

JAMIRUDDIN ANSARI

V.

CENTRAL BUREAU OF INVESTIGATION & ANR.

Criminal Appeal No. 958 of 2009

MAY 6, 2009

(ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.)

*Maharashtra Control of Organised Crime Act, 1999:*

*Sections 9(1), 23(1), 25 — Special Court constituted under the Act — Whether could order investigation save and except in accordance with Section 23(1) and interplay, if any, between Sections 9(1) and Section 23 — Held: Special Judge cannot take cognizance of any offence under the Act unless sanction has been previously given by the Police Officer — Provisions of Section 9(1) will have to be read in harmony with the provisions of Section 23(2) as far as private complaints are concerned — Hence the majority view of the Full Bench of the Bombay High Court holding otherwise is negated — Its conclusions and directions are also set aside — Minority view approved since it correctly interprets the interplay between Sections 9, 23 and 25 of the Act — Code of Criminal Procedure, 1973 — Section 156(3).*

**In these appeals against the judgment of the Full Bench of the Bombay High Court, the question that arose for consideration was as to whether an investigation could be ordered by the Special Court constituted under the Maharashtra Control of Organised Crime Act, 1999 (MCOCA), save and except in accordance with Section 23(1) of MCOCA, and interplay, if any, between Section 9(1) and Section 23 of MCOCA.**

**Disposing of the appeals, the Court**

**HELD: 1. Section 9 of MCOCA cannot be read or invoked independent of Section 23. Section 9(1)**

A contemplates filing of complaints both by the investigating authorities and also by private parties and the Special Judge is, therefore, entitled to take cognizance of offences under MCOCA even on a private complaint, but after due compliance with Section 23(2) thereof. In view of the  
B stringent provisions of MCOCA, the Legislature included certain safeguards for invoking the provisions thereof. The same is manifest from the provisions of Section 23 as a whole. [Para 35] [779-F-H; 780-A]

*State of Orissa Vs. Ganesh Chandra Jew* (2004) 8 SCC  
C 40; *K. Kalimuthu Vs. State by DSP* (2005) 4 SCC 512; *State of Himachal Pradesh Vs. M.P. Gupta* (2004) 2 SCC 349; *Sankaran Moitra Vs. Sadhna Das and another* (2006) 4 SC 584; *N.K. Ogle Vs. Sanwaldas* (1999) 3 SCC 284; *Harpal Singh Vs. State of Punjab* (2007) 13 SCALE 728; *Rambhai D Nathabhai Gadhvi and others Vs. State of Gujarat* (1997) 4 SCC 744; *Nelson Motis Vs. Union of India & Anr.* (1992) 4 SCC 711; *Nazir Ahmad Vs. King Emperor* AIR 1936 PC 253; *LIC Vs. Escorts Ltd. & Ors.* (1986) 1 SCC 264; *Mansukhlal Vs. State of Gujarat* (1997) 7 SCC 622; *State of Maharashtra E & Ors. Vs. Lalit Somdatta Nagpal & Anr.* (2007) 4 SCC 171; *A.R. Antulay Vs. Ramdas Srinivas Nayak & Anr.* (1984) 2 SCC 500 and *Moti Lal Vs. CBI & Anr.* (2002) 4 SCC 713 – referred to.

2. The expression used in Section 9(1) indicates that the Special Court may take cognizance of any offence  
F without the accused being committed to it for trial, either on receiving a complaint of facts or upon a police report of such facts, which clearly indicates that the Special Court is also empowered to take cognizance of an offence under MCOCA even on a private complaint. The said  
G power vested in the Special Judge is, however, controlled by the provisions of Section 23(2) of the Act, which provides that no Special Court shall take cognizance of any offence under the Act without the previous sanction  
H of a Police Officer not below the rank of Additional Director General of Police. [Para 36] [780-E-G]

3. The wording of Sub-Section (2) of Section 23 leaves no room for doubt that the Special Judge cannot take cognizance of any offence under MCOCA unless sanction has been previously given by the police officer. In such a situation, even as far as a private complaint is concerned, sanction has to be obtained from the Police Officer not below the rank of Additional Director General of Police, before the Special Judge can take cognizance of such complaint. Accordingly, the provisions of Section 9(1) will have to be read in harmony with the provisions of Section 23(2) as far as private complaints are concerned, and this Court has no hesitation in negating the majority view of the Full Bench of the Bombay High Court in the impugned judgment, holding otherwise. [Para 38] [781-D-F]

4. In view of the provisions of Section 25 of MCOCA, the provisions of the said Act would have an overriding effect over the provisions of the Criminal Procedure Code and the Special Judge would not, therefore, be entitled to invoke the provisions of Section 156(3) Cr.P.C. for ordering a special inquiry on a private complaint and taking cognizance thereupon, without traversing the route indicated in Section 23 of MCOCA. The provisions of Section 23 are the safeguards provided against the invocation of the provisions of the Act which are extremely stringent and far removed from the provisions of the general criminal law. If, as submitted on behalf of some of the respondents, it is accepted that a private complaint under Section 9(1) is not subject to the rigours of Section 23, then the very purpose of introducing such safeguards lose their very *raison d'etre*. At the same time, since the filing of a private complaint is also contemplated under Section 9(1) of MCOCA, for it to be entertained it has also to be subject to the rigours of Section 23. Accordingly, in view of the bar imposed under Sub-Section (2) of Section 23 of the Act, the Special Judge is precluded from taking

A cognizance on a private complaint upon a separate inquiry  
under Section 156(3) Cr.P.C. The bar of Section 23(2)  
continues to remain in respect of complaints, either of a  
private nature or on a police report. In order to give a  
harmonious construction to the provisions of Section 9(1)  
B and Section 23 of MCOCA, upon receipt of such private  
complaint the Special Judge has to forward the same to  
the officer indicated in Clause (a) of Sub-Section (1) of  
Section 23 to have an inquiry conducted into the complaint  
by a police officer indicated in clause (b) of Sub-Section  
C (1) and only thereafter take cognizance of the offence  
complained of, if sanction is accorded to the Special Court  
to take cognizance of such offence under Sub-Section  
E (2) of Section 23. [Paras 39, 40] [782-A-G; 781-G-H]

D 5. Criminal Appeal No.1089 of 2006 filed by the State  
of Maharashtra is allowed and the majority decision of the  
Full Bench in the judgment impugned, together with the  
directions issued thereupon are set aside. Instead, the  
minority view of the acting Chief Justice together with the  
conclusions arrived at and the directions given thereupon  
E are endorsed.[Para 42] [783-A-B]

F 6. As far as the appeal preferred by Jamiruddin Ansari  
is concerned, the trial has not progressed on account of  
the stay orders passed by this Court on the appeals filed  
by the State of Maharashtra against the decision of the  
Full Bench on the reference made on the conflicting views  
expressed by different Benches of the High Court with  
regard to the interpretations of Sections 9 and 23 of  
MCOCA. Except for the fact that the appellant has  
undergone a further period in custody, there is really no  
G change in the circumstances under which his initial bail  
application was rejected. Therefore, there is no reason to  
entertain the appeal filed by him. [Para 43] [783-B-D]

H 7. Criminal Appeal No.1085 of 2006 filed by Ashok son  
of Gyanchand Vohra and Criminal Appeal No.1088 of 2006

filed by Shabbir Noormohamed Patel will also stand disposed of along with the appeals filed by the State of Maharashtra in the same vein. [Para 44] [783-D-E]

8. The appeals filed by the State of Maharashtra in respect of the writ petitions filed by Shri Rasiklal Manikchand Dhariwal and G.M. Joshi are delinked from the other appeals and disposed of with a direction to the High Court to dispose of their writ petitions expeditiously. Let the lower court records in respect of their matters be sent back to the High Court forthwith. [Para 45] [783-E-F]

Case Law Reference

(2004) 8 SCC 40	referred to	Para 15
(2005) 4 SCC 512	referred to	Para 15
(2004) 2 SCC 349	referred to	Para 16
(2006) 4 SC 584	referred to	Para 16
(1999) 3 SCC 284	referred to	Para 17
(2007) 13 SCALE 728	referred to	Para 21
(1997) 4 SCC 744	referred to	Para 21
(1992) 4 SCC 711	referred to	Para 22
AIR 1936 PC 253	referred to	Para 23
(1986) 1 SCC 264	referred to	Para 23
(1997) 7 SCC 622	referred to	Para 23
(2007) 4 SCC 171	referred to	Para 24
(1984) 2 SCC 500	referred to	Para 25
(2002) 4 SCC 713	referred to	Para 32

CIMINAL APPELLATE JURISDICTION : Criminal Appeal  
No. 958 of 2009

From the Judgement and Order dated 16.04.2007 passed

A by the High Court of Judicature at Mumbai in Criminal Application No. 288 of 2007

WITH

Criminal Appeal Nos.1085 of 2006

B Criminal Appeal Nos. 1088 of 2006

Criminal Appeal Nos, 1089 of 2006

Sushil Kumar, R.F. Nariman, R.S. Sodhi, Uday U. Lalit, Sameer Parekh, Lalit Chauhan, Hitesh Jai, Ranjeta Rohtagi, C Aditya Kumar, C.D. Mehta, E.C. Aggarwala, Manishabhandandari, Omkar, Srivastav, Madhu Moolchandani, Rishi Agrawala, Gaurav, Goel, Amit Kumar Sharma, Vijay Kumar, Sangeeta Kumar, Ashwani Garg, Ravindra Keshavarao Adsure, with them for the Appellant.

D A. Sharan, ASG, Ranjana Narayan, Amit Anand Tiwari, Sandhya Goswami, B. Krishna Prasad, Amit Sharma, Arpit Gupta, Anupam Lal Das, M.S. Ganesh K. Gole, K. Seshachary, R. A. Perumal, Sameer Parekh, Lalit Chauhan, Ranjeet Rohtagi, E.R. Kumar, S. Jadhay (for M/s. Parekh & Co.), Dr. Rajeev B. Masodkar, Anil Kumar Jha, Aishwarya Bhati, S. Rani, for the Respondent(s).

The Judgement of the Court was delivered by

**ALTAMAS KABIR, J.**

F 1. Leave granted in SLP(Crl.)No.5677/2007.

2. Criminal Appeal Nos.1085, 1088 and 1089 of 2006 have been taken up for final disposal along with SLP(Crl.)No.5677 of 2007, inasmuch as, they arise out of the same set of facts and common questions of law are involved. SLP(Crl.)No.5677 of 2007 has been filed by Jamiruddin Ansari, challenging the order passed by the Bombay High Court on 16<sup>th</sup> April, 2007, rejecting his prayer for bail, although, he was in custody since his arrest on 10<sup>th</sup> October, 2004, without trial, till he was released on bail by this court in the pending special leave petition on G 19th December, 2008. Criminal Appeal No.1085/06 has been H

filed by Ashok, son of Gyanchand Vohra, against the judgment of the Bombay High Court in Criminal Writ Petition No.127 of 2005, which had been heard by a Bench of three Judges on a reference being made to resolve two conflicting views which had been taken by two Division Benches of the Bombay High Court relating to the interpretation of Section 9(1) vis-à-vis Section 23 of the Maharashtra Control of Organized Crime Act, 1999 (hereinafter referred to as 'MCOCA'). Criminal Appeal No.1088 of 2006 has been filed by one Shabbir Noormohamed Patel, raising the same questions as those raised in Criminal Appeal No.1085/06. Criminal Appeal No.1089 of 2006 has been filed by the State of Maharashtra, challenging the judgment of the Bombay High Court dated 22<sup>nd</sup> December, 2005, on the question as to whether the Special Court could take cognizance of an offence on a private complaint under Section 9(1) of MCOCA and order investigation in respect thereof under Section 156(3) of the Code of Criminal Procedure (Cr. P.C.).

3. The common thread running through these appeals is the question as to whether an investigation could be ordered by the Special Court constituted under MCOCA, save and except in accordance with Section 23(1) of MCOCA, and interplay, if any, between Section 9(1) and Section 23 of MCOCA. In order to understand the context in which these questions have arisen, it is necessary to briefly set out the facts of the case.

4. On 5<sup>th</sup> September, 2003, one Himmat Nanda was alleged to have been caught red-handed accepting a bribe of Rs.3 lakhs, for and on behalf of one Nitindra Singh, in a trap set up by the Anti- Corruption Bureau, Mumbai. Pursuant to his arrest, an offence was registered by the Anti-Corruption Bureau, Mumbai, under Sections 7, 8, 9, 12, 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988, being C.R. No.3071 of 2003, against the said Nitindra Singh and several others. It was alleged that the said Himmat Nanda was, in fact, the conduit for the said respondent, Nitindra Singh.

5. On 19<sup>th</sup> August, 2004, Nitindra Singh, who was an Assistant Police Inspector, filed a private complaint, being

A Special Case No.243 of 2004, under the penal sections of  
MCOCA before the Special Judge, MCOCA Court, Mumbai,  
against 14 accused, 8 of whom were senior police and  
government officials and members of the Anti-Corruption Bureau  
and some other government officials who were members of the  
B raiding party in the above-mentioned trap case. After recording  
the statements of six witnesses on 21<sup>st</sup> August, 2004, the learned  
Special Judge passed an order under Section 202 Cr.P.C.  
directing the Commissioner of Police, Mumbai, to form a Special  
Investigation Team (hereinafter referred to as 'SIT') to raid the  
C premises of all the accused named in the complaint filed by the  
said Nitindra Singh, who were none other than the complainants  
against Nitindra Singh and witnesses of the trap case along  
with all police officers of the Anti-Corruption Bureau, who had  
conducted the raid in the trap case. On 30<sup>th</sup> August, 2004, the  
D Special Judge, MCOCA Court, appointed Smt. Meera  
Borvankar, Joint Commissioner of Police (Crime), Mumbai, to  
head the SIT. On 2<sup>nd</sup> September, 2004, acting on the instructions  
of the State of Maharashtra, Smt. Meera Borvankar filed Criminal  
Writ Petition No.1772 of 2004 before the Bombay High Court  
on behalf of the State Government, praying for quashing of the  
E order dated 24<sup>th</sup> August, 2004, passed by the learned Special  
Judge ordering the formation of a SIT to raid the premises of all  
the accused named in the complaint; the order dated 26<sup>th</sup> August,  
2004, directing urgent investigation and the order dated 30<sup>th</sup>  
August, 2004, appointing the writ petitioner to head the SIT. In  
F her Writ Petition, Smt. Meera Borvankar categorically stated  
that none of the accused in the private complaint filed by Nitindra  
Singh was a member of any criminal gang and that the said  
complaint filed by Nitindra Singh was false, frivolous and liable  
to be quashed.

G 6. Apart from the above, on 7<sup>th</sup> September, 2004, Ashok,  
son of Gyanchand Vohra, the appellant in Criminal Appeal  
No.1085 of 2006 and the proposed accused No.6 in the said  
private complaint, filed Criminal Writ Petition No.1801 of 2004  
H in the Bombay High Court for quashing the above-mentioned

orders passed by the MCOCA Court, Mumbai, along with the complaint itself. A

7. A similar writ petition, being Criminal Writ Petition No.1802 of 2004, was filed by Sandeep Singh, the proposed accused No.2 in the private complaint and the complainant in the trap case, praying for the self-same reliefs as prayed for by Ashok, son of Gyanchand Vohra. B

8. On 21<sup>st</sup> December, 2004 in another case, a Division Bench of the Bombay High Court held that a private complaint under Section 9 of MCOCA could not be entertained without compliance with Section 23 of the said Act. However, on the very next date, on 22<sup>nd</sup> December, 2004, another Division Bench of the Bombay High Court, while considering the Writ Petition filed by Smt. Meera Borvankar (Criminal Writ Petition No.1772 of 2004), quashed the three orders passed by the learned Special Judge on 24<sup>th</sup> August, 2004, 26<sup>th</sup> August, 2004 and 30<sup>th</sup> August, 2004, on the private complaint filed by Nitindra Singh, but held that while entertaining a private complaint under Section 9 of MCOCA, the Special Court could take recourse to the provisions of Section 156(3) Cr.P.C. and order investigation of such private complaint. The matter was sent back to the Special Judge with the aforesaid finding. C D E

9. Soon thereafter, on 10<sup>th</sup> January, 2005, on an application filed by Nitindra Singh, the Special Judge, passed an order under Section 156(3) Cr.P.C. and ordered the Commissioner of Police, Mumbai, to investigate into the complaint filed by Nitindra Singh. The said order was challenged by Ashok, son of Gyanchand Vohra, in Criminal Writ Petition No.127 of 2005. When the same was taken up for consideration on 23<sup>rd</sup> March, 2005, the learned Single Judge, noticed the divergence of opinion in the judgments delivered by the two Division Benches and referred the issue for decision to a larger Bench. On 22<sup>nd</sup> December, 2005, the Full Bench of the High Court gave a split verdict with the majority view being that a private complaint filed under Section 9 of MCOCA was independent of Section 23 F G H

A and compliance with the provisions of Section 23 was not a pre-condition for the learned Special Judge to take cognizance of an offence under MCOCA. The learned Special Judge was directed to consider afresh the private complaint filed by Nitindra Singh.

B 10. It is against the said judgment and order of the Full Bench that these appeals have been filed.

C 11. Of the four appeals indicated hereinbefore, Criminal Appeal No.1089 of 2006 filed by the State of Maharashtra was taken up first for consideration. On behalf of the State of Maharashtra it was emphasized that a special procedure had to be prescribed under MCOCA to deal with the rising graph of organized crime within the State of Maharashtra which could not be controlled under the existing laws. It was pointed out that MCOCA made provisions for dealing with offences under the Act by the Special Court to be constituted under Section 5 of the Act. It was also submitted that Section 9 of MCOCA provides the procedure to be followed by the Special Court in taking cognizance of an offence and the powers vested in it for holding a trial into such offences. Mr. U.U. Lalit, learned Senior Counsel, appearing for the State of Maharashtra, further submitted that under the MCOCA, the Special Judge discharged dual functions. At the stage of Section 9, the Special Court discharged magisterial duties and functions as prescribed under the Code of Criminal Procedure for the purpose of taking cognizance, but at the same time, under sub-Section (4) for the purpose of trial of any offence under the Act, it is vested with the powers exercised by the Court of Session and is to try such offence as if it were a Court of Session, in accordance with the procedure prescribed in the Code for conducting trials before a Court of Session. Learned counsel submitted that under the provisions of the Act, as indicated in Section 9, the Special Judge combined the functions of a Magistrate, as also a Court of Session, for the purpose of taking cognizance, and, thereafter, conducting the trial.

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12. A further submission was made that although Section 9(1) of MCOCA does not debar a private complaint from being entertained by the Special Judge, any subsequent action upon such complaint would be subject to the provisions of Section 23(2) of the said Act. It was urged that on account of the provisions of sub-Section (2) of Section 23 of MCOCA, the Special Court was prevented from taking cognizance of any offence under the Act without the previous sanction of a police officer, not below the rank of Additional Director General of Police. It was submitted that the said provision did not contemplate an independent inquiry by the Special Judge under Section 156(3) Cr.P.C. for the purpose of taking cognizance, since no cognizance could be taken nor could an investigation be made or directed *de hors* the provisions of Section 23. Mr. Lalit submitted that Section 9(1) would have to be read harmoniously with Section 23(2) of MCOCA in order to give a meaningful effect to the provisions of both the Sections, having particular regard to the fact that under Section 25 of the Act, the provisions of MCOCA or any Rule made thereunder or any Order made under any such Rule has an overriding effect over any other law for the time being in force or any instrument having the force of law.

13. Mr. Lalit submitted that the decision of the Full Bench of the Bombay High Court was erroneous and that the Hon'ble Judges who were in the majority had erred in holding that on a plain reading of Section 9(1) of MCOCA, it would be apparent that it is not controlled by any other provision of the law, much less Section 23 thereof. It was also submitted that the Hon'ble Judges had erroneously held that Section 9(1) and Section 23 of MCOCA were independent of each other and worked in totally different spheres. The learned counsel contended that the Hon'ble Judges taking the majority view had misconstrued the intention of the legislature in enacting MCOCA in arriving at a conclusion that Section 23(2) of MCOCA was not a *sine qua non* for taking cognizance of a complaint under Section 9(1) of MCOCA.

A 14. It was then submitted that the comparison made by  
the Hon'ble Judges with regard to the sanction required under  
Section 197 Cr.P.C. and under Section 23(2) of MCOCA was  
misconceived, and since the safeguards provided in Section  
B 23 of MCOCA had been put in place against possible misuse,  
the powers of the Special Court to take cognizance on a private  
complaint under Section 9(1) would be controlled by Section  
23. It was urged that the Hon'ble Judges had possibly overlooked  
the provisions of Section 23(2) of MCOCA, which, in fact, was  
the safeguard against prosecution under the provisions of the  
C Act which are highly stringent and could not be jettisoned for the  
purpose of taking cognizance under Section 9(1) on a private  
complaint. It was contended that in enacting the provisions of  
Section 23(2) of MCOCA, the legislature had clearly intended  
that cognizance of any offence under the Act was not to be taken  
D by the Special Court without the previous sanction of a senior  
police officer, not below the rank of Additional Director General  
of Police and that it was also the intention of the legislature that  
Section 23(2) should serve as a check against any *malafide*  
private complaint under the Act made with the intention of  
misusing the provisions of the Act.

E 15. Supporting the minority view taken in the case, Mr. Lalit  
urged that if the majority view was to be accepted, it would cause  
violence to the provisions of the other Act, particularly, Sub-  
Section (1) of Section 23 which were also checks intended by  
F the legislature to prevent misuse of the provisions of the Act. In  
this regard, reliance was placed on the decision of this Court in  
*State of Orissa Vs. Ganesh Chandra Jew* [(2004) 8 SCC 40],  
wherein while considering the bar under Section 197 Cr.P.C., it  
was observed that even if the public servant acted in excess of  
G his duty, if a reasonable connection exists between the act  
complained of and his official duty, the excess committed by  
him would not deprive him of the protection of Section 197.  
Reference was also made to the decision of this Court in *K.*  
*Kalimuthu Vs. State by DSP* [(2005) 4 SCC 512], where the  
provisions of Section 197 Cr.P.C. were also considered and in  
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addition to what had been stated in earlier decisions, it was explained that the protection given under Section 197 Cr.P.C., which is similar to the provisions of Section 23(2) of MCOCA, is to prevent the institution of possible vexatious criminal proceedings in respect of offences alleged to have been committed by such public servants while they were acting as public servants. It was observed that the intention of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties, without reasonable cause.

16. The same views, though in stronger terms, were expressed by this Court in *State of Himachal Pradesh Vs. M.P. Gupta* [(2004) 2 SCC 349] and in *Sankaran Moitra Vs. Sadhna Das and another* [(2006) 4 SC 584], wherein a Three-Judge Bench was of the view that it was a condition precedent to obtain sanction under Section 197 Cr.P.C. when the offence was triable by a Court of Session.

17. Mr. Lalit lastly referred to the decision of this Court in *N.K. Ogle Vs. Sanwaldas* [(1999) 3 SCC 284], where it was clearly observed that before coming to a conclusion regarding the application of Section 197, the Court would have to come to a conclusion that there was a reasonable connection between the act complained of and the discharge of official duties, and that the act must bear such relation to the duty that the accused could lay a reasonable claim that he did it in the course of performance of such duty.

18. In conclusion, Mr. Lalit submitted that similar to the control of Section 197 Cr.P.C. over Section 190 Cr.P.C., Section 9 and Section 23 of MCOCA are so worded that Section 9 is controlled by Section 23, inasmuch as, if Section 9 were to be treated as being independent of Section 23, then, in that event, Section 23 could be applied only when a complaint emanated from the police, which was not contemplated under the Act. Consequently, the majority view of the High Court was erroneous since Section 9 could not be treated in isolation of Section 23,

A as otherwise Section 23(2) would be rendered inconsequential in relation to taking of cognizance under Section 9(1) of the Act.

B 19. Learned Additional Solicitor General, Mr. Amrendra Sharan, appearing for the Central Bureau of Investigation (hereinafter referred to as 'CBI') supported the submissions made on behalf of the State of Maharashtra that the provisions of Section 9(1) and Section 23(2) of MCOCA had to be construed harmoniously in the case of private complaints. It was submitted that the bar of taking cognizance without the previous sanction of a Police Officer not below the rank of Additional C Director General of Police, as contained in Sub-Section (2) of Section 23, prohibited the learned Special Judge from taking cognizance of any offence under the Act without such sanction.

D 20. Apart from the above, the learned Additional Solicitor General submitted that the CBI had filed an application in Criminal Appeal No.1089/06, filed by the State of Maharashtra, for modification of the order passed on 19<sup>th</sup> September, 2006, staying all proceedings in the Trial Courts and the matters before the Bombay High Court. He submitted that such stay should be vacated as far as Shri R.M. Dhariwal and Shri J.M. Joshi were E concerned, since in their case, prior approval under Section 23(1)(a) of MCOCA had been given on 21<sup>st</sup> October, 2004 for investigation of Cr.No.122/04. The learned ASG further submitted that on the basis of material collected during the investigation, the Special Court had passed an order on 26<sup>th</sup> F July, 2005 under Section 319 Cr.P.C. summoning the said two persons in connection with the said case. The said order was challenged in Cri.W.P.Nos.1956 of 2005 and 2016 of 2005, which were transferred to the Full Bench on a representation being made that the issues involved in the writ petitions were G similar to those which were considered by the Full Bench. Upon holding that sanction under Section 23(2) was not required for taking cognizance on a private complaint, the Full Bench on 22<sup>nd</sup> December, 2005, remitted the two writ petitions filed by Shri Dhariwal and Shri Joshi to the Division Bench for hearing. H It was also submitted that the Competent Authority had, on 21<sup>st</sup>

February, 2006, granted sanction under Section 23(2) of MCOCA in respect of the said two writ petitions. The learned ASG submitted that since sanction under the provisions of Section 23 of MCOCA had been given by the Competent Authorities, as far as the two writ petitioners are concerned, their cases were required to be delinked from the other appeals so that the records could be sent back to the Trial Court to proceed with the trial, as far as they were concerned.

21. Mr. Sushil Kumar, learned Senior counsel who appeared for the appellant in Criminal Appeal No.1088/2006, submitted that the appeal had arisen out of a private complaint made by one Abdul Razzak Zariwala under Section 9(1) of MCOCA. He submitted that instead of taking cognizance on the said complaint, the Special Judge, had, by his order dated 4<sup>th</sup> May, 2005, directed the Commissioner of Police, Mumbai, to have the matter inquired into by a competent Police Officer, who could investigate the accusations made against the accused and submit a report pursuant to the investigation/ inquiry in keeping with the provisions of Section 156(3) Cr.P.C. accompanied by the statutory sanction, as contemplated under Section 23(2) of MCOCA. According to Mr. Sushil Kumar, if the minority view of the Full Bench of the High Court regarding dependence of Section 9(1) of MCOCA on Section 23 was to be accepted, then the exercise of jurisdiction by the learned Special Judge was bad in law and was liable to be quashed. Referring to the decision of this Court in *Harpal Singh Vs. State of Punjab* [(2007) 13 SCALE 728], learned counsel submitted that this Court, while considering the provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as 'TADA'), in regard to grant of sanction, confirmed the earlier view expressed in *Rambhai Nathabhai Gadhvi and others Vs. State of Gujarat* [(1997) 4 SCC 744], wherein, it was observed that taking cognizance is the act which the Designated Court has to perform and granting sanction is an act which the sanctioning authority has to perform. In fact, taking of cognizance by the Court was subject to the grant of sanction not for the

- A Designated Court to take cognizance of an offence, but, for the prosecuting agency to approach the Court concerned to enable it to take cognizance of the offence and to proceed to trial against the persons indicated in the report. In other words, a valid sanction is the *sine qua non* for enabling the prosecuting agency
- B to approach the Court in order to enable it to take cognizance of the offence as disclosed.

22. Appearing for Rasiklal Manikchand Dhariwal, Mr. R.F. Nariman, learned Senior counsel, submitted that the provisions of MCOCA had to be read as a whole since it was the intention

C of the legislature to minimise the application of the Code in respect of matters covered by MCOCA. He, however, disputed the submissions made both on behalf of the appellant as also the respondents that the Special Judge combined magisterial functions with that of the Court of Session. According to him,

D Section 9(1) of the Act merely eliminates the committal process and allows the Special Judge to take cognizance of the offence complained of directly. Mr. Nariman, however, adopted the submissions advanced by Mr. Sushil Kumar as to the control of Section 23(2) of MCOCA over Section 9(1) where cognizance

E was required to be taken either on a private complaint or on a police report. Drawing a parallel with provisions in the Prevention of Terrorism Activities Act, 2002 (POTA), the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) and the provisions of MCOCA, Mr. Nariman submitted that the

F provisions of Sections 29 and 50 of POTA were in *pari materia* with Sections 9 and 23 of MCOCA and Section 14(1) of TADA was the same as Section 9(1) of MCOCA and none of the said provisions contemplated the invocation of the provisions of Section 156(3) Cr.P.C. by the learned Special Judge. Learned

G counsel submitted that the majority view of the Full Bench that Sections 9 and 23 of MCOCA were completely independent of each other suffered from the cardinal error of failure to read the statute as a whole before applying the provisions of MCOCA to the facts of this case. He submitted that the majority view of the Full Bench that Section 9(1) of MCOCA was not controlled by

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any provision of the said Act, much less Section 23, was not acceptable as otherwise by taking recourse to Section 9(1) of MCOCA, any private individual could circumvent the rigours imposed under Sections 23(1) and (2) of MCOCA, which would completely defeat the object of the said Act. Reference was made by Mr. Nariman to the decisions of this Court in (1) *Nelson Motis Vs. Union of India & Anr.* [(1992) 4 SCC 711] and several other decisions in support of his submission regarding Harmonious Construction and urged that in construing the provisions of the several enactments dealing with terrorist and disruptive activities, a purposeful construction has to be adopted in order to promote the object of the Act and to prevent possible abuse thereof.

23. Mr. M.S. Ganesh, learned Senior counsel, who has appeared for Shri J.M. Joshi, who had been summoned by the court under section 319 of the code of Criminal Procedure, contended that it would not be correct to say that the provisions of the Act would not apply in proceedings under MCOCA. He, however, submitted that the provisions of Section 23(1) requiring prior approval for recording an information and the provisions of Section 23(2) of MCOCA requiring previous sanction for prosecution clearly indicates that the said provisions are mandatory and if not complied with, the investigation and/or prosecution would be rendered invalid. Mr. Ganesh urged that Section 23(2) is a threshold provision having a direct bearing to the jurisdiction of the Special Court to take cognizance under Section 9(1) of MCOCA. Referring to the celebrated decision of the Privy Council in *Nazir Ahmad Vs. King Emperor* [AIR 1936 PC 253], Mr. Ganesh submitted that when a power had been given to do a certain thing in a certain way, it would have to be done in that way or not at all. Submitting that there was a difference between the expression "permission" and "prior permission", Mr. Ganesh contended that while the former did not prevent *ex facto* sanction for investigation or taking cognizance, the latter was mandatory in nature and without such prior permission, no cognizance could be taken of any offence

A under MCOCA. In this regard, reference was made to the decision of this Court in (i) *LIC Vs. Escorts Ltd. & Ors.* [(1986) 1 SCC 264]; and (ii) *Mansukhlal Vs. State of Gujarat* [1997] 7 SCC 622], which were both on the same lines.

B 24. Mr. Ravindra Srivastava, learned senior counsel, appearing for the appellant in Criminal Appeal No.1085 of 2005, while accepting the submissions advanced by Mr. Sushil Kumar, Mr. R.F. Nariman and Mr. M.S. Ganesh and holding that private complaints were maintainable under Section 9 of MCOCA, submitted further that the said provision was an enabling provision, which was controlled by Section 23 which is a repository of the safeguards against false and malicious prosecution. Referring to the stringent nature of MCOCA and the existing safeguards introduced in Section 23 thereof, Mr. C Srivastava referred to the decision of this Court in *State of D Maharashtra & Ors. Vs. Lalit Somdatta Nagpal & Anr.* [(2007) 4 SCC 171], where the importance of the requirement for grant of sanction had been considered and it was observed that in taking recourse to the provisions of MCOCA which has the effect of curtailing the liberty of an individual, a great responsibility E had been cast on the authorities to ensure that the provisions of the Act are strictly adhered to and followed.

25. Mr. Srivastava also referred to the decision in *A.R. Antulay Vs. Ramdas Srinivas Nayak & Anr.* [(1984) 2 SCC 500], wherein the safeguards with regard to taking cognizance on private complaints under Section 8 of the Prevention of F Corruption Act, 1947, in respect of offences under Section 6 introduced by way of Section 5A by the Criminal Law Amendment Act, 1952, was considered and it was observed that the said amendment was necessary to prevent any abuse G by way of private complaints. Mr. Srivastava urged that there is no conflict between Sections 9 and 23 of MCOCA and both have to be read in a holistic manner and in the context of the Special Act to allow both of them to have play in the joints.

H 26. On behalf of the Respondent No.2, Nitindra Singh, in

Criminal Appeal No.1089 of 2006, Mr. Amit Sharma, learned counsel, submitted that the questions which were required to be decided in this case were mainly confined to the following two questions :

- (i) Does the Special Court have original jurisdiction of magisterial powers under MCOCA?
- (ii) Whether Section 23 of MCOCA is a condition precedent for the Special Judge to invoke the provisions of Section 9(1) of the said Act, both with regard to private complaints as well as police reports? In other words, the question is whether sanction is required to be taken under Section 23(2) before a private complaint could be filed under MCOCA?

27. Answering the first question in the affirmative, Mr. Sharma submitted that the Special Court combines in itself both magisterial functions as well as Session Court, but at different stages. He submitted that while at the stage of cognizance the Special Judge exercises magisterial powers, at the stage of trial he exercises all the powers of a Court of Session as provided under Section 9(4) of the Act.

28. Regarding the second question, Mr. Sharma submitted that Section 23 of MCOCA governed Section 9(1) only with regard to police reports, but not in respect of private complaints and consequently the provisions of the Code would become operative in respect of a private complaint and Section 9(1) of MCOCA would, therefore, be independent of Section 23(2) when a private complaint was made. He also pointed out that Section 24 of MCOCA was an additional safeguard as it provides for punishment of a public servant who fails or abstains from taking lawful measures under the Act.

29. In support of his aforesaid submissions, Mr. Sharma, while referring to the decision in *A.R. Antulay's* case (supra) referred to various other decisions of this Court which only have

A repetitive value. Mr. Sharma submitted that the view taken by the Full Bench was correct and did not require any interference.

30. Mr. E.C. Agrawala, who appeared for Abdul Razzak Zariwala, a respondent in Criminal Appeal No.1088 of 2006, adopted the submissions made by Mr. Amit Sharma.

31. Ms. Aishwarya Bhati, learned counsel appearing for the sole respondent, Ketan Pirodkar, in Criminal Appeal No.1089 of 2006, who was also one of the complainants, while generally agreeing with the submissions made by Mr. Lalit, Mr. Sushil Kumar and Mr. Srivastava, contended that the provisions of Section 23 of MCOCA have to be given a harmonious construction in relation to Section 9(1) in order to avoid a collusion between the apparently contrary provisions. She urged that if sanction under Section 23(2) is held to be a *sine qua non* for a private complaint, it would render Section 9(1) redundant and completely frustrate the remedy of a private complaint before the Special Court. She urged further that since a private complaint could be filed directly under Section 9(1), the legislature intended that in such case the provisions of Section 23(2) will not be applicable. However, if further investigation was required into such private complaint, the Special Judge could order such an investigation, subject to the safeguards provided in Section 23(1) of MCOCA.

32. Ms. Bhati then referred to Section 4 Cr.P.C. and submitted that all offences under the Indian Penal Code have to be investigated, inquired into, tried and otherwise dealt with according to the provisions of the Criminal Procedure Code and all offences under any other law are to be dealt with according to the same provision, but subject to any enactment for the time being in force regulating the place of investigation and trial. In this regard, Ms. Bhati referred to the decisions of this Court in *Moti Lal Vs. CBI & Anr.* [(2002) 4 SCC 713], where the question involved was whether the CBI was authorized to investigate an offence punishable under the Wild Life (Protection) Act, 1972, in view of the argument that the said enactment was

a self-contained Code. Answering the said question, this Court held that the provisions of the Criminal Procedure Code would apply in respect of investigation and trial even in respect of such enactments, but would be subject to any provision regulating the manner of such investigation and trial. Ms. Bhati urged that consequently, the provisions of the Cr. P.C. would apply with full force in all aspects of investigation, enquiry and trial, except where there is a specific provision to the contrary in the Special Act, such as MCOCA. A B

33. Ms. Bhati submitted that if sanction under Section 23(2) was held to be a *sine qua non* for private complaint also, the object of Section 9 would be completely frustrated and would lead to startling results and that complaint of a private party would become the subject of police investigation. C

34. Mr. Harish Salve, learned senior counsel, appearing for the Union of India, added a new dimension to the submissions made on behalf of the respective parties by contending that, in fact, no private complaint would lie under Section 9(1) of MCOCA and that such private complaints will have to be made under Section 190 Cr.P.C. He urged that since Section 9(1) was subject to compliance with the provisions of Section 23(2), the said provisions did not contemplate the filing of a private complaint and the provisions of Section 190(1)(c) Cr.P.C. stood excluded. D E

35. We have carefully considered the submissions made on behalf of the respective parties and we are convinced that Section 9 of MCOCA cannot be read or invoked independent of Section 23. In our view, Section 9(1) contemplates filing of complaints both by the investigating authorities and also by private parties and the learned Special Judge is, therefore, entitled to take cognizance of offences under MCOCA even on a private complaint, but after due compliance with Section 23(2) thereof. In view of the stringent provisions of MCOCA, the Legislature included certain safeguards for invoking the provisions thereof. The same is manifest from the provisions of F G H

A Section 23 as a whole. In order to understand and appreciate the provisions of Sections 9 and 23 and the inter-play between them, Sub-Sections (1) and (4) of Section 9, which are relevant to the submissions made in these appeals, are reproduced hereinbelow :-

B "9. Procedure and powers of Special Court :-

(1) A Special Court may take cognizance of any offence without the accused being committed to it for trial upon receiving a complaint of facts which constitute such offence or upon a police report of such facts.

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(2) xxx            xxx            xxx

(3) xxx            xxx            xxx

D

(4) Subject to other provisions of this Act, a Special Court shall, for the purpose of trial of any offence, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session, so far as may be, in accordance with the procedure prescribed in the Code for the trial before a Court of Session."

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36. The expression used in Section 9(1) indicates that the Special Court may take cognizance of any offence without the accused being committed to it for trial, either on receiving a complaint of facts or upon a police report of such facts, which clearly indicates that the Special Court is also empowered to take cognizance of an offence under MCOCA even on a private complaint. The said power vested in the learned Special Judge is, however, controlled by the provisions of Section 23(2) of the Act, which provides that no Special Court shall take cognizance of any offence under the Act without the previous sanction of a Police Officer not below the rank of Additional Director General of Police.

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37. For the sake of reference, the provisions of Section 23 are extracted hereinbelow.

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"23. Cognizance of, and investigation into, an

**offence.**— (1) Notwithstanding anything contained in the Code,- A

(a) no information about the commission of an offence of organised crime under this Act, shall be recorded by a police officer without the prior approval of the police officer not below the rank of the Deputy Inspector General of Police; B

(b) no investigation of an offence under the provisions of this Act shall be carried out by a police officer below the rank of the Deputy Superintendent of Police. C

(2) No Special Court shall take cognizance of any offence under this Act without the precious, sanction of the police officer not below the rank of Additional Director General of Police.” D

38. The wording of Sub-Section (2) of Section 23 leaves no room for doubt that the learned Special Judge cannot take cognizance of any offence under MCOCA unless sanction has been previously given by the police officer mentioned hereinabove. In such a situation, even as far as a private complaint is concerned, sanction has to be obtained from the Police Officer not below the rank of Additional Director General of Police, before the Special Judge can take cognizance of such complaint. Accordingly, the provisions of Section 9(1) will have to be read in harmony with the provisions of Section 23(2) as far as private complaints are concerned, and we have no hesitation in negating the majority view of the Full Bench holding otherwise. E F

39. We are also inclined to hold that in view of the provisions of Section 25 of MCOCA, the provisions of the said Act would have an overriding effect over the provisions of the Criminal Procedure Code and the learned Special Judge would not, therefore, be entitled to invoke the provisions of Section 156(3) Cr.P.C. for ordering a special inquiry on a private H

A complaint and taking cognizance thereupon, without traversing the route indicated in Section 23 of MCOCA. In other words, even on a private complaint about the commission of an offence of organized crime under MCOCA cognizance cannot be taken by the Special Judge without due compliance with Sub-Section (1) of Section 23, which starts with a *non-obstante* clause. As indicated hereinabove, the provisions of Section 23 are the safeguards provided against the invocation of the provisions of the Act which are extremely stringent and far removed from the provisions of the general criminal law. If, as submitted on behalf of some of the respondents, it is accepted that a private complaint under Section 9(1) is not subject to the rigours of Section 23, then the very purpose of introducing such safeguards lose their very *raison d'être*. At the same time, since the filing of a private complaint is also contemplated under Section 9(1) of MCOCA, for it to be entertained it has also to be subject to the rigours of Section 23.

40. Accordingly, in view of the bar imposed under Sub-Section (2) of Section 23 of the Act, the learned Special Judge is precluded from taking cognizance on a private complaint upon a separate inquiry under Section 156(3) Cr.P.C. The bar of Section 23(2) continues to remain in respect of complaints, either of a private nature or on a police report. In order to give a harmonious construction to the provisions of Section 9(1) and Section 23 of MCOCA, upon receipt of such private complaint the learned Special Judge has to forward the same to the officer indicated in Clause (a) of Sub-Section (1) of Section 23 to have an inquiry conducted into the complaint by a police officer indicated in clause (b) of Sub-Section (1) and only thereafter take cognizance of the offence complained of, if sanction is accorded to the Special Court to take cognizance of such offence under Sub-Section (2) of Section 23.

41. In substance, we agree with the minority view of the Full Bench, which, in our opinion, correctly interprets the inter-play between Sections 9, 23 and 25 of MCOCA.

42. We, therefore, allow Criminal Appeal No.1089 of 2006 filed by the State of Maharashtra and set aside the majority decision of the Full Bench in the judgment impugned, together with the directions issued thereupon. Instead, we endorse the minority view of the acting Chief Justice and accept the conclusions arrived at by His Lordship and the directions given thereupon.

43. As far as the appeal preferred by Jamiruddin Ansari is concerned, the trial has not progressed on account of the stay orders passed by this Court on the appeals filed by the State of Maharashtra against the decision of the Full Bench on the reference made on the conflicting views expressed by different Benches of the High Court with regard to the interpretations of Sections 9 and 23 of MCOCA. Except for the fact that the appellant had undergone a further period in custody, the only change in the circumstances is that he was granted bail by this court on 19/12/2008. We, therefore, see no reason to entertain the appeal filed by him and the same is dismissed.

44. Criminal Appeal No.1085 of 2006 filed by Ashok son of Gyanchand Vohra and Criminal Appeal No.1088 of 2006 filed by Shabbir Noormohamed Patel will also stand disposed of along with the appeals filed by the State of Maharashtra in the same vein.

45. The appeals filed by the State of Maharashtra in respect of the writ petitions filed by Shri Rasiklal Manikchand Dhariwal and J.M. Joshi are delinked from the other appeals and disposed of with a direction to the High Court to dispose of their writ petitions expeditiously. Let the lower court records in respect of their matters be sent back to the High Court forthwith.

G.N.

Appeals disposed of.