are required to be taken into consideration while the application for discharge is to be considered.

11. In the charge-sheet which has been filed on 14/10/2021, against the 17 arrested accused under the provisions of IPC as well as under the MCOC Act, the material collected during the course of investigation is compiled.

At the time of search of the nearby areas of the spot of incident, it was found one Autorickshaw bearing No. MH 47 AD 8869 was found which, was used in commission of crime from which bamboo sticks were recovered and this Autorickshaw was registered in the name of accused no.14. Statements of complainant Divesh Desai, father of the complainant Rajendra Dayal Desai, Advocate of the Complainant Ankit Tandon, Satyadev Joshi, Taukir Khan are recorded by the Magistrate and compiled in the charge-sheet, along with statement of 7 persons recorded under Section 161.

The panchanama of CCTV footage from the spot is also included in the charge-sheet, where the accused persons are seen assaulting the complainant and his associates with swords and bamboos and 12 persons have been specifically identified with their respective role.

12. In the charge sheet the statement of victim Amit Tawade is recorded on 12/08/2021, wherein he stated that the dispute leading to the incident started when he saw the accused illegally installing fencing with iron sheets, to create partition on the disputed land on 14/07/2021. The said witness also produced the video recording showing the accused in the act.

Statement of Mahesh Nirati, driver of the complainant, came to be recorded on 27/07/2021 where he stated that, at the time of incident when Manoj Shinde (accused no.10) and Usha Nikam (accused no.1) were threatening the complainant to leave the spot, one Innova car came at the spot in which gang leader i.e. the present Applicant was present. Thereafter the said accused Manoj Shinde and Usha Nikam said that the plot belongs to Mukesh Bhatia and Arun Upadhyay and threatened the complainant by saying that 'Bhai is sitting in the car', referring to gang leader, Mandar Borkar (present Applicant).

Statements of other witnesses namely, Satyadev Joshi, Taukir Ahmed Khan and Mohd Iqbal Attarwala also categorically mentioned that the present Applicant was present at the spot and was sitting in his car handing out directions.

13. The confessional statement of Vivek Manjrekar, accused no. 16 came to be recorded on 27/08/2021, when he has confessed to the commission of crime on the contract given by accused no.3, Mukesh Bhatia and accordingly engaged the gang of Mandar Borkar, to help him in removing the original owners from the land and to handover the possession to Mukesh Bhatia and Arun Upadhyay.

The CCTV footage of 12/07/2021 of the office of accused no, Mukesh Bhatia, wherein Mukesh Bhatia is seen with accused no.16, Vivek Manjrekar and two other witnesses exchanging cash, reveals the fact of hatching conspiracy. The said CCTV footage came to be seized under Panchnama dated 25/07/2021.

The accused in his confession has also stated that a deal of Rs.20 lakhs was finalised between the accused's syndicate, for dispossessing the complainant from his property. He has further admitted that he has received an amount of Rs. 5 lakhs in his bank account on 14/07/2021 from accused Mukesh Bhatia.

Further co-accused Vivek Manjrekar, in his confessional statement has also mentioned about cash of 15 lakhs, which had received from accused Mukesh Bhatia, which was handed over by him to the applicant during the meeting held on 16/07/2021.

14. The material in the charge-sheet reflect that the appellant was a participant along with other accused in the meeting held on 16/07/021, in pursuance of the pre-incident conspiracy leading to the crime.

We have perused the statement of Divesh Rajendra Desai and Rajendra Dayal Desai recorded under Section 164 before the Magistrate along with the statement of Satyadev Joshi recorded under Section 164 and the statement of Abbas Ahmed T.A. Khan recorded before the Magistrate. The statement of Mohd. Iqbal Abdulla Atarwal has clearly referred to the presence of the appellant in the meeting on 16/07/2021, and he also referred to the transaction of Rs.5 lakhs in form of transfer from Mukesh Bhatia to Vivek.

Statement of Abbas Taukir Khan in form of supplementary statement and that of one Haji Taukir Khan, the background of the incident has clearly surfaced on record. Sachin Joshi has also given a statement along with the supplementary statement, which throw light on the conspiracy and he referred to a phone call received by him from an unknown person inquiring whether a phone call from Vivek was received and he was instructed that if he received such a phone call, Bhai should be told to make a phone call urgently, the reference of Bhai is to the appellant.

The present appellant was integral part of the conspiracy and he is the gang leader and master mind behind the commission of the crime, as Mukesh Bhatia and Arun Upadhyay hired his gang to grab the complainant's land in order to establish their supremacy.

The statement of the eye witnesses to the incident of assault are already compiled in the charge-sheet, and its credibility will have to be tested during trial when the witnesses enter the witness box.

The present crime is committed by the appellant, being a gang leader with the help of other accused persons by use of dangerous weapons, with a motive of pecuniary gains by creating reign of fear and danger to the life of general public and we are not inclined to permit discharge of the appellant in the wake of aforesaid material in the charge-sheet.

15. In *M.E. Shivalingamurthy v. CBI, Bengaluru*, (2020) 2 *SCC 768*, it is reiterated by the Apex Court that while deciding a discharge petition, only material brought on record by the prosecution have to be considered and accused is entitled to discharge if evidence, which prosecution proposes to adduce to prove his guilt, even fully accepted before it is challenged in cross-examination or rebutted by defence evidence, cannot show that the offence is committed by the accused. However, it is not open to accused to explain his defence at this stage nor has the accused any right to produce any document.

It is a well settled position that the Court must without making a roving inquiry into the pros and cons, consider the broad probabilities, the total effect of the material before it along with any basic infirmities in the case but the probative value of the material on record cannot be gone into and the material brought on record by prosecution, has to be accepted as true. Existence of some material to entertain strong suspicion is sufficient to drawing up of a charge and refuse a discharge.

At the stage of Section 227, a Judge has merely to sift evidence in order to find out whether or not there is sufficient ground for proceeding against the accused and sufficiency of grounds would include the statements recorded by the police or documents produced, or documents which ex facie would lead to existence of suspicious circumstances against the accused so as to frame charge against him.

In any case, in the wake of the material, no case for discharge is made out as the material in the charge-sheet point out to the involvement of the appellant and it is a different thing that if the prosecution is not able to establish the charge, it will result in his acquittal, but at the stage of discharge, it is not possible to dissect the material in the charge-sheet as regards its authenticity and veracity which is a matter of trail. We find no legal lacunae in the impugned order and by upholding the same, it is liable to be rejected.

(MANJUSHA DESHPANDE,J) **(BHARATI DANGRE, J.)**