

(2018) 01 DEL CK 0148

Delhi High Court

Case No: 3464 of 2017 & Crl M A No 20399 of 2017

Yogesh Mittal

APPELLANT

Vs

State of Nct of Delhi

RESPONDENT

Date of Decision: Jan. 9, 2018

Acts Referred:

- Constitution of India, Article 226 - Power of High Courts to Issue certain writs
- Code of Criminal Procedure, 1973, Section 173, Section 167(2) - Re

Hon'ble Judges: S. Muralidhar, I.S. Mehta

Bench: Division Bench

Advocate: Vikram Chaudhary, Ashish Batra, Arjun Malik, Harshit Sethi, Rishi Sehgal, Rahul Mehra, Rajesh Mahajan, Tushar Sannu, Prashant Singh, Chaitanya Gosain

Final Decision: Disposed Of

Judgement

1. This habeas corpus petition under Article 226 of the Constitution seeks a declaration that the continued detention of the Petitioner in FIR No. 205/2016 by denying him the right of default bail under Section 167(2) of the Code of Criminal Procedure, 1973 ("Cr PC") and without formal cognizance taken of the offence committed by him in the said FIR is illegal, warranting his release from custody as far as the said FIR is concerned.

Background facts

2. The background facts are that the aforementioned FIR No. 205/2016, dated 25th December 2016 was registered with the Crime Branch, Delhi Police under Section 420/406/409/467/468/471/188/120 Indian Penal Code ("IPC"). In the said FIR, after conclusion of the investigation, a final report No. 1 dated 24th June 2017 was filed, alleging different offences against different accused persons who were named in

Column 11 of the said final report. The name of Petitioner, Yogesh Mittal, did not figure in Column 11 of the final report. However, in para 79 of the said report, it was stated as under:

"Further investigation is in progress. FSL Report is awaited. If more evidence comes on record against the above accused, same shall be filed before the Hon"ble court through supplementary charge sheet Investigation against Yogesh Mittal and/or his other associates is also in progress and a supplementary charge sheet will be filed against them."

3. It must also be noticed at this stage that, as noted in para 78 of the aforementioned final report, one of the accused in the aforementioned case, Rohit Tandon, was already in judicial custody in a case instituted against him by the Enforcement Directorate ("ED") under the Prevention of Money Laundering Act, 2002 ("PMLA").

Cognizance of offences under PC Act and IPC

4. The aforementioned charge-sheet was perused by the learned Special Judge (PC Act) Anti-Corruption Bureau, Tis Hazari Court, New Delhi on 24th June 2017 and the following order was passed:

"Submissions advanced by Ld. APP for state & ACP Ishwar Singh are heard.

Record is perused.

ACP Ishwar Singh submits that CS is being filed today since investigation is complete qua accused persons named in Column No. 11 and further investigation is pending against Yogesh Mittal & other persons. He submits that accused person Raj Kr. Goel and Ashish Kumar are in JC in present case. He submits that cognizance may be taken since two of accused persons are in JC and their detention needs to be authorized under Section 309 CrPC. He submits that

the Public Servant Ashish Kumar is no longer in the employment of the Bank and therefore sanction is not necessary. In light of submissions advanced and material on record, cognizance is taken of the offences U/s 406/409/420/120B/109/467/468/471 r/w 34 of IPC & Sections 11/12/13 of PC Act. There is sufficient material to proceed against the accused persons named in Column No. 11.

Police Report shall be placed before Ld. Spl. Court on 01/07/17 for further proceedings."

Petitioner taken into custody under PMLA

5. The Petitioner was taken into custody on 5th June 2017 by the ED under the PMLA. On 18th July 2017, while he was still in custody in the PMLA case, the Petitioner was remanded to police custody by the Special Judge (PC Act), Anti-Corruption Bureau, Tis Hazari Court, New Delhi. Therefore, the date of arrest of the Petitioner as far as FIR No. 205/2016 is concerned was 18th July 2017.

6. In terms of clause (i) of proviso (a) to Section 167(2) Cr PC, a Magistrate may not authorize the detention of an accused person beyond a period of 15 days and, in any event, for a total period of 90 days where it relates to an offence punishable by imprisonment for life or by imprisonment for not less than 10 years. The accused is entitled to bail in terms of the above proviso on the expiry of period of 90 days, i.e. statutory bail, unless a charge-sheet has been filed prior thereto.

7. The legal position in this regard has been expostulated by the Supreme Court in Central Bureau of Investigation v. Anupam J. Kulkarni (1992) 3 SCC 141. The Supreme Court in that case explained that while the police custody could not exceed 15 days, the remaining custody had to be a judicial custody and the total period of custody cannot exceed 90 days. It was observed as under:

"Taking the plain language into consideration particularly the words "otherwise than in the custody of the police beyond the period of fifteen days" in the proviso it has to be held that the custody after the expiry of the first fifteen days can only be judicial custody during the rest of the periods of ninety days or sixty days and that police custody if found necessary can be ordered only during the first period of fifteen days."

8. It was further explained by the Supreme Court in *Central Bureau of Investigation v. Anupam J. Kulkarni* (supra) as under:

"The proviso to Section 167 (2) clearly lays down that the total period of detention should not exceed ninety days in cases where the investigation relates to serious offences mentioned therein and sixty days in other cases and if by that time cognizance is not taken on the expiry of the said periods the accused shall be released on bail as mentioned therein."

Application for transfer to PMLA Court

9. As far as the present case is concerned, when the matter was listed before the Special Judge (PC Act) at Tis Hazari Court on 10th October 2017, an application moved by the ED under Section 44(c) PMLA, was taken up for consideration. A request was made by the ED that since the said case involved offences punishable under the PMLA, it should be transferred to the Special Judge dealing with PMLA cases. None of the counsel for the accused in FIR No. 205/2016 opposed the said request. Accordingly, the learned Special Judge (PC Act) by an order passed on that date i.e. 10th October 2017 transferred the case arising from FIR 205/2016 to the Court of the learned Special Judge (PMLA), Saket Court under Section 44(c) PMLA. It was directed that the accused in judicial custody should be presented before the said Special Judge (PMLA) on 16th October 2017. The accused, who were on interim bail, were asked to remain present before that Court on the date fixed.

10. At that stage, another submission was made by the IO of FIR No. 205/2016 which was recorded by the learned Special Judge (PC Act) in the same order dated 10th October 2017 as under:

"At this stage, IO ACP Ishwar Singh submits that in the present matter, investigation qua another accused Yogesh Mittal is underway and supplementary charge sheet qua him is likely to be filed on 13.10.2017. Since the matter stands committed/transferred to the Court of Sh. A.K. Kuhar, learned Special Judge (PMLA), Saket Courts, New Delhi, IO ACP Ishwar Singh is directed to file the supplementary charge sheet before the concerned Court. A copy of order each be given to IO ACP Ishwar Singh and Directorate of Enforcement. A copy of order be sent Jail Superintendent for information and compliance. A copy of order be placed in the custody warrants of the accused persons."

11. As it transpired, and as is sought to be explained by the Respondents, the case file was to be sent through the Court of District Judge (HQs), Tis Hazari Courts to the concerned PMLA Court. For this purpose the file was sent to the said District Judge (HQ). This was done by the Special Judge (PC Act) by an order dated 11th October 2017 which reads as under, :

"On 10.10.2017, an application filed by Sh. Rahul Verma Assistant Directorate of Enforcement was disposed off. As per the mandatory provision of Sec. 44(c) of Prevention of Money Laundering Act 2002, the present case stands committed/transferred to the Court of Sh. A.K. Kuhar, learned Special Judge (PMLA), Saket Courts, New Delhi with a direction to produced the accused persons on 16.10.2017 as another case filed by the Enforcement Directorate against the accused persons is pending trial in the said Court which is the designated Court constituted under PMLA.

Ahlmad is directed to place the case file before the learned District & Sessions Judge (HQs), Delhi on 12.10.2017 with a request to send the case file to the Court of Sh. A.K. Kuhar, learned Special Judge (PMLA), Saket Court, New Delhi through District & Sessions Judge (South), Saket Court, New Delhi."

12. On 12th October 2017, the learned District Judge (HQ), Tis Hazari passed the following order:

"12.10.2017

Present: None for either of the parties.

File has been received from the Court of Ms Hemani Malhotra. Ld. Special Judge/PC Act.

Perused.

In view of the observations made, the instant case is withdrawn from the Court of Ms Hemani Malhotra, Ld. Special Judge (PC Act) to be placed before the Court, New Delhi on 17.10.2017 at 2.00 for appropriate orders.

Judicial Assistant/Ahlmad of the transfer court is directed to send the file to the transferee court immediately."

Filing of supplementary charge sheet

13. It is stated that on 13th October 2017, the Investigating Agency was ready to file the charge-sheet qua the Petitioner herein in FIR No. 205/2016. The Investigating Agency also approached the District Judge Court at Saket Court but for some reason the case file had not reached that Court. It is further stated that, on 14th October 2017, since the case file was under administrative transfer process, the Investigating Agency apprised the Special Judge (PC Act), and filed the charge sheet against the present Petitioner as accused in that Court i.e. the court of the Special Judge (PC Act) on the 88th day of the stipulated period of 90 days. The learned Special Judge (PC Act) passed the following order on 14th October 2017:

"14.10.2017

Present: Sh. Atul Shrivastava, learned Addl. PP for the State.

IO AGP Ishwar Singh with case file.

Accused Yogesh Mittal not produced from JC.

Fresh Supplementary charge sheet qua the accused Yogesh Mittal filed. Be checked and registered.

Vide order dated 10.10.2017, the main case has been committed/transferred to the Court dealing with the cases of PMLA at Saket Court, Delhi. Learned District & Sessions Judge (HQs), Delhi has passed the order of placing the file before Learned District & Sessions Judge (South West), Saket Courts, Delhi on 17.10.2017.

IO submits that since the main case was not formally assigned to the concerned Court of Sh. A.K. Kuhar, learned special Judge (PMLA), JC remand of accused Yogesh Mittal was not extended yesterday.

IO has filed the supplementary charge sheet against the accused today. Learned Addl. PP for the State requests to send the supplementary charge sheet to the concerned Court of PMLA, Saket Court as the main case has already been transferred/committed.

Heard. In view of the submissions made, supplementary charge-sheet be placed before the Learned District & Sessions Judge (HQs), Delhi today itself for appropriate orders. Ahlmad is directed to place the file immediately before Learned District & Sessions Judge (HQs), Delhi."

Application under Section 167(2) CrPC

14. From the point of view of the Petitioner, the 90 day period after his arrest on 18th July 2017 expired on 16th October 2017. On 16th October 2017, the Petitioner filed a bail application before the learned Special Judge (PMLA), Saket Court seeking default bail under Section 167(2) CrPC. According to the Petitioner, the Special Judge (PMLA) was the only competent Court which could take cognizance of the offence.

15. The Petitioner's bail application was taken on board by Special Judge (PMLA) and posted for hearing on the following day, i.e. 17th October 2017. At 2.38 pm on 17th October 2017, the District Judge, Saket Courts passed an order acknowledging that the "file had been received from Shri Talwant Singh learned District and Sessions Judge (HQs), Delhi vide order dated 12.10.2017". The said order also acknowledged that on 16th October 2017, the Petitioner had filed an application under Section 167(2) Cr PC which had been posted for that day, i.e. 17th October 2017. It was noted that thereafter, at 10 am on 17th October 2017, "one hand written application for acceptance of bail bonds was filed" on behalf of the Petitioner.

16. It appears that it was only thereafter that the entire case was assigned to the Special Judge (PMLA) by the District Judge, South East, Saket Courts by the order dated 17th October 2017 passed at 2.45 pm, which reads as under:

"17.10.2017

(02:45 pm)

Present: None.

This is supplementary charge sheet received vide order dated 14.10.2017 of District and Session Judge (HQs). The main charge sheet also was received today and assigned to the court of Shri A.K. Kuhar, learned ASJ-02, South East, Saket and both sides were directed to appear before the concerned court today itself i.e. 17.10.2017 at 03:00 pm. It is after the said order that the present file has been put up. This supplementary charge sheet also is assigned to the court of Shri A.K. Kuhar, learned ASJ-02, South East, Saket.

File be sent immediately, to be put up before the learned court of Shri A.K. Kuhar, learned ASJ-02, South-East, Saket today itself at 03:00 pm with the main charge sheet.

In view of orders dated 10.10.2017, 11.10.2017 and 12.10.2017, the trial of this case is assigned to the court of Shri A.K. Kuhar, learned ASJ-02, South-East, Saket, New Delhi for proceeding further in accordance with law.

File be sent to the court concerned immediately and both sides shall appear before the learned concerned court of Shri A.K. Kuhar, learned ASJ-02,

South-East, Saket today itself i.e. 17.10.2017 at 03:00 pm."

17. At 3.10 pm on 17th October 2017, the Special Judge (PMLA) heard the case. Inter alia, it was noted that the Petitioner's application under Section 167 (2) Cr PC had been received along with file. It was noticed that since the supplementary charge sheet qua the Petitioner had been filed, the aforementioned application had to be considered to determine the applicability of Section 167 (2) Cr PC for releasing him on bail. It was directed to be listed for hearing on 31st October 2017.

Findings of the PMLA Court on the Section 167 application

18. On 31st October 2017, an order was passed on a further application by the Petitioner for directions to the Superintendent Central Jail regarding his blood sugar condition. The case was again adjourned to 2 pm on 18th November 2017. On 18th November 2017, the arguments were heard by the learned Special Judge (PMLA) on the Petitioner's application under Section 167 (2) Cr PC. It was asked to be further listed at 2 pm on 30th November 2017, on which date a detailed order was passed by the learned Special Judge (PMLA). Inter alia, it was held as under:

(i) The cognizance of the offence for which the FIR No. 205/2016 was registered was taken by a competent Court on 24th June 2017. The supplementary charge-sheet was also for the same offences for which cognizance was already taken. Therefore, the Special Judge (PC Act) was competent to take cognizance of the offences mentioned in the supplementary charge-sheet as well.

(ii) Even if the Special Judge (PC Act) had transferred the case by the order dated 10th October 2017 to the Special Judge (PMLA) since the offences for which the FIR No. 205/2016 was registered were mentioned to the Schedule of PMLA, the competence of the Special Judge (PC Act) to take cognizance of the offences did not cease. The word "empowered" in Section 173 (2) Cr PC refers to the inherent jurisdiction of the court where a charge-sheet had been filed.

(iii) Admittedly, the charge-sheet was filed on 14th October, 2017 in the competent Court before the expiry of 90 days. Therefore, the Petitioner was not entitled to bail under Section 167 (2) Cr PC.

Submissions on behalf of the Petitioner

19. Mr. Vikram Chaudhary, the learned Senior Counsel appearing for the Petitioner, submitted that till date no cognizance had been taken of the offences mentioned in the supplementary charge-sheet dated 14th October 2017 qua the Petitioner, by the competent Court i.e. the court of the Special Judge (PMLA). Therefore, the question of continuing the Petitioner's judicial custody under Section 309 (2) Cr PC did not arise. Mr. Chaudhary referred to the specific observations of the Supreme Court in *Central Bureau of Investigation v. Anupam J. Kulkarni* (supra).

20. While Mr. Chaudhary did not dispute that on 24th June 2017, the learned Special Judge (PC Act) had taken cognizance of the offences qua the other accused persons, he argued that that did not dispense with the need for the competent court to subsequently take cognizance of the offence qua the Petitioner after the charge sheet against him was filed. Reliance was placed on the observations of the Supreme Court in *Prasad Shrikant Purohit v. State of Maharashtra* (2015) 7 SCC 440. Mr. Chaudhary also placed reliance on the observations of the Supreme Court in *Dharmatma Singh v. Harminder Singh*, (2011) 6 SCC 102.

21. The second submission of Mr. Chaudhary was that the charge sheet qua the Petitioner ought to have been filed on or before 16th October 2017 in the competent court and that there was no excuse for the Investigating Agency not to do so despite the order of the Special Judge (PC Act) dated 10th October 2017. His primary submission on this aspect is that the failure by the Investigating Agency to comply with the aforementioned time limit would entitle the Petitioner to statutory bail under Section 167 (2) Cr PC. This was an indefeasible right which did not hinge upon any administrative lapses either on the part of the Investigating Agency or even for that matter, the Court. In this context, he referred to certain observations made by the Supreme Court in its order dated 11th December 2017 in M.A. No. 1487/2017 in Crl. A. No. 2012/2017 (*Yogesh Mittal v. Enforcement Directorate*) which had set aside an order dated 14th September 2017 passed by the learned Single Judge of this Court dismissing Bail Application No. 1165/2017 (*Yogesh Mittal v. Enforcement Directorate*).

22. Mr. Chaudhary accordingly submitted that as far as FIR No. 205/2016 is concerned, the orders passed by the learned Special Judge (PMLA) simply continuing the judicial custody of the Petitioner and the order dated 30th November 2017 declining the relief under Section 167 (2) Cr PC were unsustainable in law and ought

to be set aside by this Court. He pointed out that since the continued detention of the Petitioner beyond the permissible period of 90 days is illegal, the Petitioner is entitled to maintain the present petition for a writ of habeas corpus.

Submissions on behalf of the ED

23. Countering the above submissions, Mr. Rahul Mehra, the learned Senior Standing Counsel for the State, submitted that cognizance of the offence was to be taken only once and in this case it had been taken by the proper court on 24th June 2017, i.e. the Special Judge (PC Act). It was further submitted that cognizance was taken not of the offender but of the offence. He argued that there was no need for cognizance of the offences to be again taken separately qua the Petitioner upon the filing of a supplementary charge sheet whereby additional accused persons may be named in the same offence. In this regard, reliance was placed upon the decisions in *Mona Panwar v. High Court of Judicature* (2011) 3 SCC 496; *Prasad Shrikant Purohit v. State of Maharashtra* (supra).

24. It was further submitted by Mr. Mehra that the Investigating Agency was ready to file the charge sheet on 13th October 2017 but since the case had not yet been assigned to the Special Judge (PMLA), it was not possible for the charge sheet to be filed in that court. He submitted that there was no dispute as to the fact that the file was ultimately received by that Court only at 3.10 pm on 17th October 2017. It is pointed out, therefore, that as far as Section 167 (2) Cr PC is concerned, the charge sheet was filed before the expiry of 90 days before the Court that was still competent to take cognizance and thus, the Petitioner was not entitled to statutory bail but could only seek regular bail. It is accordingly prayed that the present petition be dismissed as misconceived.

Maintainability

25.1 At the outset, it requires to be noticed that a writ of habeas corpus is maintainable whenever it is alleged that the custody of the Petitioner is unlawful. Further, the Court has to examine the lawfulness of the custody on the date of filing of the reply by the Respondent and not with reference to the proceedings that may be instituted thereafter. In this context, reference may be made to the decision in *Ram Narayan Singh v. State of Delhi* AIR 1953 SC 277.

25.2 In that case, a petition seeking a writ of habeas corpus under Article 32 of the Constitution had been filed before the Supreme Court stating that four persons had been arrested on the evening of 6th March 1953 and were being prosecuted for an alleged defiance of an order prohibiting meetings and processions in an area in question for an offence punishable under Section 188 IPC. The detention was sought to be justified on the basis of the remand order passed by the Additional District Magistrate, Delhi at around 8 pm on 6th March 1953 and thereafter, by the trying Magistrate at about 3 pm on 9th March 1953 while adjourning the case after being told that a habeas corpus petition was being moved in the Supreme Court.

25.3 In the judgment delivered on 12th March 1953, the Supreme Court noted that the order of the trying Magistrate merely directed the adjournment of the case till 11th March 1953 and contained no directions for remanding the accused to custody. On 11th March 1953, in the evening, four slips of paper were handed over to the Registrar of the Supreme Court at around 5.20 pm. They were warrants dated 6th March 1953 for detention of the Petitioners addressed to the Superintendent of Jail directing the accused to be kept in judicial lock up and produced in the Court on 9th March 1953. The endorsements made on the reverse side of those warrants were to the effect that the accused were to be "remanded to judicial till 11th March 1953".

25.4 The Supreme Court noted that there was no order of remand made on 9th March 1953. There was only an order adjourning the case to 11th March 1953. The Supreme Court refused to take notice of the slips of paper presented to the Registrar at 5.20 pm on 11th March 1953. It observed that the continued detention of the Petitioners was without any formal order of remand and therefore the Court is to have regard to the legality of the detention at the time of filing of the reply by the State and not with reference to the institution of proceedings.

25.5 The Supreme Court further held that the material date in this case was 10th March 1953, when the affidavit of the Government justifying the detention of the four accused as lawful was filed. However, it was noted that on the date there was no order remanding the four accused to custody. It was observed as under:

"This Court has often reiterated before that those who feel called upon to deprive other persons of their personal liberty in the discharge of what they conceive to be their duty, must strictly and scrupulously observe the forms and rules of the law. That has not been done in this case. The petitioners now before us are therefore entitled to be released, and they are set at liberty forthwith."

26. It is the above "forms and rules of law" with which we are concerned in the present case which deals with the life and liberty of a citizen. Therefore, the present petition is maintainable.

Cognizance

27.1 First, the Court would like to consider the issue of taking of cognizance of the offence by the Court empowered to do so. In this regard there is a detailed discussion of the legal position in *Prasad Shrikant Purohit v. State of Maharashtra* (supra).

27.2 The facts of that case were that there had been a bomb explosion on 23rd November 2003 at a mosque at Parbhani and the case had been registered as CR

No. 63/2003 (Parbhani Bomb Blast Case). There had been another bomb explosion at a mosque at Jalna on 27th August 2004 and the case was registered as CR No. 194/2004 (Jalna Bomb Blast Case).

27.3 The charge sheet in Parbhani Bomb Blast Case was filed on 7th September 2006 against accused no. 1 (Prasad Purohit) for various cognizable offences under IPC, Explosives Act and Arms Act. A supplementary charge sheet was filed in the Parbhani Bomb Blast Case against four accused persons (including the Appellants, i.e. Purohit and others) for the same offences as well as for the offences under Section 120B/153A read with Section 34 IPC on 29th September 2006.

27.4 In the Jalna Bomb Blast case, a charge sheet was filed against the accused therein on 30th September 2006. Two supplementary charge sheets were filed; the first on 7th January 2008 against the four additional accused persons and the second on 14th January 2008 against five additional accused persons. A supplementary charge sheet was filed against the Appellant, Prasad Purohit, in the Parbhani Bomb Blast Case on 13th November 2008 and another was filed on 15th November 2008 in the Jalna Bomb Blast Case.

27.5 There was a third bomb blast in Malegaon on 29th September 2008 (Malegaon Bomb Blast Case). In this regard, FIR No. 130/2008 was registered. One of the Appellants before the Supreme Court, Prasad Purohit, was arrested by the Anti-Terrorism Squad ("ATS") on 2nd November 2008. Other Appellants were thereafter arrested. On 20th November 2008, approval was given under the Maharashtra Control of Organized Crime Act, 1999 ("MCOCA") and on 15th January 2009, sanction was also granted thereunder.

27.6 The Special Judge (MCOCA) had passed an order of discharge on 31st July 2009 on the footing that the prerequisite for invocation of MCOCA, i.e. cognizance of two earlier cases within 10 years preceding the date of the third occurrence (29th September 2008), was not satisfied. This was because the supplementary charge sheets qua the Appellant therein were filed only on 13th November 2008 and 15th November 2008, after the last date 29th September 2008.

27.7 The High Court took a different view. It was held that the Special Judge had misdirected himself by stating that the cognizance was with reference to the offender and not the offence. Therefore, the order of discharge was set aside.

27.8 Aggrieved by the above order of the High Court, the Appellants came before the Supreme Court wherein the two central questions considered were:

"(i) Whether the common order of the Division Bench dated 19-7-2010 setting aside the discharge order of the Special Judge in Special Case No. 1 of 2009 on the ground that MCOCA was not applicable to the said case and consequently the case was to be tried by the regular court under Section 11 of MCOCA, calls for

interference?

(ii) If answer to Question (i) is in the negative, whether for the purpose of grant of bail under Section 21(4)(i) of MCOCA, can it be held that the application of MCOCA is not made out against the appellants and consequently the rejection of bail by the trial court and as confirmed by the High Court is Justified?"

27.9 The Supreme Court, on the aspect of taking cognizance, observed as under:

"63. When we read the said Section 173 (2) (i) along with Section 190 Cr PC, it can be seen that any Magistrate of the First Class or any Magistrate of the Second Class specially empowered as provided under sub-section (2) of the said section may take cognizance of any offence upon a police report of such facts. Therefore, reading Section 173(2)(i) along with Section 190(1)(b), a duty is cast upon the officer in charge of the police station mandatorily to forward to the Magistrate who is empowered to take cognizance of the offence on a police report. Under Section 190(1)(b) any Magistrate of the First Class and for that matter any Magistrate of the Second Class who is empowered by the Chief Judicial Magistrate for taking cognizance under sub-section (1) can take cognizance of any offence based on filing of a police report furnished with the facts as stipulated under Section 173(2)(i)(a to h). A conjoint reading of Section 173(2)(i) and Section 190(1)(b), therefore, makes the position crystal clear that taking of cognizance of any offence by a Magistrate of the First Class or the Second Class subject to empowerment created under sub-section (2) of Section 190 can take cognizance upon a police report. It can be emphasised here that under Section 190(1)(b) where the police report as stated in Section 173(2)(i) is filed before a Magistrate under Section 190(1)(b), irrespective of the nature of offence, the said Magistrate has been invested with all the powers to take cognizance by applying his judicial mind. To be more precise, once the police report is filed before a Judicial Magistrate as prescribed under Section 190(1)(b), who has been invested with the judicial authority to take cognizance of any offence in the first instance, the requirement of taking cognizance gets fulfilled at that very moment. Further the very fact that proceedings pertaining to Parbhani and Jalna were pending before the Magistrate where such proceedings were initiated by the filing of the police report till the occurrence in Malegaon took place itself was sufficient to demonstrate that judicial mind was very much applied to the proceedings based

on the police report consequent upon cognizance taken.

(.....)

66. We are now pitted with the question as to whether the taking of cognizance of the offence by the competent court under Section 2(1)(d) of MCOCA is referable only to the Court of Sessions or even to a Magistrate of First Class under Section 190 CrPC. In this context, when we read Section 2(1)(d) of MCOCA along with Sections 190 and 193 CrPC, in the absence of any specific stipulation either under Section 2(1)(d) of MCOCA or any other provision under the said Act in the ordinary course of interpretation it can be validly stated that on fulfilment of Section 190 CrPC, when a Judicial Magistrate of First Class or an empowered Second Class Magistrate, takes cognizance of any offence that would fulfil the requirement of Section 2(1)(d) relating to competent court. We have noted under MCOCA that beyond what has been stipulated under Section 2(1)(d) there is no other provision dealing with the matter relating to a competent court for the purpose of taking cognizance. When under the provisions of CrPC, Judicial Magistrate of First Class has been empowered to take cognizance of any offence based on a police report, we fail to see any hurdle to state that on taking cognizance in that manner, the said court should be held to be the competent court for satisfying the requirement of Section 2 (1) (d) of MCOCA. In this respect, we will have to bear in mind that the implication of MCOCA would come into play only after the third occurrence takes place and only after that it will have to be seen whether on the earlier two such occasions involvement of someone jointly or singly, either as a member of an "organised crime syndicate" or on its behalf indulged in a crime in respect of which a charge-sheet has already been filed before the competent court which court had taken cognizance of such offence.

67. Therefore, we are able to state the legal position without any ambiguity to the effect that in the event of a Judicial Magistrate, First Class or an empowered Second Class Magistrate having taken cognizance of an offence based on a police

report as stipulated under Section 173 (2) (i) Cr PC, such cognizance of an offence would fulfil the requirement of that part of the definition under Section 2 (1) (d) of MCOCA. Once we are able to ascertain the said legal position by way of strict interpretation, without any ambiguity, we also wish to refer to various decisions relied upon by either party to note whether there is any scope of contradiction with reference to the said legal position."

27.10 The Supreme Court also referred to the earlier decisions in *Darshan Singh Ram Krishan v. State of Maharashtra* (1971) 2 SCC 654 and *State of West Bengal v. Salap Service Station and others* 1994 (3) Supp. SCC 318 and explained the law with respect to Section 173 Cr PC as under:

"The above statement of law with particular reference to Section 173(8) Cr PC makes the position much more clear to the effect that the filing of the supplementary charge-sheet does not and will not amount to taking cognizance by the court afresh against whomsoever again with reference to the very same offence. What all it states is that by virtue of the supplementary charge-sheet further offence may also be alleged and charge to that effect may be filed. In fact, going by Section 173 (8) it can be stated like in our case by way of supplementary charge-sheet some more accused may also be added to the offence with reference to which cognizance is already taken by the Judicial Magistrate. While cognizance is already taken of the main offence against the accused already arrayed, the supplementary charge-sheet may provide scope for taking cognizance of additional charges or against more accused with reference to the offence already taken cognizance of and the only scope would be for the added offender to seek discharge after the filing of the supplementary charge-sheet against the said offender."

(emphasis supplied)

28. In this context, reference may also be made to a recent decision of the Supreme Court *Sarah Mathew v. Institute of Cardio Vascular Diseases* (2014) 2 SCC 62 on the question of a Magistrate taking "cognizance" where it was observed as under:

"34. Thus, a Magistrate takes cognizance when he applies his mind and takes judicial notice of an offence with a view to initiating proceedings in respect of offence which is said to have been committed. This is the special connotation

acquired by the term "cognizance" and it has to be given the same meaning wherever it appears in Chapter XXXVI. It bears repetition to state that taking cognizance is entirely an act of the Magistrate. Taking cognizance may be delayed because of several reasons. It may be delayed because of systemic reasons. It may be delayed because of the Magistrate's personal reasons."

29. In the present case, on 24th June 2017, the competent court, viz. the Special Judge (PC Act) took cognizance of the offences under FIR No. 205/2016. Every time a supplementary charge-sheet was filed thereafter, there was no need for the Court to again take cognizance of the same offences qua the additional accused.

30. The supplementary charge sheet is qua the present Petitioner, Yogesh Mittal, whose name is now shown in Column 11. Further, while the supplementary charge sheet states in para 16.43 that "he is running in judicial custody" and that "cognizance be taken against him", the legal position is such that there was no need for the Court to specifically pass another order taking cognizance of the same offences qua the Petitioner. This is made explicit by the Supreme Court in Prasad Shrikant Purohit v. State of Maharashtra (supra). As explained therein, the option for such an accused person, who is included in the supplementary charge sheet for the same offences under the FIR, would be to seek discharge.

31. The Court further notices that the Petitioner was himself aware of his inclusion in the supplementary charge sheet which is why he applied for statutory bail under Section 167 (2) Cr PC. He has been in custody in this case from 18th July 2017 onwards and therefore, was aware of developments at every stage. Therefore, the question of his being in continued detention without cognizance being taken of the offence qua him does not arise. This submission of the Petitioner is accordingly negated.

Statutory bail under Section 167 (2) Cr PC

32. We now come to the next aspect of the case, i.e. the entitlement of the Petitioner to statutory bail. Even the Respondents do not dispute the legal position as explained by the Supreme Court in Central Bureau of Investigation v. Anupam J. Kulkarni (supra), viz., that the charge sheet qua the Petitioner had to be filed within 90 days from 18th July 2017, i.e. on or before 16th October 2017 in the competent court, failing which, he would be entitled to statutory bail. In the present case, the "competent court" is that Court which could have taken cognizance of the offences qua the Petitioner.

33. The Special Judge (PC Act) did have the jurisdiction to take cognizance of the offences under the PC Act and IPC. However, once the case was transferred from that court on 10th October 2017 with a clear direction that the charge sheet was to

be filed only in the court of the Special Judge (PMLA), the learned Special Judge (PC Act) could not have thereafter entertained any further request by the CBI. As far as the present case is concerned, after 10th October 2017, the Special Judge (PC Act) should be held to have become functus officio qua this case.

34. There was no question of the Special Judge (PC Act) taking on board, after 10th October 2017, any supplementary charge sheet with regard to FIR No. 205/2016. For the purpose of Section 167 (2) Cr PC, the investigation qua the Petitioner was complete only when the supplementary charge sheet was filed in the jurisdictional court. The court of the Special Judge (PC Act) ceased to have jurisdiction qua the present case after 10th October 2017 and in any event, after 12th October 2017, when the file was received by the District Judge (HQ), Tis Hazari Courts with a clear direction that it should be transmitted forthwith to the Special Judge (PMLA) at Saket Court. The order dated 12th October 2017 of the District Judge (HQ), Tis Hazari Courts makes it abundantly clear that the Special Judge (PC Act), after that date, could not have accepted the supplementary charge sheet filed by the CBI.

35. The problem of the file not reaching the Special Judge (PMLA) has to do with the internal administrative arrangements in the judiciary. While the CBI cannot be blamed for failing to file the charge sheet before the proper Court, since the file had not reached such Court, equally the accused cannot also be deprived of the right to statutory bail as a result thereof. It is only when the Court of the Special Judge (PMLA) received the supplementary charge sheet could it be said that the investigation qua the Petitioner was complete. That did not happen, for the reasons already noted, till 17th October 2017, by which time the 90 days period had elapsed.

36. It was repeatedly stressed by Mr. Mehra that for the fault of the Court, the prosecution cannot be made to suffer. In this context, it must be noticed that a similar contention was advanced before the learned Single Judge of this Court by the ED in Bail Application No. 1165/2017 was accepted in the judgment dated 14th September, 2017 where in para 17, the Court observed as under:

"The petitioner had earlier been remanded to custody with specific endorsement. However, for the fault of the Court the prosecution cannot be made to suffer. Otherwise also, such departures from the procedure would come within the category of irregularity and not an illegality."

(emphasis supplied)

37. When the matter travelled to the Supreme Court by way of an MA No. 1487/2017 in Crl Appeal No. 12/2017, the Supreme Court set it aside with the following order:

"Having heard the learned counsel appearing for the parties, we set aside the judgment and order dated 14.09.2017 of the High Court inasmuch, as after recording in paras 76 & 77 that the appellant was remanded for more than 15 days in one go and that a clear/specific endorsement was necessary and without that having been recorded, the remand was illegal, yet the Court went on to state that for the fault of the Court, the prosecution cannot be made to suffer. Another major departure from settled procedure was that the order of remand was permitted to be recorded by the Reader of the Court which would, according to the High Court, only be an irregularity and not an illegality, which is obviously incorrect in law.

We are, therefore, of the considered view that, in the justice, this order is set aside and the matter is remanded for hearing afresh by the High Court. All contentions are kept open to both the parties. We request the High Court to decide the matter as expeditiously as possible."

38. Clearly, therefore, the Supreme Court did not accept the plea of the ED in the Petitioner's own case i.e. in the PMLA case that the ED cannot be made to suffer for the fault of the Court. Equally, therefore, as far as the present FIR No. 205/2016 is concerned, the prosecution cannot be heard to say that it should not suffer for the failure of the file reaching the Court which had jurisdiction, namely, the PMLA Court.

39. For all of the aforementioned reasons, the Court disagrees with the learned Special Judge, PMLA that since the charge sheet had already been filed in a proper Court on 14th October, 2017 i.e. prior to the expiry of 90 days, the Petitioner was not entitled to the statutory bail under Section 167(2) Cr PC. The said order dated 30th November, 2017 of the Special Judge, PMLA to that extent is hereby set aside.

Summary of conclusions

40. To summarize the conclusions:

(i) The plea of the Petitioner that since no cognizance has yet been taken of the offence qua the Petitioner, the continued detention of the Petitioner in the judicial custody is illegal, is rejected.

(ii) The failure by the Investigating Agency to file a supplementary charge-sheet qua the Petitioner before the Court having jurisdiction i.e. the Court of the Special Judge, PMLA, before the expiry of 90 days i.e. on or before 16th October, 2017, would entitle the Petitioner to the relief of the statutory bail/default bail under Section 167(2) Cr PC.

Directions

41. Accordingly, the Petitioner is directed to be released on bail in FIR No. 205/2016, subject to his furnishing a personal bond in the sum of Rs. one lac with one surety of the like amount to the satisfaction of the Special Judge, PMLA and further subject to the following conditions:

(i) The Petitioner will surrender his passport to the investigating agency.

(ii) The Petitioner will not leave the country without the prior permission of the Special Judge, PMLA.

(iii) The Petitioner will not contact any of the witnesses cited by the prosecution or in any manner interfere with the fair progress of the trial of the case from the stage onwards.

42. If any of the above conditions is violated, it will be open to the Investigating Agency to apply to the Special Judge, PMLA for cancellation of the bail. It will also be open to the Special Judge, PMLA to vary any of the above conditions.

43. It is, however, made clear that this order will not influence the decision in the pending bail application of the Petitioner in the case under the PMLA, which application is stated to be pending before the learned Single Judge of this Court pursuant to the order dated 11th December, 2017 passed by the Supreme Court.

44. The writ petition and the application are disposed of in above terms but, in the circumstances, with no orders as to costs.