

CASE NO.:  
Special Leave Petition (crl.) 3320-21 of 2005

PETITIONER:  
State of Maharashtra & Ors

RESPONDENT:  
Lalit Somdatta Nagpal & Anr

DATE OF JUDGMENT: 13/02/2007

BENCH:  
Dr. AR. Lakshmanan & Altamas Kabir

JUDGMENT:  
J U D G M E N T  
WITH

Special Leave Petition (Crl.) No. 1101 of 2006  
Special Leave Petition (Crl.) No. 4581 of 2006  
and  
Special Leave Petition (Crl.) No. 4611 of 2006

ALTAMAS KABIR, J.

Five Special Leave Petitions, of which three have been filed by the State of Maharashtra, one by Lalit Somdatta Nagpal and one by Kapil Nagpal, have been taken up for hearing together as they involve common questions of law relating to the application of the provisions of the Maharashtra Control of Organized Crime Act, 1999 in respect of offences alleged to have been committed under Sections 3 and 7 of the Essential Commodities Act, 1955. In order to answer the above question, it is necessary to briefly set out the facts involved in these Special Leave Petitions.

On 6th June, 2004 the Deputy Commissioner of Police (Enforcement), Crime Branch, Mumbai alongwith other officers, including the District Supply Officer, Kolhapur, Nayab Tehsildar, Taluka Karveer, Distt. Kolhapur, raided Vijayanand Petrol Pump, Kolhapur and seized two iron tanks of 12,000 and 6,000 litres capacity, greenish lubricating oil in 200 litres barrel, 45 kilos of white chemical powder in 5 gunny bags and ten motor tankers containing petroleum products and two empty tankers, worth Rs.77,14,195/-, and arrested 9 persons in connection therewith.

On the statement made by Ranjit Pandurang Desai, Nayab Tehsildar, Karveer Taluka, a case was registered at Karveer Police Station, Kolhapur, being C.R. No. 39/2004, under Sections 3 and 7 of the Essential Commodities Act, 1955 and under Section 3 of the Petroleum Storage and Distribution Act, 2000 against 11 accused persons. Out of the 11 accused persons 10 were arrested and produced before the Chief Judicial Magistrate, Kolhapur, and remanded to judicial custody on 7th May, 2004. On 20th May 2004, on the orders of the Director General of Police, the investigation into the alleged offence was transferred to CB (Control), Crime Branch, Worli, Mumbai.

On an application made by the prosecution for police custody of the accused persons, the Fast Track Court, Kolhapur, by its order dated 25th May, 2004 remanded the accused persons to police custody from judicial custody. On 27th May, 2004, Lalit Nagpal, Ranjana Nagpal, Anil Nagpal, Vijay Nagpal and Chetan Mehta moved the Sessions Judge,

Kolhapur, for grant of anticipatory bail and although initially protection was given from arrest, on 14th June, 2004 the Sessions Judge rejected the anticipatory bail applications of all the applicants except that of Ranjana Nagpal, the wife of the accused Lalit Nagpal. The second anticipatory bail application filed by Anil Nagpal, Chetan Mehta and Lalit Nagpal by way of three separate Writ Petitions were rejected by the High Court. The Writ Petition filed by Vijay Nagpal was allowed while the others were directed to surrender before the Police on or before 20th August 2004.

The said Anil Nagpal, Lalit Nagpal and Chetan Mehta thus filed Special Leave Petitions against the order of the Bombay High Court and renewed their prayer for anticipatory bail before this Court. This Court also initially directed that the applicants be not arrested and directed them to attend the Police Station every day. Subsequently, however, on 14th December, 2004 the Special Leave Petitions were dismissed and the petitioners therein were directed to surrender and apply for regular bail before the Trial Court.

Thereafter, on 19th January, 2005, Lalit Somdatta Nagpal filed Criminal Writ Petition No. 44 of 2005 in the High Court challenging the approval order dated 31st October 2004 passed under Section 23(1)(a) of the Maharashtra Control of Organized Crime Act, 1999 (hereinafter referred to as "MCOCA")

Accused Chetan Mehta also filed a writ petition, being No. 276 of 2004, in the Bombay High Court also challenging the approval order dated 31st October, 2004 under Section 23(1)(a) of the above Act.

The said two writ petitions were heard by the High Court along with Writ Petition No. 2562 of 2004 filed by the accused, Deepak Dwarkadas Mundado, on 2nd February, 2005. On the said date the writ petition of Deepak Mundada was permitted to be withdrawn and the remaining two writ petitions were adjourned till 10th February, 2005 and again till 17th February, 2005, when one of the other accused, Anil Nagpal, filed Writ Petition No. 146 of 2005.

By judgment dated 11th March, 2005, Bombay High Court allowed the writ petitions filed by Lalit Nagpal and Anil Nagpal upon holding that having regard to the provisions of the Essential Commodities Act, 1955 and the Essential Commodities (Special Provisions) Act, 1981, the provisions of MCOCA would have no application to the cases against the petitioners. The State of Maharashtra has filed S.L.P.(Crl.) Nos.3320-21 of 2005 against the said judgment of the Bombay High Court.

Though, for reasons which are different from those given while allowing the writ petitions filed by Lalit Nagpal and Anil Nagpal, the Bombay Court in a separate judgment issued rule and granted interim relief in Criminal Writ Petition No. 2183 of 2005 filed by Lalit Nagpal & Ors. seeking to quash CR II-B of 2005 registered with Rasayani P.S., Raigad, and also for quashing the investigation proceedings under MCOCA. The State has filed SLP(Crl) No. 1101 of 2006 against the interim order passed by the Bombay High Court in Criminal Writ Petition No. 2183 of 2005.

Special Leave Petition (Criminal) 4581 of 2006 has been filed by Lalit Nagpal against the order of the Bombay High Court dated 14th July, 2006 whereby Lalit Nagpal's prayer for bail in Crl. Application No.1057 of 2006 was rejected, but the second application, being Crl. Application No. 348 of 2006, for shifting the applicant to a particular hospital, was directed to be placed before the appropriate Court taking up such applications.

The fifth and last Special Leave Petition (Crl.) No. 4611 of

2006 has been filed by Kapil Lalit Nagpal against the order dated 1st September 2006 passed by the Bombay High Court in his Criminal Writ Petition No. 2183 of 2005 directing him to surrender before the Reviewing Authority at Kolhapur within two weeks, failing which his petition, inter alia, for restraining the respondents from arresting him and stay of further investigation in Rasayani P.S., Raigad, C.R. No. II-B/2005, would stand dismissed..

As the common question of law in all these Special Leave Petitions relate to the applicability of MCOCA to the offences alleged to have been committed by Lalit Nagpal and Kapil Nagpal, we have heard the matters together and are disposing of all the five petitions by this common judgment.

Appearing for the State of Maharashtra in these Special Leave Petitions, Mr. Uday Lalit took us through the relevant provisions of the Maharashtra Control of Organized Crime Act, 1999, in support of his stand that the High Court had erroneously held that the provisions of the said Act would have no application in respect of the offences alleged to have been committed by Lalit Nagpal and others in connection with CR 39 of 2004 under Sections 3 and 7 of the Essential Commodities Act, 1955 and Section 3 of the Petroleum Storage and Distribution Act, 2000 and in respect of CR No. II-B of 2005 of Rasayani P.S., Raigad.

Mr. Lalit drew our attention to the expression "continuing unlawful activity" defined in Section 2(i)(d) of the MCOCA, which reads as follows:-

2(1)(d) " continuing unlawful activity " means an activity prohibited by law for the time being in force, which is a cognizable offence punishable with imprisonment of three years or more, undertaken either singly or jointly, as a member of an organized crime syndicate or on behalf of such syndicate in respect of which more than one charge-sheets have been filed before a competent Court within the preceding period of ten years and that Court has taken cognizance of such offence;

He also drew our attention to the definition of "organized crime" and "organized crime syndicate" which is defined in Section 2(1)(e) and (f) of the above Act as under :-

2(1)(e) "organized crime" means any continuing unlawful activity by an individual, singly or jointly, either as a member of an organized crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means, with the objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any other person or promoting insurgency ;

2(1)(f) "organized crime syndicate" means a group of two or more persons who, acting either singly or collectively, as a syndicate or gang indulge in activities of organized crime ;

Mr. Lalit pointed out that the expression "continuing unlawful activity" implied activity prohibited by law for the time being in force, which is a cognizable offence punishable with imprisonment of three years or more, continuously undertaken and in respect whereof 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.

Mr. Lalit then took us through Section 3 of the MCOCA which provides punishment for organized crime. The portion of Section 3 which is relevant for our purpose is Sub-section (1) which is set out hereinbelow:-

3(1)(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 a fine, subject to a minimum fine of rupees one lac ;

(i) 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 a fine, subject to minimum fine of rupees five lacs ;

Mr. Lalit also referred to Section 21 of the aforesaid Act which provides for the modified application of certain provisions of the Code of Criminal Procedure in respect of offences under MCOCA. He laid special emphasis on Sub-sections (3) and (4) whereby the provisions of Section 438 of the Code have been made inapplicable to cases under MCOCA and grant of bail has been made dependent on certain conditions. He lastly referred to Section 23(1)(a) which provides that no investigation could be taken up without the prior approval of the Police Officer not below the rank of Deputy Inspector General of Police. Since according to Mr. Lalit offences under the Essential Commodities Act also attracted the provisions of MCOCA, he also referred to some of the relevant provisions of the Essential Commodities Act, 1955. He firstly referred to Section 3 which empowers the Central Government to control production, supply, distribution etc. of essential commodities and in particular provides for powers to the Central Government to make Orders to provide for the purposes set out in Sub-section(2).

He pointed out that by virtue of Section 7 of the Act any person contravening any order made under Section 3 would be punishable

(i) in the case of an order made with reference to clause (h) or clause (i) or sub-section (2) of that section, with imprisonment for a term which may extend to one year and shall also be liable to fine, and

(ii) in the case of any other order, with imprisonment for a term which shall not be less than three months but which may extend to seven years and shall also be liable to fine :

[Provided that the court may, for any adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than three months;]

Mr. Lalit submitted that under Section 10A of the above Act every offence punishable under the Essential Commodities Act would be cognizable.

Mr. Lalit urged that in order to more effectively deal with persons indulging in hoarding and black-marketing of and

profiteering in essential commodities, the Central Government enacted the Essential Commodities (Special Provisions) Act, 1981, which came into force on 1st September, 1982, in all the States and Union Territories, except in the Union Territories of the Andaman and Nicobar Islands, Arunachal Pradesh, Dadra and Nagar Haveli, Lakshadweep and Mizoram. Mr. Lalit submitted that by virtue of Section 1(3) and as indicated in the preamble to the Act, the same was to be valid for a period of 15 years from the date of commencement of the Act except in respect of things done or omitted to be done before such cesser of operation of the Act and Section 6 of the General Clauses Act 1897 would apply upon such cesser of operation of the Act. In other words, the Act which came into force on 1st September, 1982 was to remain in force till 31st August, 1997.

Mr. Lalit contended that by virtue of the provisions of the 1981 Act, Section 7 of the principal Act was amended to make the said provision more stringent by removing the prohibition to impose a sentence of less than three months. Mr. Lalit submitted that Section 12A of the principal Act had been substituted by Section 12A of the 1981 Act which provides for the constitution of special Courts and provides further in Section 12AA that all offences under the Act would be triable only by the Special Court constituted for the area in which the offence had been committed or where there are more special courts than one for such area by such one of them as may be specified in this behalf by the High Court. He pointed out that 12AA(f) provides that all offences under the 1981 Act was to be tried in a summary way and the provisions of Section 262 to 265 of the Code of Criminal Procedure would, as far as may be, apply to such trial.

Assailing the judgment of the High Court wherein it had been held that since trials under the Essential Commodities Act were to be tried by Special Court in a summary way for which the maximum sentence that could be imposed was two years, the provisions of MCOCA had no application. Mr. Lalit submitted that such a view was not sustainable.

Mr. Lalit submitted that notwithstanding the amendments which have been introduced by the 1981 Act to Section 7 of the principal Act, the main provisions of Section 7 of the principal Act remained untouched. He submitted that the punishment provided for under Section 7(1)(a)(ii) of the 1955 Act remain unchanged and punishment for an offence to which the said provision was attracted would continue to be punishable with imprisonment for a term which would not be less than three months but could extend to 7 years with liability to pay fine as well.

Mr. Lalit submitted that having regard to the above, the provisions of MCOCA would still be applicable to cases to be tried by the Special Court under the provisions of the Essential Commodities (Special Provisions) Act, 1981.

In support of his submissions, Mr. Lalit firstly referred to and relied on a decision of this Court in the case of Nirmal Kanti Roy vs. State of West Bengal, reported in (1998) 4 SCC 590, where almost the same question, as has been indicated by Mr. Lalit, had come up for consideration in the context of Section 468 of the Code of Criminal Procedure. In the said matter, the contention which had been raised on behalf of the appellant was that although Section 7 (1) (a) (ii) of the 1955 Act provided for maximum imprisonment of seven years, by virtue of the provisions of Section 12 AA (1) (f) of the 1981 Act, the maximum punishment which could be imposed for an offence under the said Act is only two years. On such reasoning, it was contended that the limit fixed by Parliament by the 1981 Act would have the effect of altering

the extent of punishment for the offence under Section 7 of the 1955 Act to imprisonment for a period of two years. The aforesaid contention was turned down by this Court upon holding that when the maximum punishment prescribed under Section 7 (1) (a) (ii) was seven years, merely because the proviso to Section 12 AA (1) (f) limits the jurisdiction of the Special Court to award sentence up to two years, it would not make the offence itself punishable with only two years' imprisonment. It was observed that one has to look at the punishing provision to know the extent of the sentence prescribed and not at the limit fixed for a particular court in the matter of awarding sentence.

Reference was also made to the decision of this Court in the case of State of West Bengal vs. Falguni Dutta And Anr., (1993) 3 SCC 288, where also a similar view was taken. As far as S.L.P. (Crl.) No.1101/06 is concerned, Mr. Lalit submitted that the prayer of the writ petitioners to quash C.R.No.II-B registered with Rasayani Police Station, Raigarh and for quashing the investigation under MCOCA is yet to be considered, but having held in the earlier case that MCOCA would not apply to an offence under the Essential Commodities Act, the same benefit had been extended to the writ petitioners in the present case and at the interim stage relief had been granted in terms of prayer 'C' to the writ petitioner which reads as follows:-

"To restrain the respondents from applying, carrying on further investigation and from arresting the petitioners under the provisions of MCOCA Act pertaining to the FIR registered with Rasayani Police Station at C.R.No.II-B/2005 on the complaint of Shri S.S. Tathaude, P.I. attached to LCB, Alibag, pending the hearing and final disposal of this petition."

Mr. Lalit submitted that by virtue of the said interim order, the investigating agencies have been prevented from the proceeding further with the investigation and/or arresting the petitioners under the provisions of the MCOCA. Mr. Lalit submitted that the decision in the first two matters would have a direct bearing on the decision to be rendered in this Special Leave Petition as well.

Mr.R.F. Nariman, appearing for the respondents in the first two Special Leave Petitions also referred to the provisions of Section 2 (d) of MCOCA and laid special emphasis on the expression "continuing". He urged that "continuing unlawful activity" would necessarily mean continuous engagement in unlawful activity where there would be a live link between all the different offences alleged. According to Mr. Nariman, isolated incidents spread over a period of 10 years, involving different types of offences, would not attract the provisions of MCOCA. Such activity must be such as to have a link from the first to the last offence alleged to have been undertaken in an organized manner by an organized crime syndicate. It was contended that there was nothing on record to indicate the existence of any organized crime syndicate for the purpose of carrying on any continuing unlawful activity as envisaged under Section 2 (d) (e) and (f) of MCOCA.

Reference was also made to the approval granted by the Special Inspector General of Police, Kolhapur Range, granting permission under Section 23 (1) (a) of MCOCA for applying Section 3 (1) (2) (4) of MCOCA to Karveer Police Station C.R.No.39 of 2004 under Sections 3 and 7 of the 1955 Act. Mr. Nariman submitted that the said approval reveals

complete non-application of mind inasmuch as except for Karveer Police Station C.R.No.39/04, no other case alleged to be pending against the respondents had even been referred to in the said order so as to make out a case of "continuing unlawful activity" which by its very connotation contemplates more than one offence spread over a period of 10 years. Apart from the above, it was also submitted that reference had been made under the order of approval to Section 3 of the Petroleum Storage and Distribution Act which enactment does not exist.

It was submitted that it is obvious that the sanctioning authority had not applied its mind in granting approval under Section 23 (1) (a) of MCOCA and mechanically granted such permission. Mr. Nariman submitted that the approval granted to apply Section 3 (1) (2) (4) of MCOCA to the respondents was liable to be set aside on such score alone. Mr. Nariman then drew our attention to the changed legal position in view of the enactment of the Essential Commodities (Special Provisions) Act, 1981. He urged that the effect of Section 7 of the principal Act and in particular Sub-section (1) (a) (2) thereof stood altered by virtue of Section 12 AA (1) (f) of the 1981 Act. Mr. Nariman urged that by virtue of Section 12 A of the 1981 Act, provision was made for the constitution of Special Courts as Section 12 AA provided that notwithstanding anything contained in the Code of Criminal Procedure all offences under the Act would be triable only by the Special Court constituted for the area and that all such offences were to be tried in a summary way and that the provisions of Sections 262 to 265 of the Code may be applicable as far as may be to such trial. Mr. Nariman submitted that the proviso to Section 12 AA (1) (f) made it even more clear that in the case of any conviction in a summary trial under the said Section, it would be lawful for the Special Court to pass the sentence of imprisonment for a term not exceeding two years. It was urged that by virtue of the above the provisions of MCOCA stood eliminated in respect of proceedings involving an offence under the Essential Commodities (Special Provisions) Act, 1981. It was submitted that in order to attract the provisions of MCOCA the cognizable offence had to be punishable with imprisonment of three years or more, which is not so in respect of offences under the 1981 Act where the punishment has been limited to two years only.

Mr. Nariman submitted that the decision rendered in Falguni Datta's case (supra) was in the context of Section 167 (5) of the Code of Criminal Procedure relating to the completion of investigation within the stipulated period and has little relevance in the instant case. Mr. Nariman submitted that the provisions of MCOCA were extremely stringent and application of the provision thereof would have far reaching consequences including restrictions on grant of bail. In fact, by virtue of Section 21 (3), the provisions of Section 438 of the Code of Criminal Procedure have been made inapplicable in relation to any case involving the arrest of any person accused of having committed an offence punishable under the MCOCA. Section 21 (4) also lays down that no person accused of an offence punishable under the Act shall, if in custody, be released on bail, on his own bond unless the conditions indicated are fulfilled. Mr. Nariman submitted that in view of the stringent provisions of MCOCA, its provisions were required to be strictly interpreted as was observed by this Court in Ranjitsing Brahmjeetsing Sharma vs. State of Maharashtra And Anr., (2005) 5 SCC 294, commonly known as Telgi case. Referring to the list of cases on the basis whereof

sanction had been granted, Mr. Nariman submitted that the cases related mainly to offences under the Indian Penal Code which would immediately reveal that there was no live link between the old and new cases to constitute continuing unlawful activity. He also added that "organized crime" as defined in Section 2 (e) of MCOCA contemplated continuing unlawful activity by use of violence or threat of violence or intimidation or coercion or other unlawful means with the objective of gaining pecuniary benefits or gaining undue economic or other advantage for the perpetrator of the crime or any other person promoting insurgency. He urged that none of the said ingredients were present in respect of the cases for which sanction had been granted to apply the provisions of MCOCA to the case of the respondents. It was urged that the High Court had rightly held that the provisions of MCOCA would not apply to the cases filed against the respondents and no interference was called for therewith.

Mr. Harish Salve, learned senior counsel, who appeared for the respondents in S.L.P. (CrI.) 1101/2006, while re-emphasizing the submissions made by Mr. Nariman regarding the interpretation of the expression "continuing unlawful activity" in relation to Sections 3 and 7 of the MCOCA urged on a different note that the entire proceedings taken under MCOCA against the respondents were misconceived. He reiterated that having regard to the stringent provisions of MCOCA, the said provisions would have to be strictly interpreted.

Mr. Salve urged that an offence under the MCOCA being one of 'continuing unlawful activity', there could not be more than one First Information Report in respect of the same set of offences, as has been done in the instant case. Mr. Salve submitted that such a course of action was contrary to the provisions of MCOCA and consequently the approval given to apply the provisions of MCOCA to the respondents was not only untenable but in complete violation of Section 23 (1) (a) of MCOCA. Mr. Salve, submitted that as will appear from the application made by the P.I.L. C.B., Raigad, on 18th August, 2005, for permission to register an offence under Section 1 (ii) of MCOCA against the respondents, there is only one case involving Kapil Lalit Nagpal and that too essentially under the provisions of the Indian Penal Code. With malicious intent another case has been referred to which had, however, been dismissed. Similarly, a case has been mentioned in relation to both Lalit Nagpal and Anil Nagpal under Sections 120B, 364, 302, 506 (2), Indian Penal Code and Section 34, Arms Act, from which they had already been acquitted.

Mr. Salve also urged that in the absence of any enactment, such as the Petroleum Storage and Distribution Act, on the basis whereof sanction had purportedly been given to apply the provisions of MCOCA to the petitioners, such sanction was wholly invalid as it is clear that the same was granted mechanically without application of mind despite the drastic consequences involved.

Mr. Salve urged that not only had no ground been made out for interference with the order of the High Court, but observations are required to be made by this Court regarding the manner and the circumstances in which the provisions of Acts having drastic consequences such as MCOCA should be applied.

Mr. Mukul Rohtagi, learned senior counsel, who appeared for some of the other respondents, adopted the submissions made by Mr. Nariman and Mr. Salve. He submitted that the alleged offences, on the basis of which approval had been granted to apply the provisions of MCOCA



to the petitioners' cases, did not satisfy the conditions relating to commission of and/or involvement in continuing unlawful activity which forms the very basis of an offence under MCOCA.

He also submitted that approval having been given on the basis of a non-existent enactment, such approval stood vitiated on such account.

Replying to the submissions made on behalf of the respondents in the first three petitions, who were also the petitioners in the fourth and fifth petitions, Mr. Lalit submitted that the conflict in ratio in Falguni Datta's case (supra) and in Durgesh Chandra Shah vs. Vimal Chandra Shah, 1996(1) SCC 341, had been referred to a larger Bench to resolve the question relating to the interpretation of Section 167(5) of the Code of Criminal Procedure as amended by the State of West Bengal. The controversy stood concluded upon the larger Bench holding that as the offence under Section 7A(1)(9)(ii) of the Essential Commodities Act is punishable with imprisonment upto seven years, the offence would not attract the bar of limitation under Section 468 of the Code.

Mr. Lalit submitted that the said decision reversed the decision in Falguni Datta's case in relation to the interpretation of Section 7 in respect of offences under MCOCA.

Mr. Lalit disputed Mr. Nariman's submissions that a live link had to exist between the different cases on the basis of which the decision is taken to apply the provisions of MCOCA.

According to Mr. Lalit, the legislature has consciously not referred to such nexus theory so that each individual offence could be treated as a separate cause to apply MCOCA. It was also submitted that 'organized crime' as defined in Section 2(1)(e) of MCOCA does not indicate that such organized crime is required to be accompanied by any of the coercive methods mentioned therein and any unlawful means would be sufficient to attract the said definition.

As to the filing of two FIRs necessitating the grant of two approvals it was submitted that after the First FIR had been lodged and approval obtained in respect thereof, a further offence came to light as part of the sequence of continuing unlawful activity. This compelled the authorities to lodge a second FIR and seek approval in respect thereof also. It was sought to be urged that two FIRs were really the result of continuing unlawful activity, which is the very basis for an offence under MCOCA.

On the question of grant of bail to Lalit Nagpal, Mr. Lalit contended that the said petitioner in SLP (Crl) No. 4581 of 2006 had absconded for a considerable length of time and that, in any event, by virtue of the interim orders passed in the Special Leave Petition, he had been allowed to be treated in a private hospital in Bombay of his choice, though under the custody of the investigating authorities.

Mr. Lalit submitted that the said order of 15th December, 2006 was still being given effect to and the petitioner could continue to avail of such treatment, when necessary, since his application for bail on medical grounds was still pending before the High Court.

Regarding the challenged order thrown by Kapil Nagpal to the order dated 1st September, 2006 passed by the High Court directing him to surrender before the Investigating Authority within two weeks failing which his petition for quashing the FIR registered with Rasayani Police Station would stand dismissed, Mr. Lalit submitted that no ground had been made out to interfere with the same.

He submitted that since Kapil Nagpal had also absconded and steps had been taken under Section 82 of the Code of

Civil Procedure against him, the High Court had quite rightly directed him to surrender before his application for quashing could be taken up for consideration.

From the submissions made on behalf of the State of Maharashtra, it appears that the main question for determination in the Special Leave Petitions filed by the State of Maharashtra relates to the applicability of MCOCA to offences under the Essential Commodities Act, 1955, having particular regard to the enactment of the Essential Commodities (Special Provisions) Act, 1981.

As noticed hereinbefore, the Essential Commodities (Special Provisions) Act, 1981 came into force on 1st September, 1982 and was to remain in force for a period of 15 years. Under Section 12 AA (1) (a) of the aforesaid Act, all offences under the said Act were to be triable by Special Courts. Section 12 AA (1) (f) further provides that all offences under the Act are to be tried in a summary way and the provisions of Sections 262 to 265 of the Code of Criminal Procedure shall apply, as far as may be, to such trial. In case of conviction, the proviso limits the period of punishment to imprisonment for a term not exceeding two years.

Before the commencement of the 1981 Act, all offences relating to the contravention of Orders made under Section 3 of the 1955 Act were triable by Judicial Magistrates of the First Class or by Metropolitan Magistrates who had powers to impose punishment of imprisonment for a term which could even extend to 7 years by virtue of Section 7 (1)(a) (ii) of the aforesaid Act. It is only after the commencement of the 1981 Act that all offences under the said Act were triable by a Special Court with powers to impose punishment for a term not exceeding two years.

Since the provisions of MCOCA can be applied in respect of continuing unlawful activity which has been defined to mean an activity prohibited by law for the time being in force and which is a cognizable offence punishable with imprisonment of 3 years or more, it has been urged by Mr. Nariman that the provisions of the 1981 Act made provisions of MCOCA inapplicable for offences under the said Act. Even the High Court has proceeded on the aforesaid basis and has inter alia observed that the offences punishable under the provisions of the 1955 Act, committed during the period when the 1981 Act was in force, could not be said to be offences which could be considered for the purpose of continuing unlawful activity as defined in Section 2 (d) of the MCOCA. The said view taken by the High Court in our judgment is incorrect inasmuch as the offences under the 1955 Act continued to attract the provisions of Section 7 thereof. The only change brought about by the 1981 Act was to limit the power of the Special Court to impose punishment for a maximum period of two years. The offence continues to remain punishable up to a maximum period of seven years so as to attract the provisions of MCOCA.

The aforesaid position has been clearly explained in Nirmal Kanti Roy's case (supra) wherein this Court held that merely because the proviso to Section 12 AA (1) (f) limits the jurisdiction of the Special Court to award sentence up to two years it would not make the offence itself punishable with only two years' imprisonment.

The submissions advanced on behalf of the respondents on this count must, therefore, fail.

However, we are in agreement with the submission that having regard to the stringent provisions of MCOCA, its provisions will have to be very strictly interpreted and the concerned authorities would have to be bound down to the strict observance of the said provisions. There can be no

doubt that the provisions of the MCOCA have been enacted to deal with organized criminal activity in relation to offences which are likely to create terror and to endanger and unsettle the economy of the country for which stringent measures have been adopted. The provisions of the MCOCA 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 relating to the electronic media have also been provided for. In such a situation it is to be seen whether the investigation from its very inception has been conducted strictly in accordance with the provisions of the Act.

As has been repeatedly emphasized on behalf of all the parties, the offence under MCOCA must comprise continuing unlawful activity relating to organized crime undertaken by an individual singly or jointly, either as a member of the organized crime syndicate or on behalf of such syndicate by use of coercive or other unlawful means with the objective of gaining pecuniary benefits or gaining undue economic or other advantage for himself or for any other person or for promoting insurgency. In the instant case, both Lalit Somdutt Nagpal and Anil Somdutt Nagpal have been shown to have been involved in several cases of a similar nature which are pending trial or are under investigation. As far as Kapil Nagpal is concerned, his involvement has been shown only in respect of CR No.25/03 of Rasayani Police Station, Raigad, under Sections 468,420,34, Indian Penal Code and Sections 3, 7,9 & 10 of the Essential Commodities Act. In our view, the facts as disclosed justified the application of the provisions of the MCOCA to Lalit Nagpal and Anil Nagpal. However, the said ingredients are not available as far as Kapil Nagpal is concerned, since he has not been shown to be involved in any continuing unlawful activity. Furthermore, in the approval that was given by the Special Inspector General of Police, Kolhapur Range, granting approval to the Deputy Commissioner of Police (Enforcement), Crime Branch, C.I.D., Mumbai to commence investigation under Section 23 (1) of MCOCA, Kapil Nagpal has not been mentioned. It is only at a later stage with the registering of CR No.25/2003 of Rasayani Police Station, Raigad, that Kapil Nagpal was roped in with Lalit Nagpal and Somdutt Nagpal and permission was granted to apply the provisions of the MCOCA to him as well by Order dated 22nd August, 2005.

In addition to the above, a glance at the permission sought by P.I.L.C.B., Raigad, on 18th August, 2005 seeking permission for registering an offence under Section 1 (ii) MCOCA 1999 against Lalit Nagpal, Anil Nagpal, Kapil Nagpal and one Parasnath Ramdular Singh will reveal that such permission was being sought for, as far as Kapil Nagpal is concerned, in respect of an offence allegedly under Section 63 of the Sales Tax Act, which in our opinion would not attract the provisions of the MCOCA.

We, therefore, have no hesitation in holding that as far as Kapil Lalit Nagpal is concerned, the provisions of the MCOCA have been misapplied to him.

Since we have already held that the limitation of the power to impose punishment only for a maximum period of two years for an offence under the 1981 Act did not preclude the authorities from applying the provisions of the MCOCA for offences under Sections 3 & 7 of the 1955 Act as well as the 1981 Act, we are left with the question as to whether the same had been applied to the case of Lalit Nagpal and Anil Nagpal strictly in accordance with the provisions of the MCOCA 1999. Having regard to the stringent provisions of the MCOCA, Section 23 (1) (a) provides a safeguard to the

accused in that notwithstanding anything contained in the Code of Criminal Procedure, no investigation of an alleged offence of organized crime under the MCOCA, 1999 can be commenced without the prior approval of a police officer not below the rank of Deputy Inspector General of Police. An additional protection has been given under Sub-section (2) of Section 23 which prohibits any Special Court 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.

In the instant case, though sanction had been given by the Special Inspector General of Police, Kolhapur Range, on 31st August, 2004, granting permission under Section 23 (1) (a) of the MCOCA 1999 to apply its provisions to the alleged offences said to have been committed by Anil Nagpal, Lalit Nagpal and Vijay Nagpal, such sanction reveals complete non-application of mind as the same appears to have been given upon consideration of an enactment which is non est. Even if the subsequent approval order of 22nd August, 2005 is to be taken into consideration, the organized crime referred to in the said order is with regard to the alleged violation of Sales Tax and Excise Laws, which, in our view, was not intended to be the basis for application of the provisions of the MCOCA 1999. To apply the provisions of MCOCA something more in the nature of coercive acts and violence is required to be spelt out so as to bring the unlawful activity complained of within the definition of "organized crime" in Section 2 (a) of MCOCA. In our view, both the sanctions which formed the very basis of the investigation have been given mechanically and are vitiated and cannot be sustained. In taking recourse to the provisions of the MCOCA 1999, which has the effect of curtailing the liberty of an individual and keeping him virtually incarcerated, a great responsibility has been cast on the authorities in ensuring that the provisions of the Act are strictly adhered to and followed, which unfortunately does not appear to have been done in the instant case.

We are not, therefore, inclined to interfere with the decision of the High Court though for reasons which are entirely different from those given by the High Court. The Special Leave Petitions (Crl.) Nos. 3320-3321/2005 filed by the State of Maharashtra are, therefore, dismissed. For the same reasons, Special Leave Petition (Crl.) No.1101/2006 filed by the State of Maharashtra must also fail and the High Court will now have to dispose of the application filed by the petitioners in Crl. Writ Petition No. 2183/2005 for quashing C.R. No.II-8/2005 registered with Rasayani Police Station, Raigad.

As far as Special Leave Petition (Crl.) No. 4581/2006 is concerned, the same has been filed against the order passed by the Bombay High Court rejecting the petitioner's prayer for grant of bail. As will be seen from the records, the petitioner had earlier applied for grant of anticipatory bail which was rejected by the Bombay High Court. In the Special Leave Petition filed against the said order of rejection, this Court also on 14th December, 2004 rejected the petitioner's prayer for grant of anticipatory bail. This Court however granted 15 days' time to the petitioner to surrender and to apply for regular bail. Despite the said order, the petitioner did not surrender till 1st July 2005, and thereafter applied for bail which was rejected on the ground that the petitioner had violated the order passed by this Court on 14th December, 2004 and had absconded for almost six months before surrendering. The order passed by this Bombay High Court rejecting the petitioner's prayer for bail was again challenged before this Court and the same was once again dismissed on

20th January, 2006 with the observation that such dismissal would not bar the petitioner to approach the trial court afresh. Thereafter, the petitioner moved a fresh application for bail before the Sessions Court which was rejected on 3rd March, 2006. The petitioner challenged the order of the Sessions Court in the Bombay High Court which once again dismissed the petitioner's prayer for grant of bail on the ground that the circumstances had not changed except that the prayer for enlarging the petitioner on had been made bail on medical grounds. While rejecting the petitioner's prayer for bail, the High Court observed that on the basis of the medical report, no case had been made out for enlarging the petitioner on bail. However, the prayer as regards shifting the applicant to a particular hospital would have to be considered on its own merits.

Special Leave Petition (Crl.) No. 4581/2006 is directed against the said order of the High Court refusing to grant bail to the petitioner.

It may be indicated that during the pendency of the writ petition, this Court on a consideration of the medical condition of the petitioner permitted him to be treated in a private hospital, though under the custody of the respondents. We understand that the petitioner continues to be hospitalized. Having regard to the fact that we have dismissed the Special Leave Petitions filed by the State of Maharashtra against the order of the Bombay High Court holding that the provisions of MCOCA had been misapplied to the facts of the case, the stringent provisions regarding bail under the MCOCA 1999 will no longer be attracted in this case. Since the petitioner has been under arrest since the date of his surrender on 1st July, 2005, and having further regard to his medical condition, we direct that the petitioner, Lalit Somdutt Nagpal, be released on bail to the satisfaction of the Chief Judicial Magistrate, Kolhapur. He will surrender his passport to the Chief Judicial Magistrate, Kolhapur, until further orders of the magistrate and will not leave the country without the prior permission of the magistrate and shall report to the Investigating Officer of the different cases as and when called upon to do so. Special Leave Petition (Crl.) No. 4581/2006 is accordingly allowed and the order of the Bombay High Court dated 14th July, 2006 refusing the petitioner's prayer for grant of bail is set aside.

As far as Special Leave Petition (Crl.) No.4611/2006 is concerned, since we have held hereinbefore while deciding the Special Leave Petitions filed by the State of Maharashtra that Kapil Lalit Nagpal had been wrongly proceeded against under the provisions of the MCOCA 1999, we allow the special leave petition and set aside the order passed by the Bombay High Court on 1st September, 2006 in Crl. Writ Petition No.2183/2005 with a direction to hear out the petitioner's said writ petition in accordance with law.

There will be no order as to costs in any of these special leave petitions.