REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 2291 OF 2022
(arising out of SLP (CRIMINAL) NO. 6101 OF 2021)

THE STATE OF GUJARAT .....APPELLANT

VERSUS

SANDIP OMPRAKASH GUPTA .....RESPONDENT

J U D G M E N T

J. B. PARDIWALA, J.

1. Leave granted.

2. This appeal is at the instance of the State of Gujarat and is directed against the order passed by the High Court of Gujarat dated 06.05.2021, in R/Criminal Miscellaneous Application No. 3819 of 2021 by which the High Court ordered release of the respondent accused herein on bail in connection with the First Information Report being C.R. No. 11210015200100 of 2020 registered with the D.C.B. Police Station, Surat City, District Surat for the offences punishable under Sections 3(1)(i) and (ii), 3(2) and 3(4) resply of the Gujarat Control of Terrorism and Organised Crime Act, 2015 (for short, 'the 2015 Act').

3. The question that falls for our consideration is: whether the requirement of 'continuing unlawful activity', as defined under Section 2(1)(c) of the 2015 Act, necessarily requires a separate FIR to have been registered against any purported member of a gang after the promulgation of the 2015 Act i.e., after 01.12.2019? To put it in other words: whether an FIR under the 2015 Act (Special enactment) is maintainable in law or can be registered if there is no FIR registered against the accused after the promulgation of the 2015 Act for any offence under the IPC or any other statute?

4. The aforesaid question arises especially in view of the fact that the last offence registered against the respondent-accused is of 2019 and the chargesheet in regard to the said FIR was filed on 21.01.2019 i.e., indisputably prior to the promulgation of the 2015 Act. Furthermore, there is no FIR registered against the respondent-accused after the 2015 Act came into force w.e.f. 01.12.2019.

FACTUAL MATRIX

5. On 27.11.2020 an FIR came to be registered against the respondent accused herein and thirteen other co-accused for the offence punishable under Sections 3(1)(i) and (ii), 3(2) and 3(4) resply of the 2015 Act. The respondent-accused came to be arrested on the very same day and date of registration of the FIR i.e., 27.11.2020. The respondent-accused applied for bail before the Sessions Court at Surat by filing the Criminal Miscellaneous Application No. 6483 of 2020. The Sessions Court at Surat rejected the bail application *vide* order dated 21.01.2021.

6. The respondent-accused thereafter, preferred bail application before the High Court by way of the Miscellaneous Criminal Application No. 3819 of 2021.

The High Court allowed the bail application and ordered release of the respondent-accused on bail subject to certain terms and conditions.

7. The High Court granted bail to the respondent-accused, essentially relying on the dictum as laid by this Court in the case of ***State of Maharashtra v. Shiva alias Shivaji Ramaji Sonawane*** reported in (2015) 14 SCC 272. The High Court took notice of the fact that the 2015 Act came into force w.e.f. 01.12.2019 in the State of Gujarat and no FIR had been registered against the respondent-accused for any substantive offence after 01.12.2019.

8. In such circumstances referred to above, the High Court took the view relying on the decision of this Court in the case of ***Shiva alias Shivaji Ramaji Sonawane*** (supra) that the five FIRs, which were registered in the past for different offences under the Indian Penal Code (IPC) cannot be construed as a 'continuing unlawful activity' of the respondent-accused so as to prosecute him under the provisions of the 2015 Act.

9. We must look into the relevant observations of the High Court, made in its impugned order as under:

> *"6. In order to curb and control organized crime and terrorist activities in the State of Gujarat the Legislature has promulgated "the Gujarat Control of Terrorism and Organized Crime Act, 2015" vide Notification. The Act has come into force from 01.12.2019. Sections 2(c) and (f) which define "continuing unlawful activity" and "organized crime syndicate" read as under:*
>
> > *(c) "continuing unlawful activity" means an activity prohibited by law for the time being in force, which is a cognizable offence punishable with imprisonment for a term of three years or more, undertaken either singly or jointly, as a member of an organised 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 the preceding period of ten years and that court has taken cognizance of such offence;
(f) "organised crime syndicate" means a group of two or more persons who, acting either singly or collectively, as a syndicate or gang indulging in activities of organised crime;

The combined reading of the aforesaid provisions suggest that there has to be a continuing unlawful activity carried out by an organized crime syndicate, for which more than one charge sheets have been filed before a competent court within the preceding period of ten years, and that the court has taken cognizance of such offence.

7. The Supreme Court in the case of Shivaji Ramaji Sonawale (supra) while considering the parimaterial provisions of section 2(d) of the Maharashtra Control of Organised Crime Act, 1999 to that of section 2(c) of the Gujarat Act, which defines "continuing unlawful activity" has held thus:

"9. The significant feature of the two cases is that for Crimes No.37 of 2001 and 38 of 2001 the respondents were separately tried and acquitted on 18th January, 2008 in the case of Shiva and on 28th February, 2006 in the case of Mehmood Khan Pathan. In the said charge sheets, the respondents were accused of committing offences only under the IPC and the Arms Act. For the offences punishable under MCOCA separate and independent charge sheets were filed against the accused persons in which they were convicted by the Trial Court which conviction was reversed by the High Court as noticed earlier. It was in the above backdrop that the High Court held that once the respondents had been acquitted for the offence punishable under the IPC and Arms Act in Crimes No.37 and 38 of 2001 and once the Trial Court had recorded an acquittal even for the offence punishable under Section 4 read with Section 25 of the Arms Act in MCOCA Crimes No.1 and 2 of 2002 all that remained incriminating was the filing of charge sheets against the respondents in the past and taking of cognizance by the competent court over a period of ten years prior to the enforcement of the MCOCA. The filing of charge sheets or taking of the cognizance in the same did not, declared the High Court,

by itself constitute an offence punishable under Section 3 of the MCOCA. That is because the involvement of respondents in previous offences was just about one requirement but by no means the only requirement which the prosecution has to satisfy to secure a conviction under MCOCA. What was equally, if not, more important was the commission of an offence by the respondents that would constitute "continuing unlawful activity". So long as that requirement failed, as was the position in the instant case, there was no question of convicting the respondents under Section 3 of the MCOCA. That reasoning does not, in our opinion, suffer from any infirmity.

10. The very fact that more than one charge sheets had been filed against the respondents alleging offences punishable with more than three years imprisonment is not enough. As rightly pointed out by the High Court commission of offences prior to the enactment of MCOCA does not by itself constitute an offence under MCOCA. Registration of cases, filing of charge sheets and taking of cognizance by the competent court in relation to the offence alleged to have been committed by the respondents in the past is but one of the requirements for invocation of Section 3 of the MCOCA. Continuation of unlawful activities is the second and equally important requirement that ought to be satisfied. It is only if an organised crime is committed by the accused after the promulgation of MCOCA that he may, seen in the light of the previous charge sheets and the cognizance taken by the competent court, be said to have committed an offence under Section 3 of the Act.

11. In the case at hand, the offences which the respondents are alleged to have committed after the promulgation of MCOCA were not proved against them. The acquittal of the respondents in Crimes No. 37 and 38 of 2001 signified that they were not involved in the commission of the offences with which they were charged. Not only that the respondents were acquitted of the charge under the Arms Act even in Crimes Case No.1 and 2 of 2002. No appeal against that acquittal had been filed by the State. This implied that the prosecution had failed to prove the second ingredient required for completion of an offence under MCOCA. The High Court was, therefore, right in holding that Section 3 of the MCOCA could not be invoked only on the basis

of the previous charge sheets for Section 3 would come into play only if the respondents were proved to have committed an offence for gain or any pecuniary benefit or undue economic or other advantage after the promulgation of MCOCA. Such being the case, the High Court was, in our opinion, justified in allowing the appeal and setting aside the order passed by the Trial Court."

8. By analyzing the expression "continuing unlawful activity", the Apex Court has held that the filing of more than one charge sheets for the offences punishable with more than three years imprisonment is not enough, but it must be satisfied that the continuation of unlawful activities is the second and equally important requirement that ought to be satisfied. It is only if an organised crime is committed by the accused after the promulgation of the Act that has to be considered in the light of the previous charge sheets. Thus, the contention raised by the learned Advocate with regard to the prospective effect of the Act is not palatable in view of the aforesaid observations made by the Apex Court, but at the same time it is noticed in the present case, that the expression "continuing unlawful activity" is not satisfied in view of the offences which are considered by the authority. In the instant case, for invoking the provisions of the Act against the applicant, the state has relied on 5 offences and one experiment order registered against the applicant. The details are as under:

Sr. No.	*F.I.R. / Police station*	*Offence under I.P.C.*	*Charge sheet no.*
1	*29/2019, Dahej*	*407, 411, 465, 467, 468, 471, 120(b)*	*1128/2019 dated 21.09.2019*
2	*285/2018, Sachin*	*506(2), 114*	*43491/18 dated 29/08/2018*
3	*26/2016, Sachin*	*326, 323, 114*	*36060/2016 dated 27/06/2016*
4	*22/2019, Sachin*	*506(2), 114*	*6778/2019 dated 12.12.2019*
5	*382, Sachin*	*323, 504, 506(2)*	*64157/2018 dated 25.12.18*

6	*Order No. 03/2019 dated 03.03.2019 of Asst. Police Commissioner*		

9. The Act came into force on 01.12.2019. The last offence which is registered against the applicant is of 2019 registered vide F.I.R. No.29/2019, (Item.1), for which the charge-sheet is filed on 21.01.2019 which is prior to the promulgation of the Act. The offence at serial no.6 being F.I.R. No.14/209 under sections 364(A), 387, 120(B), 114 of the IPC has been quashed by this Court vide order dated 03.12.2019 passed in Criminal Misc. Application No.21872 of 2019 and hence, the same could not have been considered by the authority while registering the F.I.R. on 27.11.2020. The applicant has not committed any offence after the promulgation of the Act. At serial no.6, the state has referred to the extension order dated 03.03.2019 also which is against the provisions of section 2(c) of the Act. The Supreme Court has held that it is only if an organized crime is committed by the accused after the promulgation of the Act that has to be considered in the light of the previous charge sheets. Thus, the state has misdirected itself with regard to the registration of offences against the applicant, hence the applicant cannot be allowed to be further incarcerated in jail.

10. Having perused the materials placed on record and taking into consideration the facts of the case, nature of allegations, gravity of offences, role attributed to the accused, without discussing the evidence in detail, at this stage, this Court is inclined to grant regular bail to the applicant. It is clarified that this Court has not expressed any opinion with regard to the applicant not being a member or a member of the crime syndicate."

10. Being dissatisfied with the aforesaid impugned order passed by the High Court releasing the respondent-accused on bail, the State of Gujarat is here before this Court with the present appeal.

SUBMISSIONS ON BEHALF OF THE APPELLANT STATE

11. Mr. Tushar Mehta, the Solicitor General vehemently submitted that the dictum as laid by this Court in ***Shiva alias Shivaji Ramaji Sonawane*** (supra) requires a relook, as the said dictum frustrates the very object of enacting the 2015 Act. Mr. Mehta would submit that the five FIRs referred to above, registered against the respondent-accused prior to the 2015 Act coming into force, were sufficient to bring the case within the ambit of 'continuing unlawful activity' as defined under the 2015 Act. He would submit that the term 'organised crime' as defined under Section 2(1)(e) of the 2015 Act uses the term 'continuing unlawful activity'. A bare perusal of the definition of the term 'continuing unlawful activity' would indicate that it does not refer to any 'continuing unlawful activity' to be committed only after the promulgation of the 2015 Act. Mr. Mehta would argue that the said term means activities prohibited by law in respect of which more than one chargesheets has been filed before a competent court within the preceding period of ten years. The phrase 'within the preceding period of ten years' by itself indicates that the 'continuing unlawful activity' may be such activity, which could be said to have been committed prior to the enactment of the 2015 Act.

12. Mr. Mehta submitted that one distinguishing feature of the decision of this Court in the case of ***Shiva alias Shivaji Ramaji Sonawane*** (supra) is that in the said case, the accused persons were acquitted and the same signified that they were not involved in the commission of the offence with which they were charged. It is in such factual background that this Court in ***Shiva alias Shivaji Ramaji Sonawane*** (supra) could be said to have observed that it is only if an organised crime is committed by the accused after the promulgation of Maharashtra Control of Organised Crime Act, 1999 (for short, 'the MCOCA') that he may, seen in the light of the previous chargesheets and the cognizance

taken by the competent court, be said to have committed an offence under Section 3 of the MCOCA.

13. In the last, Mr. Mehta submitted that if the dictum as laid in ***Shiva alias Shivaji Ramaji Sonawane*** (supra) is affirmed, the object of the 2015 Act i.e., prevention and control of terrorist acts and for coping with criminal activities by organised crime syndicates, will surely get hampered.

14. In the aforesaid contest, the submission of Mr. Mehta is that if, the dictum as laid in ***Shiva alias Shivaji Ramaji Sonawane*** (supra) is to be treated as the final word so far as the law is concerned, then the first case under the 2015 Act can be registered, only after two cases of the nature described in the 2015 Act, had been registered against the person or against an organised syndicate after 01.12.2019. As the definition indicates, for making a crime punishable under the provisions of the 2015 Act, there has to be more than one case registered or in other words, it is the third case which can be registered for an offence under Sections 3 and 4 resply of the 2015 Act. Such an interpretation would be in direct conflict with the very purpose of the 2015 Act. If such an interpretation is accepted then the State will have to wait and helplessly watch the organised crime taking place till it is the third time a person or a syndicate is found involved in the offence after the 2015 Act came into operation w.e.f. 01.12.2019 in the State of Gujarat. According to Mr. Mehta, the 'continuing unlawful activity' could have taken place ten years prior to the registration of the new case. In such circumstances, the intention of the Legislature could not have been other than giving immediate effect to the 2015 Act by taking note of all the offences or chargesheets registered within ten years prior to the commencement of the 2015 Act.

15. In such circumstances referred to above, the learned Solicitor General prays that the ratio of the decision of this Court in the case of ***Shiva alias Shivaji Ramaji Sonawane*** (supra) may either be explained accordingly, keeping in mind the object of the 2015 Act or the issue may be referred to a larger Bench.

SUBMISSIONS ON BEHALF OF THE RESPONDENT-ACCUSED

16. On the other hand, this appeal has been vehemently opposed by the learned counsel appearing for the respondent-accused. The learned counsel would submit that no error not to speak of any error of law could be said to have been committed by the High Court while passing the impugned order. He would submit that the decision of this Court in the case of ***Shiva alias Shivaji Ramaji Sonawane*** (supra) is binding on the High Court and the High Court has rightly applied the dictum, as laid therein for the purpose of releasing the respondent-accused on bail.

17. The learned counsel would submit that if the interpretation put forward by the learned Solicitor General is accepted then the same would be in breach of Article 20(1) of the Constitution which provides that no person shall be convicted of an offence except for one which is in violation of any law in force at the time of commission of the act charged as an offence nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of commission of the offence.

18. The learned counsel further submitted that the scheme of the 2015 Act makes it abundantly clear that it is only if an accused commits an organised crime after the promulgation of the 2015 Act, then the accused can be prosecuted under

the provisions of the 2015 Act with the aid of the charge sheets that might have been filed in last ten preceding years.

19. The learned counsel would submit that unless there is a substantive offence, mere past chargesheets would not constitute the offence of organised crime. He would argue that there is no merit in the contention canvassed on behalf of the appellant-State that offence of organised crime itself comprises of chargesheets filed in the past of which cognizance is taken. He would argue that if such a contention were to be accepted, it would amount to giving a free hand to the police to send anybody to a long term of imprisonment, merely by filing chargesheets in respect of more than one offence.

20. In such circumstances referred to above, the learned counsel appearing for the respondent-accused prays that there being no merit in the present appeal, the same may be dismissed.

ANALYSIS

21. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the decision rendered by a coordinate Bench of this Court in the case of ***Shiva alias Shivaji Ramaji Sonawane*** (supra) requires a relook and the issue be referred to a larger Bench.

AN OVERVIEW OF THE GUJARAT CONTROL OF TERRORISM AND ORGANISED CRIME ACT, 2015

22. The Gujarat Control of Terrorism Act, 2015, as its long title indicates, is 'an Act to make special provisions for the prevention and control of terrorist acts and for coping with criminal activities by organised crime syndicates and for the matters connected therewith or incidental there to'. The statement of objects and reasons contains the reasons, which constitute the foundation for the legislature to step in:

First, organised crime which is in existence for some years poses a serious threat to society;

Secondly, organised crime is not confined by national boundaries;

Thirdly, organised crime is fuelled by illegal wealth generated by contract killing, extortion, smuggling and contraband, illegal trade in narcotics, kidnapping for ransom, collection of protection money and money laundering, and other activities;

Fourthly, the illegal wealth and black money generated by organised crime pose adverse effects on the economy;

Fifthly, organised crime syndicates make common cause with terrorists fostering narcoterrorism which extends beyond national boundaries;

Sixthly, the existing legal framework in terms of penal and procedural laws and the adjudicatory system were found inadequate to curb and control organised crime; and

Seventhly, the special law was enacted with 'stringent and deterrent provisions' including in certain circumstances, the power to intercept wire, electronic or oral communication.

In understanding the ambit of the enactment, emphasis must be given to three definitions:

a. Organised crime (Section 2(1)(e));[1]

b. Organised crime syndicate (Section 2(1)(f));[2] and

c. Continuing unlawful activity (Section 2(1)(c).[3]

The expression 'organised crime' is defined with reference to a continuing unlawful activity. The definition is exhaustive since it is prefaced by the word 'means'. The ingredients of an organised crime are:

a. The existence of a continuing unlawful activity;

b. Engagement in the above activity by an individual;

c. The individual may be acting singly or jointly either as a member of an organised crime syndicate or on behalf of such a syndicate;

d. The use of violence or its threat or intimidation or coercion or other unlawful means; and

e. The object being to gain pecuniary benefits or undue economic or other advantage either for the person undertaking the activity or any other person or for promoting insurgency.

---

1 Section 2(1)(e) - "organised crime" means any continuing unlawful activity and terrorist act including extortion, land grabbing, contract killing, economic offences, cyber crimes having severe consequences, running large scale gambling rackets, women trafficking, racket for prostitution or ransom by an individual, singly or jointly, either as a member of an organised crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means.

2 Section 2(1)(f) - "organised crime syndicate" means a group of two or more persons who, acting either singly or collectively, as a syndicate or gang indulging in activities of organised crime.

3 Section 2(1)(c) - "continuing unlawful activity" means an activity prohibited by law for the time being in force, which is a cognizable offence punishable with imprisonment for a term of three years or more, undertaken either singly or jointly, as a member of an organised 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 the preceding period of ten years and that court has taken cognizance of such offence;

The above definition of organised crime, as its elements indicate, incorporates two other concepts namely, a continuing unlawful activity and an organised crime syndicate. Hence, it becomes necessary to understand the ambit of both those expressions. The ingredients of a continuing unlawful activity are:

a. The activity must be prohibited by law for the time being in force;

b. The activity must be a cognizable act punishable with imprisonment of three years or more;

c. The activity may be undertaken either singly or jointly as a member of an organised crime syndicate or on behalf of such a syndicate;

d. More than one charge-sheet should have been filed in respect of the activity before a competent court within the preceding period of ten years; and

e. The court should have taken cognizance of the offence.

The elements of the definition of 'organised crime syndicate' are:

a. A group of two or more persons;

b. Who act singly or collectively, as a syndicate or gang; and

c. Indulge in activities of organised crime.

Section 2(1)(c) while defining 'continuing unlawful activity' and Section 2(1)(e) while defining 'organised crime', both contain the expression 'as a member of an organised crime syndicate or on behalf of such syndicate'. While defining an organised crime syndicate, Section 2(1)(f) refers to 'activities of organised crime'.

Section 3 provides for the punishment for organised crime.[4] Sub-section (1) of Section 3 covers 'whoever commits an offence of organised crime'. Sub-section (2) covers whoever conspires or attempts to commit or advocates, abets or knowingly facilitates the commission of an organised crime or any act preparatory to organised crime. Sub-section (3) covers whoever harbours or conceals or attempts to harbour or conceal any member of an organised crime syndicate. Sub- section (4) covers any person who is a member of an organised crime syndicate. Sub-section (5) covers whoever holds any property derived or obtained from the commission of an organised crime or which has been acquired through the funds of an organised crime syndicate. Section 4 punishes the possession of unaccountable wealth on behalf of a member of an organised crime syndicate.

---

4 Section 3 - (1) Whoever commits an offence of terrorist act or organised crime shall,— (i) if such offence has resulted in the death of any person, be punishable with death or imprisonment for life and shall also be liable to fine which shall not be less than rupees ten lakhs;

(ii) in any other case, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine which shall not be less than rupees five lakhs.

(2) Whoever conspires or attempts to commit or advocates, abets or knowingly facilitates the commission of any terrorist act or an organised crime or any act preparatory to any terrorist act or organised crime, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine, which shall not be less than rupees five lakhs.

(3) Whoever intentionally harbours or conceals or attempts to harbour or conceal any person who has committed an offence of any terrorist act or any member of an organised crime syndicate shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine which shall not be less than rupees five lakhs.

(4) Any person who is a member of an organised crime syndicate shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine which shall not be less than rupees five lakhs.

(5) Whoever holds any property derived, or obtained from commission of terrorist act or an organised crime or which has been acquired through the organised crime syndicate funds shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to imprisonment for life and shall also be liable to fine which shall not be less than rupees two lakhs.

23. For charging a person of organised crime or being a member of organised crime syndicate, it would be necessary to prove that the persons concerned have indulged in :

(i) an activity,

(ii) which is prohibited by law,

(iii) which is a cognizable offence punishable with imprisonment for three years or more,

(iv) undertaken either singly or jointly,

(v) as a member of organised crime syndicate i.e. acting as a syndicate or a gang, or on behalf of such syndicate,

(vi) (a) in respect of similar activities (in the past) more than one charge-sheets have been filed in competent court within the preceding period of ten years,

(b) and the court has taken cognizance of such offence.

(vii) the activity is undertaken by :

(a) violence, or

(b) threat of violence, or intimidation or

(c) coercion or

(d) other unlawful means

(viii) (a) with the object of gaining pecuniary benefits or gaining undue or other advantage or himself or any other person, or

(b) with the object of promoting insurgency.

24. A close analysis of the term, 'organised crime' would indicate that there has to be 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 as singly or jointly as a member of organised crime syndicate or on behalf of such syndicate, in respect of which activity more than one chargesheets have been filed before a competent court within the preceding period of ten years and the Court has taken cognizance of such offence.

PRINCIPLES GOVERNING GRANT OF BAIL IN CASES OF THE 2015 ACT

25. Although, Mr. Mehta with all fairness submitted that the discretion exercised by the High Court in favour of the respondent-accused in so far as releasing the accused on bail is concerned, the same may not be disturbed in the facts and circumstances of the case. Yet as this appeal arises from an order of bail granted by the High Court wherein the provisions of the 2015 Act are made applicable, we deem it fit to reiterate the principles of grant of bail.

26. The considerations which normally weigh with the Court in granting bail in non-bailable offences are:

(1) the nature and seriousness of the offences;

(2) the character of the evidence;

(3) circumstances which are peculiar to the accused;

(4) a reasonable possibility of the presence of the accused not being secured at the trial;

(5) reasonable apprehension of witnesses being tampered with;

(6) the larger interest of the public or the State and other similar factors which may be relevant in the facts and circumstances of the case.

27. However, if the provisions of the 2015 Act are invoked in a given case, then, in addition to the aforementioned broad principles, the limitations imposed in the provisions contained in sub-section (4) of Section 20 of the 2015 Act should not be lost sight of while dealing with application for grant of bail. The relevant provision reads as under:

> *"**20.**(4) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond, unless –*
>
> *(a) the Public Prosecutor has been given an opportunity to oppose the application of such release; and*
>
> *(b) where the Public Prosecutor opposes the application, the Special Court is satisfied that there are reasonable grounds for believing that accused is not guilty of committing such offence and that he is not likely to commit any offence while on bail."*

28. It is plain from a bare reading of the non-obstante clause in the sub-section that the power to grant bail by the High Court or Court of Sessions is not only subject to the limitations imposed by Section 439 of the Code but is also subject to the limitations placed by Section 20(4) of the 2015 Act. Apart from the grant of opportunity to the Public Prosecutor, the other twin conditions are: the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds. The expression 'reasonable grounds' means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provisions requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the

accused is not guilty of the alleged offence. Thus, recording of findings under the said provision is a sine qua non for granting bail under the 2015 Act.

29. The Court should bear in mind the principles enunciated in the case of ***Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra and Another*** reported in (2005) 5 SCC 294. We quote paras 43, 44 and 46 resply:

> ***"43.*** *Section 21(4) of MCOCA does not make any distinction between an offence which entails punishment of life imprisonment and an imprisonment for a year or two. It does not provide that even in case a person remains behind the bars for a period exceeding three years, although his involvement may be in terms of Section 24 of the Act, the court is prohibited to enlarge him on bail. Each case, therefore, must be considered on its own facts. The question as to whether he is involved in the commission of organised crime or abetment thereof must be judged objectively. .....*
>
> ***44.*** *The wording of Section 21(4), in our opinion, does not lead to the conclusion that the court must arrive at a positive finding that the applicant for bail has not committed an offence under the Act. If such a construction is placed, the court intending to grant bail must arrive at a finding that the applicant has not committed such an offence. In such an event, it will be impossible for the prosecution to obtain a judgment of conviction of the applicant. Such cannot be the intention of the legislature. Section 21(4) of MCOCA, therefore, must be construed reasonably. It must be so construed that the court is able to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. Similarly, the court will be required to record a finding as to the possibility of his committing a crime after grant of bail. However, such an offence in future must be an offence under the Act and not any other offence. Since it is difficult to predict the future conduct of an accused, the court must necessarily consider this aspect of the matter having regard to the antecedents of the accused, his propensities and the nature and manner in which he is alleged to have committed the offence.*

Xxx *xxx* *xxx*

> ***46.*** *The duty of the court at this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. However, while dealing with a special statute like MCOCA having regard to the provisions contained in sub-section (4) of Section 21 of the Act, the court may have to probe into the matter deeper so as to enable it to arrive at a finding that the materials collected against the accused during the investigation may not justify a judgment of conviction. The findings recorded by the court while granting or refusing bail undoubtedly would be tentative in nature, which may not have any bearing on the merit of the case and the trial court would, thus, be free to decide the case on the basis of evidence adduced at the trial, without in any manner being prejudiced thereby."*

DECISION OF THIS COURT IN THE CASE OF STATE OF MAHARASHTRA V. SHIVA ALIAS SHIVAJI RAMAJI SONAWANE

30. We may now proceed to look into the decision of this Court rendered in the case of ***Shiva alias Shivaji Ramaji Sonawane*** (supra). But before we undertake this exercise, we must look into the judgment of the High Court of Judicature at Bombay in ***Prafulla Uddhav Shende v. State of Maharashtra***, 2008 SCC OnLine Bom 1848 : (2009) 2 AIR Bom R 1, which came to be challenged by the State of Maharashtra before this Court & titled ***Shiva alias Shivaji Ramaji Sonawane*** (supra).

31. The High Court in ***Prafulla*** (supra) decided a batch of criminal appeals filed by individual convicts. The accused persons therein were convicted for the offences punishable under Section 3(4) of the MCOCA**.** ***Shiva alias Shivaji Ramaji Sonawane*** was also one of the appellants in the batch of appeals before the High Court.

32. The High Court after referring to the various provisions of the MCOCA looked into its own decision delivered by a Division Bench in the case of ***Jaisingh Ashrfilal Yadav and Others v. State of Maharashtra and Another*** reported at 2003 All MR (Cri) 1506. We quote paras 42 and 43 resply of the decision of the High Court in ***Prafulla*** (supra):

> ***"42.*** *In Jaisingh Ashrfilal Yadav v. State of Maharashtra, reported at 2003 All MR (Cri) 1506, to which the learned A.P.P. drew my attention, a Division Bench of this Court was considering the constitutionality of the provisions of MCOC Act. The Court observed in paragraph 9 as under:*
>
> > *"9. The analysis of the definition of the organised crime, therefore, would reveal that continuing unlawful activity is one of its ingredients whereas in order to make an activity to be continuing unlawful one, it should disclose filing of minimum two charge-sheets in relation to the activity prohibited by law in force and of the nature specified in Section 2(d) during the period of preceding ten years. In other words, lodging of two charge-sheets in relation to the acts which are already declared under the law then in force as offences of the nature specified under Section 2(d) during the preceding period of ten years is <u>one of the requisites</u> for the offence of organised crime under the said Act." (Emphasis supplied)*
>
> ***43.*** *The Court then considered the challenge based on Article 20(1) of the Constitution of India. In paragraph 19 the Court observed as under:*
>
> > *"19. There is lot of difference between the act or activity itself being termed or called as an offence under a statute and such act or activity being taken into consideration <u>as one of the requisites</u> for taking action under the statute. The former situation has to satisfy the mandate of Article 20(1) of the Constitution, however, in case of latter situation, it stands on totally different footing. Undoubtedly, for the purpose of organised crime there has to be a continuing unlawful activity. There cannot be continuing unlawful activity unless at least two charge-sheets are to be found to have been lodged in relation to the offence punishable*

with three years' imprisonment during the period of ten years. Undisputedly, the period of ten years may relate to the period prior to 24-2-1999 or thereafter. In other words, it provides that the activities which were offences under the law in force at the relevant time and in respect of which two charge-sheets have been filed and the Court has taken cognizance thereof, during the period of preceding ten years, then it will be considered as continuing unlawful activity on 24-2-1999 or thereafter. It nowhere by itself declares any activity to be an offence under the said Act prior to 24-2-1999. It also does not convert any activity done prior to 24-2-1999 to be an offence under the said Act. It merely considers two charge-sheets in relation to the acts which were already declared as offences under the law in force to be one of the requisites for the purpose of identifying continuing unlawful activity and/or for the purpose of an action under the said Act. This by itself cannot be said to be in any manner violative of the mandate of Article 20(1) considering the law laid down by the Apex Court in Rao Shiv Bahadur Singh's case as well as in Sajjan Singh's case."

33. The High Court, thereafter in para 44 of ***Prafulla*** (supra) referred to its decision, rendered by a Division Bench in ***Bharat Shantilal Shah v. State of Maharashtra*** reported at 2003 All MR (Cri) 1061. In ***Bharat Shantilal Shah*** (supra), the challenge was to the constitutional validity of MCOCA. We quote paras 44, 45 and 46 resply:

*"**44.** In Bharat Shantilal Shah v. State of Maharashtra, reported at 2003 All MR (Cri) 1061 the challenge to the constitutional validity of MCOC Act, was considered by another Division Bench. Definition of continuing unlawful activity in Section 2(1)(d) was sought to be attacked by advancing the following arguments:*

"19. Dealing with the next definitions in Section 2(1)(d) of 'continuing unlawful activity' it was submitted that it suffers from violation of Article 14 as it treats unequals as equals. It makes an activity continuing unlawful activity if more than one charges of

cognizable offence punishable with imprisonment of three years or more are filed in competent Court, if does not touch an activity as continuing unlawful activity if undertaken by a person who is known to be a criminal but more than one charge sheets have not been filed against him. A person charged ten times of an offence though acquitted on every occasion may yet be roped in as a person engaged in continuing unlawful activity. Whereas a person who is convicted for an offence for three years punishment cannot be touched by this definition if he is not charged with more than two of such offences. The definition therefore treats as equal persons who are hopelessly unequal that is to say a person who is a known criminal but charge-sheeted and convicted not more than once and another who has been falsely charged with 10 fabricated charges and acquitted of all the 10 charges with a finding that the charges were fabricated yet merely because cognizance has been taken of that charge are treated as person engaged in continuous unlawful activity. The definition therefore arbitrary and liable to be struck down as violative of Article 14. The arguments appear to be attractive at the first blush, but deeper scrutiny reveals the hollowness of the argument."

45. *Dealing with the objections to this definition the Court observed in paragraph 25 of the judgment as under:*

"25. Then we would consider the submission of Shri Manohar that the definition of continuing unlawful activity violates the mandate of Article 14 and is therefore liable to be struck down. According to the learned counsel unequals are being treated as equals. Persons charged only once are not brought within the purview of the Act but a person, with several charges framed and cognizance taken by competent Court who later on are acquitted are covered by the definition. According to him therefore a person is acquitted, of, ten charges cannot be treated as equal to a person who charged and convicted of only one offence. In our opinion, there is no violation of Article 14 by this definition. If we read the definition again, what has been defined as continuing

unlawful activity is a member of organized crime syndicate in respect of which any activity prohibited by law and done repeatedly i.e. more than once for which charge-sheet has been filed in the Court of competent jurisdiction in the past ten years. The purpose of definition is to define what continuing unlawful activity is and it is for the purposes of defining what is continued unlawful activity that those charges are to be taken into consideration. Mere taking into consideration of such charges cannot result in discrimination of the kind alleged by Shri Manohar. The activity must be continuing unlawful activity and to define it with clarity it is provided that any person who in the past was charge-sheeted for more than one charge of such activity or crime the cognizance of which has been taken and imprisonment for which is more than three years should be taken into account. The fact of the person having been charge-sheeted in such cognizable offences in the past makes the unlawful activity continuing unlawful activity. This Section only defines what the activity is. It does not itself provide for any punishment for that activity. Had punishment been provided the submission that it threats while punishing unequals as equals may carry weightage. That being not the case in the challenge to Section 2(1)(d) of the Act we see no vagueness or violation of Article 14 by the definition. We find that the provision treats all those covered by it in a like manner and does not suffer from the vice of class legislation." (emphasis supplied)

46. *In paragraph 27 the Court then went on to observe as under:*

"27. We also do not find substance in the challenge that the equality clause in the Constitution is violated because the definition ropes in anyone charged more than once, irrespective of whether the charge resulted in an acquittal or conviction. The circumstances that followed the charge are not material. The provision only defines what is continued unlawful activities and refers to whether a person has been charged over a period of ten years for the purpose of seeing whether the person is charged for the first time or has been charged often. The circumstance of

conviction or acquittal that followed the charge are not material. The limited purpose is to see antecedents of the person. Not to convict."" (emphasis supplied)

34. Thus, ***Prafulla*** (supra) looked into paras 19, 25 and 27 resply of ***Bharat Shantilal Shah*** (supra). It may not be out of place to State that the High Court of Judicature at Bombay in ***Bharat Shantilal Shah*** (supra) held that Sections 3 and 4 resply of the MCOCA inherently contemplated *mens rea*. The High Court held that the provisions of MCOCA except those contained in Sections 13 to 16 resply to be valid and struck down the provisions of Sections 13 to 16 resply as beyond the legislative competence of the State Legislature. The High Court of Judicature at Bombay also held that the words in sub-section (5) of the Section 21 of the MCOCA 'or under any other Act on the date of the offence in question' were violative of Article 14 of the Constitution and, therefore, were to be deleted.

35. The judgment of the High Court of Judicature at Bombay in the case of ***Bharat Shantilal Shah*** (supra) was challenged by the State of Maharashtra before this Court in so far as it held Sections 13 to 16 resply of the MCOCA as unconstitutional. A Bench of three Judges of this Court in ***State of Maharashtra v. Bharat Shanti Lal Shah and Others*** reported in (2008) 13 SCC 5 upheld the judgment of the High Court of Judicature at Bombay deleting the words 'or under any other ….' from sub-section (5) of the Section 21. The questions raised before this Court were concerned essentially with the constitutionality of interception of conversation or communication, which was subject matter of Sections 13 to 16 resply of the MCOCA. This Court reversed the judgment only to the extent the High Court held the provisions *ultra vires*.

36. There was no cross appeal filed by Bharat Shah challenging the order of the High Court upholding the constitutional validity of the provisions of Sections

2(1)(d), (e) and (f) and Sections 3 and 4 respectively of the MCOCA. Therefore, this Court had no occasion to go into that question. This Court, however, observed that there was no vagueness as the definitions defined with clarity what was meant by continuing unlawful activity, organised crime and also organised crime syndicate. This Court specifically concluded that after examining the judgment of the High Court of Judicature at Bombay on the issue of the constitutional validity of Sections 2(1)(d), (e) and (f) and Sections 3 and 4 respectively of the MCOCA, that the court was in accord with the finding arrived at by the High Court that the aforesaid provisions cannot be said to be *ultra vires* of the Constitution and this Court did not find any reason to take a different view than the one taken by the High Court of Judicature at Bombay while upholding the validity of the aforesaid provisions.

37. The High Court of Judicature at Bombay had specifically held as affirmed by a three-Judge Bench decision of this Court that had punishment been provided for continuing unlawful activity, the submission that while punishing, it treats unequals as equals may carry weightage. The High Court, as affirmed by this Court, upheld the validity of the provision defining 'continuing unlawful activity' only because the Act did not provide any punishment for that activity. In para 27 of ***Bharat Shantilal Shah*** (supra), the High Court made it explicitly clear that the limited purpose of continuing unlawful activity was to see the antecedents of the person and not to convict. Section 2 defines, not only the offence of 'organised crime' but also the other terms used in the MCOCA. What is material is the definition of offence of 'organised crime' and not the definitions of other terms included in Section 2. Had the term 'continuing unlawful activity' been synonymous with 'organised crime', it would not have been necessary for the Legislature to include or provide for two definitions. It would have been

sufficient to provide for only one definition of continuing unlawful activity and make that activity punishable. The definitions in clauses (d) and (e) resply of sub-section (1) clearly indicate that one of the components of organised crime is continuing unlawful activity and, therefore, organised crime is something more than mere continuing unlawful activity.

38. The High Court thereafter proceeded to observe in paras 47 to 53 resply as under:

> *"**47.** The Court then rejected the objections to the constitutional validity of the definition. It is thus clear that apart from previous charge-sheets there has to be a continuation, an activity to which MCOCA is applied.*
>
> ***48.** This fortifies the conclusion that mere proof of filing charge-sheets in the past is not enough. It is only one or the requisites for constituting offence of organised crime. If only the past charge-sheets were to be enough to constitute offence of organised crime, it could have offended the requirement of Article 20(1) of the Constitution and possibly Article 20(2) as well, (and in any case Section 300 of the Cr PC). Had these judgments of the Supreme Court and Division Benches of this Court been cited before the learned single Judge deciding Amarnath v. State, (2006 All MR (Cri) 407 : ((2006) 6 AIR Bom R 120), the learned single Judge, without doubt, would not have held that the matter was simply one of an arithmetical equation. The said judgment cannot be reconciled with the judgments or Division Benches in Jaisingh v. State, (2003 All MR (Cri) 1506 and Bharat Shah v. State, 2003 All MR (Cri) 1061, which I am bound to follow.*
>
> ***49.** It is not necessary to go into the implications of the expression "prosecuted and punished" used in Article 20(2) of the Constitution. Section 300 of the Cr PC itself clearly bars a fresh trial for the same offence. Section 21 of MCOCA which prescribes modified applications of the Code to offences under MCOCA does not make provisions of Section 300 of the Cr PC inapplicable.*

Therefore, since the previous criminal history of the applicants denotes that they had been or are being separately charged/tried for those offences before competent Courts, there is no question of such offences constituting offence of organised crime.

50. *In Appa @ Prakash Haribhau Londhe v. State of Maharashtra, reported at 2006 All MR (Cri) 2804 : ((2006) 6 AIR Bom R 401), a Division Bench of this Court was considering the challenge to the applicability of MCOC Act. The Court observed as under in paragraph 10 of the judgment:*

> *"10. For the purpose of organised crime there has to be a continuing unlawful activity and there cannot be continuing unlawful activity unless at least two charge-sheets are to be found to have been lodged in relation to the offence punishable with three years' imprisonment during the period of ten years. If no illegal activity as contemplated by MCOC Act are committed after 1999, then the past activities prior to 1999 may not be of any help for registering any FIR only on the basis of those past activities as has been observed by the Division Bench (R.M.S. Khandeparkar and P.V. Kakade, JJ.) of this Court in Writ Petition No. 689 of 2005 and other petitions, but if two or more illegal activities are committed after 1999, then the past activities can be taken into consideration in order to show the continuity. We are therefore not in agreement with the submissions made by Mr. Pradhan that on the date of registration of FIR against the petitioners they had not committed any act, as contemplated."*

51. *While offences committed prior to 24-2-1999 cannot amount to "organised crime", since this offence was not on statute book then, even post-24-2-1999 crimes could be tried as "organised crime" only if information in respect of these crimes is permitted to be registered as organised crime and sanction is accorded for prosecution for such crime under Section 23 of MCOCA. Such are not the facts in the present cases. There is no substantive crime which is allowed to be registered under MCOCA. Offences in Crime Nos. 37/01 and 38/01. for which approval was sought are not subject-matter of these trials. When Crime Nos. 3007/2001 and*

3008/2001 were registered, upon receiving approval, there was no crime reported. Seizure of weapons is subsequent to registration of these crimes, for which the concerned accused persons have been acquitted. Consequently without there being a substantive offence indicating continuity, there would be no continuation of the unlawful activity and as a corollary no "continuing unlawful activity".

52. *A look at provisions of the punishment. Section 3 of the MCOCA would fortify this conclusion. Clauses (i) and (ii) of sub-section (1) would show that "if such offence has re-suited in death of any person", the offence of organised crime would attract death sentence or life imprisonment with a fine of Rs. one lakh. Now, if only old charge-sheets should be held as enough, a person acquitted of a murder charge in the past would be liable to be sent for a life term, in spite of acquittal, simply because a charge-sheet had been filed in the past. Had this been contemplated, the learned Judge, Special Court, would have charged Accused No. 1/I Shiva of offence punishable under Section 3(1)(i) of MCOCA and not one punishable under Section 3(1)(ii) of the MCOCA, since Shiva had been charged once of murder (Sr. No. 9 in the chart) and acquitted. Same would hold good about the other gangsters. Advocate Tiwari, the learned counsel for Mehmood and others relying on judgment of the Supreme Court in Dilip Singh v. State of Punjab, reported at (1997) 3 Current Criminal Journal 223, that charge-sheets cannot be made the basis of guilt or innocence of an accused. Therefore, it is clear that the offences referred to in various charge-sheets are not "such oftence(s)" and consequently an offence, punishable under Section 3 of the MCOCA has to be different from those for which such accused had been charge-sheeted in the past. Past criminal activity only aggravates the continued activity amounting to an offence and attracts provisions of MCOCA.*

53. *In view of this, since the appellants are not shown to have indulged in any crime which can be said to be continuation of past criminal activity provisions of Section 3(1) of the MCOCA are not*

attracted. It cannot be said that the appellants have committed the offence of organised crime."

39. It may not be out of place to state at this stage that in ***Prafulla*** (supra), the High Court also referred to and relied upon its own decision in the case of ***Altaf Ismail Sheikh v. State of Maharashtra***, 2005 SCC OnLine Bom 420 : 2005 Cri LJ 3584 : (2006) 1 CCR 391, more particularly para 24 therein, which reads thus:

> *"**24.** The Section 23 of the MCOC Act which opens with non-obstante clause and further clothed with negative words clearly discloses the mandate of the legislature that the cognizance of the offences under the MCOC Act should not be in routine course, but only upon the facts disclosing the applicability thereof and satisfaction of the officer of the high rank, the minimum being of the rank of Deputy Inspector General of Police, in that regard. In fact, the officer of such high rank is required to decide about the approval even for recording of FIR in relation to any offence under the MCOC Act. This obviously discloses that the approving authority has to apply its mind about the applicability of the provisions of the MCOC Act to the facts disclosed in a matter before allowing the recording of FIR and for that purpose, he must be, prima facie, satisfied about the commission of offence of organised crime under the MCOC Act by the person or persons against whom the FIR is to be recorded. Obviously, for prima facie satisfaction regarding the commission of the offence of organised crime or of participation therein in whatever manner, the approving authority must have some materials before it disclosing the activities of the person or the persons to be of the nature of offence under the MCOC Act and having committed such activities on or after 24th February, 1999. In other words, the activities of a person to be termed as the offence under the MCOC Act, the same should inevitably disclose to have been committed on or after 24th February, 1999. If the activity of the person is relating to the period prior to 24th February, 1999, obviously, it cannot be said to be an offence under MCOC Act, even though the activity may be an offence under the provisions of some other statute in force at the relevant time....."*
>
> (Emphasis supplied)

40. Thus, the High Court took the view relying on its various other decisions that if no illegal activities as contemplated by MCOCA are shown to have been committed after 1999, then the past activities, prior to 1999 may not be of any help for registering any FIR only on the basis of such past activities. Further, if two or more illegal activities are committed after 1999, then the past activities can be taken into consideration in order to show the continuity.

41. The State of Maharashtra being dissatisfied with the aforesaid judgment of the High Court of Judicature at Bombay challenged the same before this Court. It is the said challenge which culminated in the decision titled as ***Shiva alias Shivaji Ramaji Sonawane*** (surpa).

42. We now proceed to look into the relevant observations made by this Court as contained in paras 9, 10 and 11 resply:

> *"**9.** It was in the above backdrop that the High Court held that once the respondents had been acquitted for the offences punishable under IPC and the Arms Act in Crimes Nos. 37 and 38 of 2001 and once the trial court had recorded an acquittal even for the offence punishable under Section 4 read with Section 25 of the Arms Act in MCOCA Crimes Nos. 1 and 2 of 2002, all that remained incriminating was the filing of charge-sheets against the respondents in the past and taking of cognizance by the competent court over a period of ten years prior to the enforcement of MCOCA. The filing of charge-sheets or taking of the cognizance in the same did not, declared the High Court, by itself constitute an offence punishable under Section 3 of MCOCA. That is because the involvement of the respondents in previous offences was just about one requirement but by no means the only requirement which the prosecution has to satisfy to secure a conviction under MCOCA. What was equally, if not, more important was the commission of an offence by the respondents that would constitute "continuing unlawful activity". So long as that requirement failed, as was the position in the instant case, there was*

no question of convicting the respondents under Section 3 of MCOCA. That reasoning does not, in our opinion, suffer from any infirmity.

10. *The very fact that more than one charge-sheets had been filed against the respondents alleging offences punishable with more than three years' imprisonment is not enough. As rightly pointed out by the High Court commission of offences prior to the enactment of MCOCA does not by itself constitute an offence under MCOCA. Registration of cases, filing of charge-sheets and taking of cognizance by the competent court in relation to the offence alleged to have been committed by the respondents in the past is but one of the requirements for invocation of Section 3 of MCOCA. Continuation of unlawful activities is the second and equally important requirement that ought to be satisfied. It is only if an organised crime is committed by the accused after the promulgation of MCOCA that he may, seen in the light of the previous charge-sheets and the cognizance taken by the competent court, be said to have committed an offence under Section 3 of the Act.*

11. *In the case at hand, the offences which the respondents are alleged to have committed after the promulgation of MCOCA were not proved against them. The acquittal of the respondents in Crimes Nos. 37 and 38 of 2001 signified that they were not involved in the commission of the offences with which they were charged. Not only that the respondents were acquitted of the charge under the Arms Act even in Crime Cases Nos. 1 and 2 of 2002. No appeal against that acquittal had been filed by the State. This implied that the prosecution had failed to prove the second ingredient required for completion of an offence under MCOCA. The High Court was, therefore, right in holding that Section 3 of MCOCA could not be invoked only on the basis of the previous charge-sheets for Section 3 would come into play only if the respondents were proved to have committed an offence for gain or any pecuniary benefit or undue economic or other advantage after the promulgation of MCOCA. Such being the case, the High Court was, in our opinion, justified in allowing the appeal and setting aside the order passed by the trial court."* (Emphasis supplied)

43. *Thus, in* ***Shiva alias Shivaji Ramaji Sonawane*** (surpa), this Court took the view that there are two essential ingredients to constitute an offence under MCOCA. First, the registration of cases, filing of chargesheets and taking of cognizance by the competent court in relation to the offences alleged to have been committed by the accused in the past and secondly, continuation of unlawful activities. In other words, it is only if an organised crime is committed by the accused after the promulgation of the MCOCA that he may, on the basis of the previous chargesheets and the cognizance taken by the competent court, be said to have committed an offence under Section 3 of the MCOCA.

44. Indisputably, in ***Shiva alias Shivaji Ramaji Sonawane*** (surpa), the accused persons stood acquitted in connection with two of the crimes and considering the same, this Court took the view that the accused persons could not be said to have committed the alleged crime after the promulgation of MCOCA, as the allegations could not be proved against them. However, this Court, in no uncertain terms, has observed that what is important is the commission of an offence by the accused that would constitute 'continuing unlawful activity' and the unlawful activities could be said to have continued only if the accused are found to have indulged in an organised crime after the promulgation of the MCOCA.

45. The learned counsel appearing for the respondent-accused is right in his submission that having regard to the stringent provisions of the 2015 Act, its provisions should be very strictly interpreted and the authorities concerned would be obliged in law to strictly observe the said provisions. There need not be any debate on the fact that the provisions of the 2015 Act have been enacted to deal with organised criminal activity in relation to offence, which are likely to create terror and endanger and unsettle the economy of the country for which stringent

measures have been adopted. The provisions of the 2015 Act seek to deprive a citizen of his right to freedom at the very initial stage of the investigation, making it extremely difficult for him to obtain bail. Other provisions relating to the admission of evidence and electronic media have also been provided for. In such a situation, it has to be ensured whether the investigation from its very inception has been conducted strictly in accordance with the provisions of the 2015 Act. (See: ***State of Maharashtra and Others v. Lalit Somdatta Nagpal and Another*** reported in (2007) 4 SCC 171)

46. It is a sound rule of construction that the substantive law should be construed strictly so as to give effect and protection to the substantive rights unless the statute otherwise intends. Strict construction is one which limits the application of the statute by the words used. According to Sutherland, 'strict construction refuses to extend the import of words used in a statute so as to embrace cases or acts which the words do not clearly describe'.

47. The rule as stated by Mahajan C.J. in ***Tolaram Relumal and Another v. State of Bombay*** reported in AIR 1954 SC 496, is that "*if two possible and reasonable constructions can be put upon a penal provision, the court must lean towards that construction which exempts the subject from penalty rather than the one which imposes a penalty. It is not competent to the court to stretch the meaning of an expression used by the legislature in order to carry out the intention of the legislature*...." In ***State of Jharkhand and Others v. Ambay Cements and Another*** reported in (2005) 1 SCC 368, this Court held that it is a settled rule of interpretation that where a statute is penal in character, it must be strictly construed and followed. The basic rule of strict construction of a penal statute is that a person cannot be penalised without a clear letter of the law. Presumptions or assumptions have no role in the interpretation of penal statutes.

They are to be construed strictly in accordance with the provisions of law. Nothing can be implied. In such cases, the courts are not so much concerned with what might possibly have been intended. Instead, they are concerned with what has actually been said.

48. We are of the view and the same would be in tune with the dictum as laid in ***Shiva alias Shivaji Ramaji Sonawane*** (supra) that there would have to be some act or omission which amounts to organised crime after the 2015 Act came into force i.e., 01.12.2019 in respect of which, the accused is sought to be tried for the first time in the special court.

49. We are in agreement with the view taken by the High Court of Judicature at Bombay in the case of ***Jaisingh*** (supra) that neither the definition of the term 'organised crime' nor of the term 'continuing unlawful activity' nor any other provision therein declares any activity performed prior to the enactment of the MCOCA to be an offence under the 1999 Act nor the provision relating to punishment relates to any offence prior to the date of enforcement of the 1999 Act, i.e., 24.02.1999. However, by referring to the expression 'preceding period of ten years' in Section 2(1)(d), which is a definition clause of the term 'continuing unlawful activity' inference is sought to be drawn that in fact, it takes into its ambit the acts done prior to the enforcement of the 1999 Act as being an offence under the 1999 Act. The same analogy will apply to the 2015 Act.

50. There is a vast difference between the act or activity, which is being termed or called as an offence under a statute and such act or activity being taken into consideration as one of the requisites for taking action under the statute. For the purpose of organised crime, there has to be a continuing unlawful activity. There cannot be continuing unlawful activity unless at least two chargesheets are found to have been lodged in relation to the offence punishable with three years'

imprisonment during the period of ten years. Indisputably, the period of ten years may relate to the period prior to 01.12.2019 or thereafter. In other words, it provides that the activities, which were offences under the law in force at the relevant time and in respect of which two chargesheets have been filed and the Court has taken cognizance thereof, during the period of preceding ten years, then it will be considered as continuing unlawful activity on 01.12.2019 or thereafter. It nowhere by itself declares any activity to be an offence under the said 2015 Act prior to 01.12.2019. It also does not convert any activity done prior to 01.12.2019 to be an offence under the said 2015 Act. It merely considers two chargesheets in relation to the acts which were already declared as offences under the law in force to be one of the requisites for the purpose of identifying continuing unlawful activity and/or for the purpose of an action under the said 2015 Act.

51. If the decision of the coordinate Bench of this Court in the case of ***Shiva alias Shivaji Ramaji Sonawane*** (supra) is looked into closely along with other provisions of the Act, the same would indicate that the offence of 'organised crime' could be said to have been constituted by at least one instance of continuation, apart from continuing unlawful activity evidenced by more than one chargesheets in the preceding ten years. We say so keeping in mind the following:

(a) If 'organised crime' was synonymous with 'continuing unlawful activity', two separate definitions were not necessary.

(b) The definitions themselves indicate that the ingredients of use of violence in such activity with the objective of gaining pecuniary benefit are not included in the definition of 'continuing unlawful activity', but find place only in the definition of 'organised crime'.

(c) What is made punishable under Section 3 is 'organised crime' and not 'continuing unlawful activity'.

(d) If 'organised crime' were to refer to only more than one chargesheets filed, the classification of crime in Section 3(1)(i) and 3(1)(ii) resply on the basis of consequence of resulting in death or otherwise would have been phrased differently, namely, by providing that 'if any one of such offence has resulted in the death', since continuing unlawful activity requires more than one offence. Reference to 'such offence' in Section 3(1) implies a specific act or omission.

(e) As held by this Court in ***State of Maharashtra v. Bharat Shanti Lal Shah*** (supra) continuing unlawful activity evidenced by more than one chargesheets is one of the ingredients of the offence of organised crime and the purpose thereof is to see the antecedents and not to convict, without proof of other facts which constitute the ingredients of Section 2(1)(e) and Section 3, which respectively define commission of offence of organised crime and prescribe punishment.

(f) There would have to be some act or omission which amounts to organised crime after the Act came into force, in respect of which the accused is sought to be tried for the first time, in the Special Court (i.e. has not been or is not being tried elsewhere).

(g) However, we need to clarify something important. ***Shiva alias Shivaji Ramaji Sonawane*** (supra) dealt with the situation, where a person commits no unlawful activity after the invocation of the MCOCA. In such circumstances, the person cannot be arrested under the said Act on account of the offences committed by him before coming into force of the said Act,

even if, he is found guilty of the same. However, if the person continues with the unlawful activities and is arrested, after the promulgation of the said Act, then, such person can be tried for the offence under the said Act. If a person ceases to indulge in any unlawful act after the said Act, then, he is absolved of the prosecution under the said Act. But, if he continues with the unlawful activity, it cannot be said that the State has to wait till, he commits two acts of which cognizance is taken by the Court after coming into force. The same principle would apply, even in the case of the 2015 Act, with which we are concerned.

52. In the overall view of the matter, we are convinced that the dictum as laid by this Court in ***Shiva alias Shivaji Ramaji Sonawane*** (supra) does not require any relook. The dictum in ***Shiva alias Shivaji Ramaji Sonawane*** (supra) is the correct exposition of law.

53. With the aforesaid clarification, the appeal stands disposed of.

…….J.
(S. Abdul Nazeer)

…….J.
(J.B. Pardiwala)

New Delhi
Date: December 15, 2022.