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IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.431 of 2016

Arising Out of PS.Case No. -115 Year- 2012 Thana -AURANGABAD TOWN District- AURANGABAD

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Akhilesh Kumar Singh @ Manoj Kumar Singh @ Uttam @ Uttam Singh @ Tinku @ Tinku Singh, son of Sri Ram Bujhawan Singh, resident of village Shukul Chak, P.S. Kadona, District- Jehanbad.

.... Appellant

Versus

The Union of India (N.I.A) .... Respondent

With

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Criminal Appeal (DB) No. 610 of 2016

Arising Out of PS.Case No. -115 Year- 2012 Thana -AURANGABAD TOWN District- AURANGABAD

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Udit Narayan Singh @ Tulsi @ Tufan, son of Chandrika Singh, resident of Mushee Khap P.S. - Bishrampur (Pandu), District - Palamu (Jharkhand).

.... Appellant

Versus

The Union of India (N.I.A.) .... Respondent

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Appearance :
(In both appeals)

For the Appellant(s)	:	Mr. Sunil Kumar Pathak, Advocate
For the Respondent UOI	:	Mr. S.D.Sanjay, Addl. S.G. Mr. Rajesh Kumar Verma, C.G.C.
For the Respondent N.I.A.	:	Mr. Akhileshwar Prasad Singh, Senior Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

JUDGMENT AND ORDER

C.A.V.

(Per: HONOURABLE THE CHIEF JUSTICE)

Date: 06-09-2016

When pitted against each other, which one is more important ─ liberty of a person or the security of the State? Society has struggled to find a uniform answer to this question in all its stages of civilization. There was a time, when the concern of the security of the State made rulers ignore the question of personal liberty of his subjects. As the civilizational standards started rising,

participation of the people, in the governance of the State, started increasing.

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2. However, the experience taught the people that ignoring personal liberty, in all cases and in all circumstances, may prove counter-productive inasmuch as it may turn the ruler ─ whether an individual or a group of persons - into a despot and dictator. Ignoring personal liberty may even slide the State to the brink of tyranny and, eventually, plunge the State into such a catastrophe as could destroy the State itself. The human civilization, therefore, realized that a balance has to be struck between the two.

3. While the concern of the security of the State, in all conditions and always, may not be allowed to override the concerns of civil liberty, the civil liberty must also be subjected to certain restrictions so that the liberty does not become a licence to do anything, which anyone pleases to do, for, civil liberty, beyond a point, may also prove disastrous for State inasmuch as such licencees would tempt to ignore the law and defeat thereby the very rule of law, which is the cherished goal of civil liberty.

4. Fortunately, in India, her Constitution creates a balance between the two conflicting interests─civil liberty and security of the State. All laws, in India, have to, therefore,

withstand the test of this constitutional balance. With the spread of terrorism, human civilization has been put under severe strain inasmuch as terrorism is, now, testing our value system. Do we allow the concerns of civil liberty to be ignored in order to escape the horrors of terrorism? Should we learn to forget the values, which we have attached so far to an individual's human rights, even if he is an offender? No wonder that *'terrorism'* has become, in the present day world, the greatest threat to human civilization.

5. The concern for security of the State has, therefore, forced the State to make more and more stringent laws. Lest the State also does not become as insensitive as a terrorist, all the acts of the State and the laws, made by the State, must be tested and interpreted on the touchstone of human rights. A successful State administers its laws with meaning and effect. (See ***National Investigation Agency v. Redaul Hussain Khan***, reported in 2010 (3) GLT 302.

6. In the light of the above observations made on the constitutional guarantee of civil liberty *vis-a-vis* horrors of terrorism, we, now, come to the present appeal.

(i) Some significant amendments have been made in the Unlawful Activities (Prevention) Act, 1967, (in short, the UA(P) Act by the Unlawful Activities (Prevention) Amendment

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Act, 2008, the amendments having come into force on 31.12.2008, which introduced and defined certain terms, such as, *terrorist act*, terrorist gang, terrorist organization, unlawful association and unlawful activity and made, *inter alia*, punishable a terrorist act under Section 16 and, by Section 17, while the UA(P) Act, as amended by the Unlawful Activities (Prevention) Amendment Act, 2008, made raising of fund for terrorist act punishable. The UA(P) Act also provided punishment for conspiracy, act of abetment, etc., for commission of terrorist act or any act preparatory to the commission of terrorist act. This apart, the UA(P) Act made *'membership'* of a terrorist gang or terrorist organization punishable offences and also provided punishment for those, who hold or held proceeds of terrorism. The UA(P) Act made, under Section 38, even *'association'* by a person with a terrorist organization a punishable offence, if one associates with a terrorist organization with intention to further its activities or if he professes to be associated with a terrorist organization with intention to further its activities.

(ii) The UA(P) Amendment Act, 2008, has also introduced Section 43D and put restrictions, by the proviso to Sub-section (5) of Section 43D, on the Court's power to grant bail by imposing condition that an accused shall not be released on bail or on his own bond if the Court, on perusal of the case diary, or on

the report, made under Section 173 of the Code of Criminal Procedure (in short, the 'Code'), is of the opinion that there are reasonable grounds for believing that the accusation against such a person is *prima facie* true. Thus, the UA (P) Act, 1967, as the same stands today, puts serious fetters on the Court's discretion to allow an accused to go on bail.

(iii) Yet another development from the enactment of NIA Act, 2008, which came into force on 31.12.2008, is that the Central Government stands empowered to constitute a special agency to be called National Investigation Agency (in short, 'NIA') for investigation and prosecution of offences under the enactment specified in the Schedule of the NIA Act. Section 11 also empowers the Central Government to constitute Special Courts and, it is out of the order, passed by such a Special Court refusing to grant bail that these appeals have been preferred.

7. To be precise, these appeals, under Section 21(4) of the National Investigation Agency Act, 2008, (hereinafter to be referred as 'NIA Act'), arise against the order, dated 16.01.2016, passed by the learned Special Judge, NIA Act, Patna, in Special Case No.04 of 2013/ RC 01 of 2013, rejecting the application for bail made by the appellants.

8. The appellants, namely, Akhilesh Kumar Singh @ Manoj Kumar Singh @ Uttam @ Uttam Singh @ Tinku @ Tinku

Singh and Udit Singh @ Tulsi @ Tufan, were, initially, arrested in connection with Aurangabad Town P.S. Case No.115 of 2012 under Sections 16, 17, 18, 19, 20, 38 of the Unlawful Activities (Prevention) Act, 1967, read with Section 25 (1-AA), 26, 35 of the Arms Act, 1959, Section 4/5 of the Explosive Substance Act, 1908, and Section 17 of the Criminal Law Amendment Act.

9. The material facts, which have led to the present appeals, may, in brief, be set out as under:

(i) The Station House Officer of Aurangabad Police Station, at the said Police Station, on 26.03.2012, gave a *fardbeyan,* stating to the effect, *inter alia*, that on the preceding night, i.e., on 25.03.2012, at 8.00 PM, he received secret information that in the house of one Bisheshwar Singh, situated at Mohalla Rama Bandh, members of extremists organization had assembled to execute their plan and, on the information so received, entry was made regarding the said information and, having informed his senior police officers, about the said information, the informant, accompanied by his team of police personnel, reached the house of Bisheshwar Singh and found there a white colour Bolero bearing registration No. JH-03-D 0691 and, upon enquiry, the informant came to learn that the said vehicle belonged to Udit Singh @ Tulsi @ Tufan, a tenant in the house of Bisheshwar Singh, whereupon when rented room of accused Udit Singh @ Tulsi @ Tufan was searched by the

police, 20 liters of chemical and 25 pieces of plastic gloves were recovered. Upon interrogation, accused Udit Singh @ Tulsi @ Tufan, according to the first informant, disclosed to the police party that the vehicle had been given to him by one Arbind Jee, a senior member of the *Maobadi* organization, which is a banned organization, and the chemical, which had been so found, was to be used for preparing explosive substances for blowing of government buildings and bridges in the States of Bihar and Jharkhand. The chemical, so found, was, therefore, seized and, on the basis of the statement of accused Udit Singh @ Tulsi @ Tufan, he was arrested and, then, another raid was conducted, at 11.00 PM, in the same night, at the house of one Dwarika Sao and, on conducting search in the presence of two witnesses, cartridges of fire-arms, a sum of Rs.3,34,000/- in cash, a mobile set charger, grenade charger, magazines, etc., were, according to the *fardbeyan,* recovered from the room, which the present appellant, Akhilesh Kumar Singh @ Manoj Kumar Singh @ Uttam @ Uttam Singh @ Tinku @ Tinku Singh, had been allegedly using. The materials, so found, were seized and the appellant, Akhilesh Kumar Singh @ Manoj Kumar Singh @ Uttam @ Uttam Singh @ Tinku @ Tinku Singh, was arrested and, thereafter, another raid was conducted at the room of one Arjun at Mohalla- Jagdeo Nagar. The key of the said room had been given by the appellants, Udit Singh @ Tulsi @

Tufan and Akhilesh Kumar Singh @ Manoj Kumar Singh @ Uttam @ Uttam Singh @ Tinku @ Tinku Singh, and a search was made, in course thereof, three cartoons, containing twelve bottles of chemical, were recovered. The chemical, so found, was accordingly seized.

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(ii) Based on the information so lodged by the Station House Officer himself, Aurangabad Town P.S. case No.115 of 2012, under Sections 16, 17, 18, 19, 20, 38 of the Unlawful Activities (Prevention) Act, 1967, read with Section 25 (1-AA), 26, 35 of the Arms Act, 1959, Section 4/5 of the Explosive Substance Act, 1908, and Section 17 of the Criminal Law Amendment Act came to be registered.

(iii) In course of time, the appellants herein were granted bail. While the appellants were on bail, the case, so registered, was taken up by the National Investigation Agency, by virtue of notification, dated 13.03.2013, issued, in this regard, by the Government of India, and, upon completion of investigation, when *charge-sheet* was filed against the accused.

(iv) Special Case No. 04 of 2013 came to be, thus, born in the Court of the Special Judge, NIA, Patna, cognizance was, then, taken of the offences under Sections 16, 17, 18, 19, 20, 38 of the Unlawful Activities (Prevention) Act, 1967, read with Section 25 (1-AA), 26, 35 of the Arms Act, 1959, Section 4/5 of the

Explosive Substance Act, 1908, and Section 17 of the Criminal Law Amendment Act. Charges, for alleged commission of the offences aforementioned were, thereafter, framed against three persons including the present appellants, trial commenced and some witnesses have been examined.

(v) While the case was pending for investigation, the appellants made an application, under Section 439 of the Code of Criminal Procedure, in this Court, and the said application gave rise to Cr. Misc. No.16537 of 2013 and Cr. Misc. No.46182 of 2012 respectively and the appellant, Akhilesh Kumar Singh @ Manoj Kumar Singh @ Uttam @ Uttam Singh @ Tinku @ Tinku Singh, was granted bail by order, dated 17.04.2013, passed in Cr. Misc. No.16537 of 2013, whereas, appellant, Udit Singh @ Tulsi @ Tufan, was granted bail by the order, dated 22.03.2013, passed in Cr. Misc. No. 46182 of 2012.

(vi) Thus, while the appellants were on bail, at the time of their trial, because of their default in appearance in the learned trial Court, the learned trail Court forfeited the appellants' bail bonds and issued warrants of arrest accordingly. Pursuant thereto, the appellants were arrested and though both the appellants filed application for bail in the learned trail Court, their prayers were rejected by order, dated 16.01.2016, passed by the learned trial Court.

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10. Aggrieved by the denial of his bail, the appellant, Akhilesh Kumar Singh @ Manoj Kumar Singh @ Uttam @ Uttam Singh @ Tinku @ Tinku Singh, filed yet another application, under Section 439 of the Code of Criminal Procedure, in this Court, which gave rise to Cr. Misc. No. 16776 of 2016, but having realized that the case, in question, having been investigated and *charge-sheet* having been submitted by the NIA, refusal of bail becomes an appealable order, under Section 24(1) of the NIA Act, 2008, the appellant has withdrawn his application and filed the present appeal, which came to be registered as Cr. Appeal (D.B.) No. 431 of 2016; whereas, the appellant, Udit Singh @ Tulsi @ Tufan, has preferred the appeal, under Section 21(4) of the National Investigation Agency Act, 2008, which came to be registered as Cr. Appeal (D.B.) No. 610 of 2016, aggrieved by the order, dated 16.01.2016, aforementioned passed by the learned trial Court rejecting the prayer for bail.

11. We have perused the impugned order, dated 16.01.2016, passed by the learned Special Judge, NIA, Patna, in Special Case No.04 of 2013/R.C. 01 of 2013, declining to release the appellants on bail.

12. We have heard Mr. Sunil Kumar Pathak, learned Counsel, appearing on behalf of the appellants, and Mr. Akhileshwar Prasad Singh, learned Senior counsel, appearing for

the NIA. We have also heard Mr. S. D. Sanjay, learned Additional Solicitor General, appearing for the Union of India.

13. Before we deal with the merit of the present appeals, we would like to point out that Section 16 of the NIA Act embodies the procedure to be followed, while taking cognizance of offence(s) by a Special Court. Section 16 of the NIA Act is, therefore, of great relevance in the present case and is reproduced below:

> *"16. (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 that constitute such offence or upon a police report of such facts.*
>
> *(2) Where an offence triable by a Special Court is punishable with imprisonment for a term not exceeding three years or with fine or with both, the Special Court may, notwithstanding anything contained in Sub-section (1) of Section 260 or Section 262 of the Code, try the offence in a summary way in accordance with the procedure prescribed in the Code and the provisions of Sections 263 to 265 of the Code shall, so far as may be, apply to such trial:*
>
> *Provided that when, in the course of a summary trial under this sub-section, it appears to the Special Court that the nature of the case is*

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such that it is not desirable to try it in a summary way, the Special Court shall recall any witnesses who may have been examined and proceed to re-hear the case in the manner provided by the provisions of the Code for the trial of such offence and the said provisions shall apply to, and in relation to, a Special Court as they apply to and in relation to a Magistrate:

Provided further that in the case of any conviction in a summary trial under this section, it shall be lawful for a Special Court to pass a sentence of imprisonment for a term not exceeding one year and with fine which may extend to five lakh rupees.

(3) Subject to the 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.

(4) Subject to the other provisions of this Act, every case transferred to a Special Court under Sub-section (2) of Section 13 shall be dealt with as if such case had been transferred under Section 406 of the Code to such Special Court.

(5) Notwithstanding anything contained in the Code, but subject to the provisions of Section 299 of the Code, a Special

Court may, if it thinks fit and for reasons to be recorded by it, proceed with the trial in the absence of the accused or his pleader and record the evidence of any Witness, subject to the right of the accused to recall the witness for cross-examination."

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14. On a close reading of Section 16 of the NIA Act, what becomes clear is that notwithstanding the fact that, according to Section 16(3) of the NIA Act, a Special Court, for the purpose of trial of a scheduled offence, has all the powers of a Court of Session and shall try such offence *'as if it were a Court of Session'*, the Special Court does not become a Court of Session inasmuch as it is only the power of trial of a Court of Session that the Special Court, by virtue of Section 16(3), entitled to exercise. In other words, the expression, *'as if it were a Court of Session'*, which occur in Section 16(3), really reflects that it is only the procedure for trial of a Sessions case, which a Special Court can follow; but it is, otherwise, not a Court of Session.

15. We may pause here to point out that Section 16(3) of the NIA Act states, *"Subject to the 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*

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Session." Similar provisions existed in Section 14(3) of TADA. Both the provisions were, thus, *pari materia*. The Supreme Court had the occasion to interpret Section 14(3) in ***Usmanbhai Dawoodbhai Memon Vs. State of Gujarat,*** reported in (1988) 2 SCC 271. Referring to the expression *'as if it were'*, appearing in Section 3 of the TADA, the Supreme Court pointed out, in ***Usmanbhai Dawoodbhai Memon*** (supra), that though the Parliament has vested, by using the words *'as if it were'*, in the Designated Court, the status of a Court of Session, yet this legal fiction, contained in Section 14(3), must be restricted to the procedure to be followed for trial of an offence under the TADA, i.e., trial must be in accordance with the procedure prescribed, by the Code, in respect of a trial before a Court of Session in so far as it is applicable. The relevant observations, made in this regard, which appear at para 18, read as under:

> *"18. No doubt, the legislature by the use of the words "as if it were" in Section 14(3) of the Act vested a Designated Court with the status of a Court of Session. But, as contended for by Learned Counsel for the State Government, the legal fiction contained therein must be restricted to the procedure to be followed for the trial of an offence under the Act i.e. such trial must be in accordance with the procedure prescribed under the Code of the trial before a Court of Session,*

insofar as applicable."

16. The above impression gets strengthened from the fact that Section 16(1) provides that a Special Court may take cognizance of offence, without the accused being committed to it for trial, which, in turn, implies that a Special Court takes cognizance of an offence as a Court of original jurisdiction and does not have the trappings of a Court of Session, which cannot, ordinarily, take, in the light of Section 193 of the Code, cognizance of an offence, unless the case, in terms of Section 209 of the Code, is committed to it, for, Section 193 states that a Court of Session cannot take cognizance of an offence as a Court of original jurisdiction except when the Code or the special law provides otherwise. Thus, a Court of Session could not have taken cognizance of an offence, under the NIA Act, without the case having been committed to it; but, as the NIA Act provides for taking cognizance of an offence by a Court of Session, without the case being committed to it, the Court of Session can take cognizance of offence, under the NIA Act, as the Court of original jurisdiction. Such a deviation is possible even in respect of a specified offence under the Indian Penal Code. For instance, Sub-section (2) of Section 199 of the Code provides that when an offence, falling under Chapter XXI of the IPC, is alleged to have committed against a person, who, at the time of such commission,

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is the President of India, Vice-President of India, Governor of a State, the Administrator of a Union territory or a minister of the Union or of a State or of a Union territory, or any other public servant employed in connection with the affairs of the Union or of a State in respect of his conduct in the discharge of his functions, a Court of Session may take cognizance of such an offence, without the case being committed to it, upon a complaint, in writing, made by the Public Prosecutor.

17. Section 16 of the NIA Act also makes it clear that cognizance of an offence can be taken by a Special Court on the basis of a complaint of facts that constitute such offence or upon a police report of such facts. Thus, a Special Court can take cognizance of an offence not only on the basis of a complaint, as defined in Section 2(d) of the Code, but also on the basis of a police report, as defined in Section 2(r) of the Code, the police report being, as indicated above, the report, which the police submits, under Section 173(2), on completion of investigation.

18. The question, which, now, arises for consideration is: ***When a Special Court takes cognizance of an offence under the NIA Act, is it exercising its powers given to a Magistrate under Section 190 of the Code, though it (i.e., the Special Court), in terms of Section 16(3) of the NIA Act, has all the powers of a***

Court of Session?

19. We have already indicated above that unlike a Court of Session, which cannot try a case, unless committed to it, under Section 209 of the Code, by a court of competent jurisdiction, a Special Court can take cognizance of an offence without any order of commitment being issued by any Magistrate, if the Special Court receives a complaint of facts that constitute an offence, or, upon police report of such facts. Since there is nothing in the NIA Act to show that a complaint has to be necessarily made by a public servant, it clearly follows that any individual can file a complaint before a Special Court. When such a complaint is filed, what is the course of action, which the Special Court can adopt? Obviously, the Special Court may take, in terms of Section 16(1), cognizance of the offence, which the complaint may disclose, and proceed to record, in terms of Section 200 of the Code, the statements of the complainant and his witness(es), if any, present. If the Special Court feels the necessity, it may even hold, in terms of Section 202 of the Code, an enquiry, and, on completion of such enquiry, it may either, in terms of Section 203 of the Code, dismiss the complaint, or, in terms of Section 204 of the Code, issue processes.

20. When a Special Court can take cognizance without

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a case being committed to it, unlike what is required to be done in the case of a Court of Session, it logically follows that a Special Court is a court of original jurisdiction and cannot be regarded as a Court of Session except to the extent as provided by the NIA Act itself. The proposition, that a Special Court is not a Court of Session, is also supported by the fact that the NIA Act empowers a Special Court to try certain classes of offences, in a summary way, in the same manner as is done by a Magistrate in exercise of his powers under Section 263 and 265 of the Code.

21. It has been pointed out by the Supreme Court, in ***A.R. Antulay v. R.S. Nayak***, reported in (1984) 2 SCC 500, that the Special Court is an addition to the classes of courts, which Section 6 of the Code provides for, and it is not necessary that a Special Court has to be either a Court of Magistrate or a Court of Session. Far from this, a Special Court, according to ***A.R. Antulay*** (supra), may be a combination of both. Shorn of all embellishments, the Court of a Special Judge, Supreme Court observed, is a court of original criminal jurisdiction and, except those powers and functions, which are specifically conferred on such a court, or, specifically denied, it has to function as a Court of original criminal jurisdiction not being hide-bound by the terminological status description of Magistrate or a Court of Session and that it will enjoy all the powers, which a court of

original jurisdiction enjoys, save and except the ones, which are specifically denied.

22. Section 5(3) of the P.C. Act, 1988, reads: *"save as provided in Sub-section (1) or Sub-section (2), the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), shall, so far as they are not inconsistent with this Act, apply to the proceedings before a special Judge; and for purposes of the said provisions, the Court of the special Judge shall be deemed to be a Court of Session and the person conducting a prosecution before a special Judge shall be deemed to be a public prosecutor"*; whereas Section 16(3) of the NIA Act reads:

> *"subject to the 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."*

23. If the provisions, contained in Section 5(3) of the P.C. Act, 1988, and Section 16(3) of the NIA Act are dispassionately analyzed, it becomes clear that under the NIA 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 the procedure, prescribed in the

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Code, for trial before a Court of Session is concerned. The expression, *'as if it were a Court of Session'*, does not mean that the Special Court would become a Court of Session or, when a Special Court is not constituted, the Court of Session, while functioning as the Special Court under the NIA Act, will remain as a Court of Session. Thus, as far as the trial of Scheduled offences are concerned, the Special Court will have the power of the Court of Session as far as such power is, in the light of the modified provisions of the NIA Act, exercisable as regards the procedure of trial by the Special Court or the Court of Session, as the case may be. But, so far as taking of cognizance of Scheduled offences is concerned, the Special Court's role is of the court of original criminal jurisdiction. Notwithstanding, therefore, the fact that while functioning as a trial Court, the Special Court or, in the absence of constitution of a Special Court, a Court of Session shall be treated *'as if it were a Court of Session'*, the fact of the matter, in the light of ***A.R. Antulay*** (supra), remains that irrespective of the fact as to whether a Special Court has been constituted or not under the NIA Act, a Special Court, if constituted, or the Court of Session, if the Special Court has not been constituted, is, under the NIA Act, not a Court of Session, this Special Court does not suffer from the trappings of a Court of Session and, while trying an offence, it has to follow, so far as applicable, the procedure for trial

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of a sessions case, as envisaged by the Code. The Special Court, under the NIA Act, will, however, remain, for the purposes, other than trial, a Court of original criminal jurisdiction. Necessarily, therefore, such a Court, being a Court of original jurisdiction, is the appropriate Court (and not the Court of Magistrate), which can authorize detention of a person accused of having committed an offence under the NIA Act and remand him to custody, police or judicial, in terms of the provisions of Section 167(2) of the Code.

24. Thus, a Special Court, under the NIA Act, also exercises the power of a Magistrate as contemplated under Section 167 of the Code, when the case is pending for investigation, though such a Court has the power of a Court of Session so far as the trial is concerned except, of course, to the extent as its power may stand modified by the relevant provisions of the statute enacted in this regard.

25. It is only in exceptional circumstances, as provided by Section 167(2-A) of the Code, that an accused, who is arrested in connection with an offence, under such a *'special law'*, as the NIA Act is, can be produced before a Magistrate for the purpose of transit to the Special Court, if immediate production, as envisaged by Section 167, before the Special Court of competent jurisdiction, is not possible, or, unless the *'special law'* itself provides for such

powers of production before a Magistrate.

26. For instance, in a case, under the Narcotic Drugs and Psychotropic Substances Act, 1985, (in short, 'the NDPS Act'), production of an arrested accused before a Judicial Magistrate, instead of a Special Court, is permissible, and such Magistrate may order detention of such a person, in custody, for a period not exceeding fifteen days. This can be well-understood by a reference to the scheme of the NDPS Act, which empowers a Special Court to take cognizance of an offence on the basis of *'police report'*. Since no commitment as provided in Section 209 Code of Criminal Procedure is required to be made in the NDPS Act, the power to remand the accused to the police or judicial custody has to be exercised by the Special Court, constituted under the NDPS Act. In order to, however, enable the investigating agency to produce an accused in connection with an offence under the NDPS Act, before a Court other than a Special Court, specific provisions, in the form of Section 36(a)(b) in the NDPS Act, have been made, which empower a Magistrate to remand to custody such an accused for the initial period of 15 days. But, thereafter, the accused can be detained only on the basis of remand order passed by the Special Court or where the Special Court, under the NDPS Act, has not been constituted, by the Court of Session. As a corollary, what one can very safely conclude is that unless a *'special law'* provides a

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Magistrate to pass orders of remand despite the Special Court (if the Special Court has been constituted or the Court of Session, when a Special Court has not been constituted), no order of remand of such an accused can be made by a Magistrate except during the transit period as contemplated by Section 167(2-A) of the Code or where the statute itself provides for such production before some other authority, such as, a Judicial Magistrate, as in the case of NDPS Act. Now, the question is: ***When such an arrested person applies for bail, whether the application for bail, so made, would be treated to be an application under Section 439 of the Code on the ground that a Special Court has the power of a Court of Session so far as the trial of the offence is concerned or is the Special Court, when such Court is constituted, or the Court of Session, when the Special Court has not been constituted, as the case may be, can entertain such an application for bail only in terms of Section 437 of the Code?***

27. The questions, therefore, are: ***When a person, arrested in connection with a Scheduled offence, is, on being taken into custody, brought, or pursuant to the fact that he is wanted in connection with a Scheduled offence, appears, before a Special Court, when a Special Court stands constituted under the NIA Act, or before a Court of Session, when the Special Court has not been constituted, what is the source of power, if***

any, of the Special or of the Court of Session, as the case may be, to consider an application for bail, if such an accused applies for bail. Will a Special Court or Court of Session exercise powers in respect of such an application for bail under Section 437 or 439 of the Code or under some other provisions of the NIA Act?

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28. In order to reach a correct answer to the questions posed above, one has to carefully analyse the provisions of Section 437 *vis-a-vis* Section 439. With this end in view, both these sections are reproduced herein below:

> *"437. When bail may be taken in case of non-bailable offence. - (1). When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Sessions, he may be released on bail, but-*
>
> *(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life; (ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, of he had been previously convicted on two or more occasions of*

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a cognizable offence punishable with imprisonment for three years or more but not less than seven years:

Provided that the Court may direct that a person referred to in Clause (i) or Clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm:

Provided further that the Court may also direct that a person referred to in Clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason.

Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court:

Provided also that no person shall, if the offence alleged to have been committed by him is punishable with death, imprisonment for life, or imprisonment for seven years or more, be released on bail by the Court under this sub-section without giving an opportunity of hearing to the Public Prosecutor.

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or

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trial as the case may be, that there are no reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall, subject to the provisions of Section 446A and pending such inquiry, be released on bail, or, at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(3) When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI of the Indian Penal Code (45 of 1860) or abetment of, or attempt to commit, any such offence, is released on bail under Sub-section (1) the Court shall impose the conditions,-

(a) that such person shall attend in accordance with the conditions of the bond executed under this Chapter,

(b) that such person shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and

(c) that such person shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts

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of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence, and may also impose, in the interests of justice, such other conditions as it considers necessary.

(4) An officer or a Court releasing any person on bail under Sub-section (1), or Sub-section (2), shall record in writing his or its reasons or special reasons for so doing.

(5) Any Court which has released a person on bail under Sub-section (1), or Sub-section (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody.

(6) If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not cocluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.

(7) If, at any time after the conclusion of the trial of a person accused of any non-bailable offence and before judgment is delivered the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the

accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered."

"439. Special powers of High Court or Court of Session regarding bail. - (1) A High Court or Court of Session may direct—

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in Sub-section (3) of Section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;

(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified:"

29. From a careful reading of the provisions contained in Section 437(1), what becomes transparent is that Section 437(1) gives power to grant bail to a court *'other than the High Court or Court of Session'*. Admittedly, a Special Court, under the NIA Act, is not a Court of Session and even the Court of Session, while acting as the Special Court under the NIA Act, does not, as already discussed above, act as a Court of Session. The Special Court is also not a High Court, for, a Special Court, as defined in Section 2(h), is a Court, which is constituted, under Section 11, by the Central Government or, under Section 22, by a State Government.

30. The expression, *'a Court other than the High Court, or the Court of Session'*, has very wide meaning and includes, within its ambit, not only the Magisterial Courts, but all such Courts, including a Special Court, which do not fall within the expressions, *'the High Court'* or *'the Court of Session'*.

31. A Special Court, under the NIA Act, not being a High Court, or a Court of Session, would obviously fall within the expression *'a Court other than the High Court or the Court of Session'*.

32. It is also well to remember that merely because of the fact that a Court of Session can function as a Special Court if Special Court is not constituted under a special law, it does not follow that the Court of Session, which exercises the powers of the Special Court, would become a Court of Session. In the given scheme of a *'special law'*, a Court of Session, as already pointed out in ***A.R. Antulay*** (supra), may become a Court of original jurisdiction with no trappings of the Court of Session. In such circumstances, merely because of the fact that a Sessions Judge exercises the jurisdiction of a Special Court, the Special Court would not be treated, or would not be deemed, to have become, a Court of Session.

33. When the Special Court, in the case at hand, falls

within the expression, *'a Court other than the High Court or the Court of Session'*, which appears in Section 437(1), it logically follows that a Special Court would run all the limitations, which are imposed by Section 437 on the powers of a Court, covered by Section 437, in respect of granting of bail. Logically extended, this will mean that, amongst other limitations, as specified by Sub-section (1) of Section 437, a Special Court would not be able to release a person on bail if there appears a reasonable ground for believing that he has been guilty of offences punishable with death or imprisonment for life except when a case is covered by the proviso to Section 437(1), which says that even such an accused person may be released, if the accused person is a woman or is sick or is infirm or if, for any other special reason, the Special Court considers it just and proper to release such a person.

34. Unlike, therefore, the powers, which a Court of Session enjoys, while considering a bail application, under Section 439, the Special Court runs the limitations, which are imposed by Section 437. Resultantly, therefore, a Special Court cannot enlarge a person on bail except to the extent as provided in Section 437. Apart from the limitations imposed on the powers of a Special Court as are prescribed by Section 437, even the special statute, which creates the Special Court, can impose additional limitations. No wonder, therefore, that the power to grant bail, in the case of

NDPS, is much more restricted than what Section 437 provides inasmuch as Section 37 of the NDPS imposes further limitations, on the Special Court, in matters of granting bail and such limitations would apply to a Sessions Judge even if he acts as a Special Court under the NDPS Act, for, while exercising the powers of a Special Court, the Session Judge does not act or function as a Court of Session, but as a Court of ordinary criminal jurisdiction.

35. We may pause, at this stage, to point out that with the object of prevention of, and for coping with terrorist and disruptive activities and for matters connected with or incidental thereto, the Terrorist and Disruptive Activities (Prevention) Act, 1987, popularly known as 'TADA', was enacted. Section 20(8) of the TADA contained provisions with regard to the Designated Court's power to grant bail, the Designated Court being a Court constituted, under the TADA, to try offences under the TADA. Section 20(8) read:

> *"(8) Notwithstanding anything contained in the Code, no person, accused of an offence punishable under this Act or any rule made thereunder shall, if in custody, be released on bail or on his own bond unless,-*
>
> *(a) the Public Prosecutor has been given an opportunity to oppose the application*

for such release, and

(b) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail."

36. In ***Usmanbhai Dawoodbhai Memon*** reported in (1988) 2 SCC 271, the Supreme Court had an occasion to consider the question: *Whether Section 439 of the Code could be invoked by a person accused of an offence under the TADA?* Yet Another question, which arose, in ***Usmanbhai Dawoodbhai Memon*** (supra), was: ***Whether the source of power of the Designated Court to grant bail was Section 20(8) of the TADA, which I have quoted above, or Section 437 of the Code?***

37. In ***Usmanbhai Dawoodbhai Memon*** (supra), the application for bail having been refused by the Designated Court constituted under the TADA Act, the accused had applied for bail to the High Court under Section 439 read with Section 482 of the Code. The High Court rejected the bail application on the ground that it had no jurisdiction to entertain any such application under Section 439 or by taking recourse to its inherent powers under Section 482 Code of Criminal Procedure. The reason, assigned by the High Court, was that the TADA Act, being a special enactment and the Designated Court, constituted thereunder, not being a

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Court subordinate to the High Court, and, further, that in view of the provisions contained in Sub-section (1) of Section 19 of the Act, which provided that an appeal, as a matter of right, shall lie, against any judgment, sentence or order of the Designated Court, not being an interlocutory order, to the Supreme Court, and in view also of the explicit bar, contained in Sub-section (2) thereof, which provided that no appeal or revision shall lie before any court, there was exclusion of jurisdiction of the High Court in regard to the proceedings before a Designated Court.

38. It was also urged before the Supreme Court, in ***Usmanbhai Dawoodbhai Memon*** (supra), that since a Court of Session, in the absence of constitution of a Designated Court, can exercise the powers of the Designated Court, the source of power to grant bail is Section 439 and not Section 437 of the Code. This was resisted by the Government by contending that the source of power of a Designated Court is really traceable to Section 437 and not Section 439 and that a Designated Court is nothing, but, *'a Court other than the High Court or the Court of Session'*, an expression, which appears in Sub-section (1) of Section 437. This construction was accepted by the Court in ***Usmanbhai Dawoodbhai Memon*** (supra). The Supreme Court pointed out, in ***Usmanbhai Dawoodbhai Memon*** (supra), that the use of ordinary courts does not imply use of standard procedure too. Just as the

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legislature can create a special court to deal with a special problem, it can also create new procedures within the existing system and though the Parliament, in its wisdom, has adopted the framework of the Code, yet the Code is not applicable except to the extent as the provisions, contained in the TADA, make it possible to apply the provisions of the Code.

39. It is worth noticing that the Supreme Court pointed out, in ***Usmanbhai Dawoodbhai Memon*** (supra), that the jurisdiction and power of a Designated Court are derived from the TADA and it is the TADA that one must, primarily, look to, for the purpose of deciding the question as to whether the Designated Court's power to grant bail is relatable to Section 437 or 439 and/or whether the High Court has the power to invoke its jurisdiction, under Section 439 or 482, to grant bail under the TADA, and, having examined the entire scheme of the TADA, the Supreme Court, in ***Usmanbhai Dawoodbhai Memon*** (supra), concluded that the source of the power of a Designated Court to consider bail is traceable to Section 437 and not Section 439 inasmuch as the Designated Court falls within the expression, *"a Court other than the High Court or the Court of Session"*.

40. Similarly, in the case at hand, one has to, primarily, look into the provisions of the scheme of the NIA Act in order to

determine if the power of the Special Court, or the Court of Session, as the case may be, in respect of grant of bail, is relatable to Section 437 or 439 and/or whether the High Court has the power to grant bail to an accused, under the NIA Act, by invoking its jurisdiction under 439 of the Code.

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41. We may pause here to point out that Section 16(3) of the NIA Act states:

> *"Subject to the 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."*

42. Similar provisions existed in Section 14(3) of TADA. Both the provisions are, thus, *pari materia*. The Supreme Court had the occasion to interpret Section 14(3) of the TADA in ***Usmanbhai Dawoodbhai Memon*** (supra). Referring to the expression 'as if it were', appearing in Section 3 of the TADA, the Supreme Court pointed out, in ***Usmanbhai Dawoodbhai Memon*** (supra), that though the Parliament has vested, by using the words, *'as if it were'*, in the Designated Court, the status of a Court of Session, yet this legal fiction, contained in Section 14(3), must be restricted to the procedure to be followed for trial of an offence

under the TADA. i.e., trial must be in accordance with the procedure prescribed, by the Code, in respect of a trial before a Court of Session in so far as it is applicable. The relevant observations, made in this regard, which appear at para 18, read as under:

> *"18. No doubt, the legislature by the use of the words "as if it were" in Section 14(3) of the Act vested a Designated Court with the status of a Court of Session. But, as contended for by Learned Counsel for the State Government, the legal fiction contained therein must be restricted to the procedure to be followed for the trial of an offence under the Act i.e. such trial must be in accordance with the procedure prescribed under the Code of the trial before a Court of Session, insofar as applicable. We must give some meaning to the opening words of Section 14(3) "subject to the other provisions of the Act" and adopt a construction in furtherance of the object and purpose of the Act. The manifest intention of the legislature is to take away the jurisdiction and power of the High Court under the Code with respect to offences under the Act. No other construction is possible. The expression "High Court" is defined in Section 2(1)(e) but there are no functions and duties vested in the High Court. The only mention of the High Court is in Section 20(6) which provides that Sections 366-371 and Section 392 of the Code shall apply in relation to*

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a case involving an offence triable by a Designated Court, subject to the modifications that the references to "Court of Session" and "High Court" shall be construed as references to "Designated Court" and "Supreme Court" respectively Section 19(1) of the Act provides for a direct appeal, as of right, to the Supreme Court from any judgment or order of the Designated Court, not being an interlocutory order. There is thus a total departure from different classes of criminal courts enumerated in Section 6 of the Code and a new hierarchy of courts is sought to be established by providing for a direct appeal to the Supreme Court from any judgment or order of a Designated Court, not being an interlocutory order, and substituting the Supreme Court for the High Court by Section 20(6) in the matter of confirmation of a death sentence passed by a Designated Court."

43. Having held that the source of power of a Designated Court, under the TADA, to grant bail is traceable to Section 437 inasmuch as the Designated Court falls within the expression *'a Court other than the High Court or Court of Session'*, the Supreme Court further clarified that the Designated Court's power to grant bail is not contained in Section 20(8); rather, Section 20(8) places only limitations on such power in addition to the limitations, which the Code has already imposed, on a

Designated Court, by making it a Court within the ambit of Section 437. This was made explicit by Section 20(9), which provided that the limitations on the granting of bail, specified in Sub-section (8), are in addition to the limitations under the Code or any other law for the time being in force.

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44. The Supreme Court has also pointed, in ***Ushmanbhai Dawoodbhai Memon*** (supra), that the powers of the High Court to entertain even an appeal has not been made available under the TADA inasmuch as an appeal lies, under Section 19 of the TADA, to the Supreme Court against any judgment, sentence or order passed by the Designated Court. Pointing out that the State has enacted TADA Act by treating terrorism as a special problem and created a Special Court to deal with such problem, the fact that even under the TADA, the ordinary courts are being used under the scheme of the Act, it does not, as a corollary, imply that since the ordinary courts are being used, standard procedure, which ordinary courts adhere to, must be followed by the Special Court too. The Supreme Court has pointed out that when the legislature can create a Special Court to deal with a special problem, it can also create a new procedure within the existing system and, in the case of TADA, while the Parliament, in its wisdom, has adopted the framework of the Code, it has chosen not to apply the procedures of the Code in its entirety and since the

jurisdiction and the powers are derived by a Designated Court from the TADA, it is the TADA, which should decide the question as to whether a High Court can invoke its powers, under Section 439 and/or 482 of the Code, for the purpose of considering an application for bail, or not. The relevant observations, appearing at para 17, in ***Ushmanbhai Dawoodbhai Memon*** (supra), read:

> *"17. The legislature by enacting the law has treated terrorism as a special criminal problem and created a special court called a Designated Court to deal with the special problem and provided for a special procedure for the trial of such offences. A grievance was made before us that the State Government by notification issued under Section 9(1) of the Act has appointed District and Sessions Judges as well as Additional District and Sessions Judges to be judges of such Designated Courts in the State. The use of ordinary courts does not necessarily imply the use of standard procedures. Just as the legislature can create a special court to deal with a special problem, it can also create new procedures within the existing system. Parliament in its wisdom has adopted the framework of the Code but the Code is not applicable. The Act is a special Act and creates a new class of offences called terrorist acts and disruptive activities as defined in Sections 3(1) and 4(2) and provides for a special procedure for the trial of such offences.*

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Under Section 9(1), the Central Government or a State Government may by notification published in the Official Gazette, constitute one or more Designated Courts for the trial of offences under the Act for such area or areas, or for such case or class or group of cases as may be specified in the notification. The jurisdiction and power of a Designated Court is derived from the Act and it is the Act that one must primarily look to in deciding the question before us. Under Section 14(1), a Designated Court has exclusive jurisdiction for the trial of offences under the Act and by virtue of Section 12(1), it may also try any other offence with which the accused may, under the Code, be charged at the same trial if the offence is connected with such other offence. Where an enactment provides for a special procedure for the trial of certain offences, it is that procedure that must be followed and not the one prescribed by the Code."

45. Leaving no one in doubt that the source of power of a Designated Court, under the TADA, to grant bail is traceable to Section 437 of the Code and not to Section 20(8) and that Section 20(8) merely imposes limitations in addition to the limitations, which Section 437 already imposes, the Supreme Court observed, in ***Ushmanbhai Dawoodbhai Memon*** (supra) and held at para 20, thus:

"...It is quite obvious that the source

of power of a Designated Court to grant bail is not Section 20(8) of the Act but it only places limitations on such powers. This is implicit by Section 20(9) which in terms provides that the limitations on granting of bail specified in Sub-section (8) are in addition to the limitations under the Code or any other law for the time being in force on granting of bail. It, therefore, follows that the power derived by a Designated Court to grant bail to a person accused of an offence under the Act, if in custody, is derived from the Code and not from Section 20(8) of the Act."

46. What emerges from the above discussion is that it is the Special Court under the NIA Act, or the Court of Session, when the Special Court has not been constituted, where an accused is required to be produced if he is arrested in connection with an offence punishable under the NIA Act and, upon his production, it is the Special Court or the Court of Session, as the case may be, which shall have the power to grant bail. The source of power of the Special Court or the Court of Session, as the case may be, to consider an application for bail is traceable to, and governed by, the provisions of Section 437 of the Code and while considering such an application for bail, the Special Court or the Court of Session, as the case may be, will not exercise the power of bail as if it is considering an application for bail under Section 439 and, consequently, the Special Court or the Court of Session, as the case

may be, would have all the limitations, which a Magistrate has, while deciding an application for bail, under Section 437 of the Code.

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47. Having, thus, settled the fact that under the NIA Act, the Special Court or the Court of Session, as the case may be, exercises the power to grant or refuse bail, by taking recourse to Section 437 of the Code and not any other provisions of the Code, not even Section 439 thereof, or under any of the provisions of the NIA Act, we, now, turn to the question: ***Whether a High Court, within the scheme of the NIA Act, can take resort to Section 439 of the Code, particularly, when the Court of Session, while acting as a Special Court, under the NIA Act, is denuded of its power contained in Section 439?***

48. Before proceeding further, it may be noted that Section 20(7) of the TADA barred application of Section 438 of the Code to the offence punishable under the TADA. Thus, the provisions, contained in Section 438, could not have been invoked by a High Court if a person, apprehending arrest in connection with an offence under the TADA, applied for pre-arrest bail; but there was not such express bar imposed on the High Court's power as far as Section 439 of the Code was concerned. Recognising this fact, the Supreme Court, in ***Usmanbhai Dawoodbhai Memon***

(supra), held that though there is no express provision excluding applicability of Section 439, similar to the one as contained in Section 20(7), which expressly barred the application of Section 438 of the Code, the scheme of the TADA, if analysed, leads to the same conclusion that applicability of Section 439 stands barred. The relevant observations, made in this regard, in ***Usmanbhai Dawoodbhai Memon*** (supra), which appear at para 19, read as under:

> *"19. Though there is no express provision excluding the applicability of Section 439 of the Code similar to the one contained in Section 20(7) of the Act in relation to a case involving the arrest of any person on an accusation of having committed an offence punishable under the Act or any rule made thereunder, but that result must, by necessary implication, follow. It is true that the source of power of a Designated Court to grant bail is not Section 20(8) of the Act as it only places limitations on such power. This is made explicit by Section 20(9) which enacts that the limitations on granting of bail specified in Section 20(8) are "in addition to the limitations under the Code or any other law for the time being in force". But it does not necessarily follow that the power of a Designated Court to grant bail is relatable to Section 439 of the Code. It cannot be doubted that a Designated Court is "a court other than the*

High Court or the Court of Session" within the meaning of Section 437 of the Code. The exercise of the power to grant bail by a Designated Court is not only subject to the limitations contained therein, but is also subject to the limitations placed by Section 20(8) of the Act."

49. I may, now, pause here to point out that Section 19 of the TADA contained provisions for appeal, which read as under:

"19. Appeal-(1) Notwithstanding anything contained in the Code, an appeal shall lie as a matter of right from any judgment, sentence or order, not being an interlocutory order, of a Designated Court to the Supreme Court both on facts and on law.

(2) Except as aforesaid, no appeal or revision shall lie to any court from any judgment, sentence or order including an interlocutory order of a Designated Court.

(3) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment; sentence or order appealed from:

Provided that the Supreme Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the Appellant had sufficient cause for not preferring the appeal within the period

of thirty days."

50. Sub-section (1) of Section 19 made it clear that notwithstanding anything contained in the Code, an appeal would lie, as a matter of right, to the Supreme Court from any judgment, sentence or order, not being an interlocutory order, of a Designated Court, both on facts and on law. Section 19(2) made it clear that no other appeal or revision would lie to any Court from any judgment, sentence or order, including an interlocutory order, of a Designated Court. The effect was that since the High Court had no jurisdiction in respect of any judgment, sentence or order, including an interlocutory order, of a Designated Court to entertain an appeal or a revision, it logically followed that even in respect of an order, refusing bail, which is an interlocutory order, no appeal or revision could have lied to the High Court against the order of a designated Court refusing to grant bail.

51. Making the above position of law clear, the Supreme Court, in ***Usmanbhai Dawoodbhai Memon*** (supra), observed that though, unlike Section 20(7), which expressly barred the High Courts from entertaining an application for pre-arrest bail under Section 438 of the Code in respect of an offence under the TADA, the jurisdiction of the High Court to entertain an appeal or revision, including an application under Section 439 stands, by necessary implication, excluded. The Supreme Court also pointed

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out that if it were held that the source of power of the Designated Court to grant bail is Section 439, it would imply that not only the High Court, but also the Court of Session would be entitled to grant bail on such terms as it deems fit, for, the power to grant bail, under Section 439, is unfettered by the conditions and limitations, which Section 437, otherwise, imposes; and it would, thus, run counter to the express prohibition contained in Section 20(8) of the Act, which enjoins that notwithstanding anything in the Code, no person, accused of an offence, punishable under the Act or any rule made thereunder, shall, if in custody, be released on bail unless the conditions set forth in Clauses (a) and (b) are satisfied.

52. The Supreme Court pointed out, in ***Usmanbhai Dawoodbhai Memon*** (supra), that it all depends on the scheme of a particular enactment as to whether the power of the High Court and/or of the Court of Session to grant bail, under Section 438 and 439, exists or not. The Supreme, in ***Usmanbhai Dawoodbhai Memon*** (supra), upheld the view expressed by the High Court that it had no jurisdiction to entertain an application for bail under Section 439 or under Section 482 of the Code. The relevant observations, made in this regard, at para 22, in ***Usmanbhai Dawoodbhai Memon*** (supra), read:

"Upon that view, the court in ***Balchand Jain*** *case held that Rule 184 of the*

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Defence and Internal Security of India Rules, 1971, does not take away the power conferred on a Court of Session or a High Court under Section 438 of the Code to grant anticipatory bail. We have been referred to the decision of R.S. Pathak, C.J. speaking for a Division Bench of the Himachal Pradesh High Court in ***Ishwar Chand v. State of Himachal Pradesh*** *holding that Rule 184 did not affect the jurisdiction and power of the High Court under Sections 438 and 4239 of the Code which were independent of the power of the special tribunal to try an offence for contravention of an order made under Section 3 of the Defence and Internal Security of India Act, 1971. Both these decisions are clearly distinguishable. The view expressed in* ***Balchand Jain*** *case is not applicable at all for more than one reason. There was nothing in the Defence and Internal Security of India Act or the Rules framed thereunder which would exclude the jurisdiction and power of the High Court altogether. On the contrary, Section 12(2) of that Act expressly vested in the High Court the appellate jurisdiction in certain specified cases. In view of the explicit bar in Section 19(2), there is exclusion of the jurisdiction of the High Court. It interdicts that no appeal or revision shall lie to any court, including the High Court, against any judgment, sentence or order, not being an interlocutory order, of a Designated Court. The Act by Section 16(1) confers the right of appeal*

both on facts as well as on law to the Supreme Court. Further, while it is true that Chapter 33 of the Code is still preserved as otherwise the Designated Courts would have no power to grant bail, still the source of power is not Section 439 of the Code but Section 437 being a court other than the High Court or the Court of Session. Any other view would lead to an anomalous situation. If it were to be held that the power of a Designated Court to grant bail was relatable to Section 439 it would imply that not only the High Court but also the Court of Session would be entitled to grant bail on such terms as they deem fit. The power to grant bail under Section 439 is unfettered by any conditions and limitations like Section 437. It would run counter to the express prohibition contained in Section 20(8) of the Act which enjoins that notwithstanding anything in the Code, no person accused of an offence punishable under the Act or any rule made thereunder shall, if in custody, be released on bail unless the conditions set forth in Clauses (a) and (b) are satisfied. Lastly, both the decision in ***Balchand Jain*** *and that in* ***Ishwar Chand*** *turn on the scheme of the Defence and Internal Security of India Act, 1971. They proceed on the well recognised principle that an ouster of jurisdiction of the ordinary courts is not to be readily inferred except by express provision or by necessary implication. It all depends on the scheme of the particular Act as to whether the power of the*

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> *High Court and the Court of Session to grant bail under Sections 438 and 439 exists. We must accordingly uphold the view expressed by the High Court that it had no jurisdiction to entertain an application for bail under Section 439 or under Section 482 of the Code."*

53. Thus, in no uncertain words, the Supreme Court, in ***Usmanbhai Dawoodbhai Memon*** (supra), held that with regard to bail, under the TADA, the High Court's jurisdiction, under Section 439 as well as Section 482 of the Code stood excluded.

54. In ***V.C. Shukla v. State*** reported in 1980 Supp SCC 92, the Supreme Court has pointed out that the expression *'interlocutory order'*, which appears in Section 19(1), is in contradistinction to what is known as *'final order'* and denotes an order of purely interim or temporary nature. The Supreme Court further observed, in ***V.C. Shukla*** (supra), that it cannot be doubted that grant or refusal of bail is, essentially, an interlocutory order, for, there is no finality attached to an order granting or refusing bail and such an application for bail can always be renewed from time to time. Referring to this aspect of the law decided in ***VC Shukla*** (supra), the Supreme Court, in no uncertain words, observed, in this regard, at para 24, in ***Usmanbhai Dawoodbhai Memon*** (supra), thus:

> *"24. At the conclusion of the hearing on the legal*

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aspect, Shri Poti, Learned Counsel appearing for the State Government contended, on instructions, that an order passed by a Designated Court for grant or refusal of bail is not an "interlocutory order" within the meaning of Section 19(1) of the Act and therefore an appeal lies. We have considerable doubt and difficulty about the correctness of the proposition. The expression "interlocutory order" has been used in Section 19(1) in contradistinction to what is known as final order and denotes an order of purely interim or temporary nature. The essential test to distinguish one from the other has been discussed and formulated in several decisions of the Judicial Committee of the Privy Council. Federal Court and this Court. One of the tests generally accepted by the English Courts and the Federal Court is to see if the order is decided in one way, it may terminate the proceedings but if decided in another way, then the proceedings would continue. In ***V.C. Shukla v. State****, Fazal Ali, J. in delivering the majority judgment reviewed the entire case law on the subject and deduced therefrom the following two principles, namely, (i) that a final order has to be interpreted in contradistinction to an interlocutory order; and (ii) that the test for determining the finality of an order is whether the judgment or order finally disposed of the rights of the parties. It was observed that these principles apply to civil as well as to criminal cases. In criminal*

proceedings, the word "judgment" is intended to indicate the final order in a trial terminating in the conviction or acquittal of the accused. Applying these tests, it was held that an order framing a charge against an accused was not a final order but an interlocutory order within the meaning of Section 11(1) of the Special Courts Act, 1979 and therefore not appealable. It cannot be doubted that the grant or refusal of a bail application is essentially an interlocutory order. There is no finality to such an order for an application for bail can always be renewed from time to time. It is however contended that the refusal of bail by a Designated Court due to the non-fulfilment of the conditions laid down in Section 20(8) cannot be treated to be a final order for it affects the life or liberty of a citizen guaranteed under Article 21. While it is true that a person arraigned on a charge of having committed an offence punishable under the Act faces a prospect of prolonged incarceration in view of the provision contained in Section 20(8) which places limitations on the power of a Designated Court to grant bail, but that by itself is not decisive of the question as to whether an order of this nature is not an interlocutory order. The court must interpret the words "not being an interlocutory order" used in Section 19(1) in their natural sense in furtherance of the object and purpose of the Act to exclude any interference with the proceedings before a Designated Court

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> *at an intermediate stage. There is no finality attached to an order of a Designated Court granting or refusing bail. Such an application for bail can always be renewed from time to time. That being so, the contention advanced on behalf of the State Government that the impugned orders passed by the Designated Courts refusing to grant bail were not interlocutory orders and therefore appealable under Section 19(1) of the Act, cannot be accepted."*

55. What surfaces from the above discussion is that ***Usmanbhai Dawoodbhai Memon*** (supra), held, in categorical terms, that neither the Designated Court nor the High Court could have exercised power to grant bail by taking recourse to Section 439 of the Code and whereas the Designated Court's source of power to grant bail was traceable to Section 437, the High Court's power to grant bail under Section 439 of the Code stood wholly excluded. The Supreme Court also held, in ***Usmanbhai Dawoodbhai Memon*** (supra), that an order of bail, being an *'interlocutory order'*, was also not an appealable order, under Section 19(1), to the Supreme Court.

56. Thus, if a Designated Court happened to refuse to grant bail to an accused under TADA, neither any of the provisions of the Code nor any of the provisions of the TADA could have been resorted to for the purpose of granting bail by the High Court.

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In fact, a person, arrested under the TADA, had no remedy if the Designated Court refused to grant him bail except, perhaps, approaching the High Court under Article 226 and/or 227 or, in an appropriate case, the Supreme Court seeking to invoke its jurisdiction under Article 136. In fact, in ***Usmanbhai Dawoodbhai Memon*** (supra), the Supreme Court exercised its power, under Article 136, to issue certain directions to the Designated Court.

57. In ***Narcotics Control Bureau v. Kishan Lal***, reported in (1991) 1 SCC 705, the question arose as to whether High Court's power to grant bail under Section 439 is restricted by the provisions of Section 237(2) of the NDPS Act. In ***Kishan Lal's*** case, the Supreme Court had an occasion to refer to, and explain, the principles laid down in ***Usmanbhai Dawoodbhai Memon*** (supra) and pointed out that ***Usmanbhai Dawoodbhai Memon*** (supra) recognizes that fetters can be imposed on the powers of even the High Court in respect of granting bail under Section 439.

58. Referring to the decision in ***Usmanbhai Dawoodbhai Memon*** (supra), the Supreme Court observed, in ***Kishan Lal*** (supra), that it had been contended, in ***Usmanbhai Dawoodbhai Memon*** (supra), that to take away the power of the High Court to grant bail, under Section 439 of the Code, would be tantamount to striking at the very foundation of an independent

judiciary free from executive control, but disagreeing with such a view, the Supreme Court had held, in ***Usmanbhai Dawoodbhai Memon*** (supra), that the High Court's power, under Section 439, did stand excluded.

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59. As there was not only serious resentment, but uproar against the manner in which TADA had been enforced and the mechanism, conceived thereunder, were unutilized, the TADA was allowed to elapse. However, as the evils of terrorism continued, the Government sought to introduce the Prevention of Terrorism Bill, 2000. This Bill was forwarded to the Law Commission of India for its views and recommendations. The views and recommendations of the Law Commission of India appear in its 173rd Report. Chapter VI of this Report relates to *'suggestions for inclusion of certain additional provisions in the bill*'. The relevant portion of Chapter VI is, therefore, extracted below:

> *"CHAPTER VI*
>
> *SUGGESTIONS FOR INCLUSION OF CERTAIN ADDITIONAL PROVISIONS IN THE BILL*
>
> *(a) It was suggested by Mr. Prashant Bhuhan, Advocate, Supreme Court that there should be a provision for appeal against an order refusing bail. We are inclined to agree with this plea. But*

the appeal should be not only against an order refusing bail but also against an order granting bail. Accordingly, it recommended that the following provision be inserted as Sub-section (5) in Section 17 of the Act:

(5) Notwithstanding anything contained in the Code, an appeal shall lie to the Special Court, against an order of the Court, granting or refusing bail."

60. From what have been extracted above, it becomes abundantly clear that since there was no provision for appeal, under the TADA, against an order refusing bail, it was suggested to the Law Commission that some provision for appeal against an order refusing bail should be made in the Prevention of Terrorism Bill, 2000. When this suggestion was offered, to the Commission, the Commission took the view that if a right of appeal should be provided against an order refusing bail, it would be appropriate to provide an appeal against an order granting bail too. The Law Commission, therefore, suggested insertion of Section 17(5) to the proposed Bill, which, if incorporated, would have meant that notwithstanding anything, which the Code may contain, an appeal shall lie to the High Court against an order of a Special Court, to be constituted under the POTA, granting or refusing to grant bail. It is in this backdrop of legislative history that Section 34, which provided for appeal under the POTA Act, 2002, needs to be, now,

considered. Section 34 is, therefore, reproduced below:

"Appeal.-

(1) Notwithstanding anything contained in the Code, an appeal shall lie from any judgment, sentence or order, not being an interlocutory order, of a Special Court to the High Court both on facts and on law.

Explanation. ─For the purposes of this section, "High Court" means a High Court within whose jurisdiction, a Special Court which passed the judgment, sentence or order, is situated.

(2) Every appeal under Sub-section (1) shall be heard by a bench of two Judges of the High Court.

(3) Except as aforesaid, no appeal or revision shall lie to any court from any judgment, sentence or order including an interlocutory order of a Special Court.

(4) Notwithstanding anything contained in Sub-section (3) of section 378 of the Code, an appeal shall lie to the High Court against an order of the Special Court granting or refusing bail.

(5) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment, sentence or order appealed from:

Provided that the High Court may entertain an appeal after the expiry of the said period of thirty

days if it is satisfied that the Appellant had sufficient cause for not preferring the appeal within the period of thirty days."

61. Let us, now, pause and refer to Section 21 of the NIA Act, which too make provisions for appeal. Section 21 reads:

"Appeals.

21. (1) Notwithstanding anything contained in the Code, an appeal shall lie from any judgment, sentence or order, not being an interlocutory order, of a Special Court to the High Court both on facts and on law.

(2) Every appeal under Sub-section (1) shall be heard by a bench of two Judges of the High Court and shall, as far as possible, be disposed of within a period of three months from the date of admission of the appeal.

(3) Except as aforesaid, no appeal or revision shall lie to any court from any judgment, sentence or order including an interlocutory order of a Special Court.

(4) Notwithstanding anything contained in Sub-section (3) of Section 378 of the Code, an appeal shall lie to the High Court against an order of the Special Court granting or refusing bail.

(5) Every appeal under this section shall be preferred within a period of thirty days

from the date of the judgment, sentence or order appealed from:

Provided that the High Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the Appellant had sufficient cause for not preferring the appeal within the period of thirty days:

Provided further that no appeal shall be entertained after the expiry of period of ninety days".

62. A cautious and minute examination of Section 34 of the POTA Act *vis-a-vis* Section 21 of the NIA Act shows that Sub-section (4) of Section 21 and Section 34(4) are *pari materia*. In fact, this position is not in dispute before us.

63. In ***State of Gujarat v. Salimbhai Abdulgaffar Shaikh and Ors.,*** reported in (2003) 8 SCC 50, the Gujarat High Court, by invoking Section 439, granted bail to persons, accused of offence, punishable under POTA. This was put to challenge. The Supreme Court pointed out that Section 34(1) lays down that an appeal shall lie from any judgment, sentence or order, not being an 'interlocutory order' of a Special Court, to the High Court both on facts and law. The relevant observations, made in this regard, read as under:

"8. Sub-section (1) of Section 34 of POTA

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lays down that an appeal shall lie from any judgment, sentence or order not being an interlocutory order of a Special Court to the High Court both on facts and law and in view of Sub-section (2), the appeal has to be heard by a Bench of two Judges. Normally an order granting or refusing bail is an interlocutory order and no appeal would lie. However, in view of Sub-section (4) of Section 34 an appeal shall lie to the High Court against such an order. Under the scheme of POTA, there is a clear departure in the matter of grant of bail from that of the Code of Criminal Procedure. The provisions regarding bail in the Code of Criminal Procedure are contained in Sections 436 to 439. Sub-section (1) of Section 439 confers power upon the Court of Session and the High Court to grant bail to any person accused of having committed a non-bailable offence. Sub-section (2) of Section 439 deals with cancellation of bail and provides that any person who has been released on bail under Chapter XXXIII may be arrested and committed to custody. There is no provision for appeal under the Code of Criminal Procedure against an order refusing or granting bail."

64. Referring to its earlier decisions in ***State v. Capt.***

Jagjit Singh, **(AIR 1962 SC 252)** and ***Gurcharan Singh v. State (Delhi Admn),*** reported in (1978) 1 SCC 118, the Supreme Court, in ***Salimbhai Abdulgaffar Shaikh*** (supra), observed:

> *"9. The considerations which normally weigh with the court in granting bail in non-bailable offences have been explained by this Court in* ***State v. Capt. Jagjit Singh*** *and* ***Gurcharan Singh v. State (Delhi Admn.)*** *and basically they are—the nature and seriousness of the offence; the character of the evidence; circumstances which are peculiar to the accused; a reasonable possibility of the presence of the accused not being secured at the trial; reasonable apprehension of witnesses being tampered with; the larger interest of the public or the State and other similar factors which may be relevant in the facts and circumstances of the case. While hearing an application for cancellation of bail under Sub-section (2) of Section 439 of the Code, the courts generally do not examine the merits of the order granting bail. What is normally relevant to be examined in such a proceeding is whether the accused is trying to tamper with the evidence subsequent to his release on bail or has threatened the witnesses or has committed any other offence while on bail or is trying to adopt dilatory tactics*

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resulting in delay of trial or has absconded or that the offence committed by him has created serious law and order problem. The court has, to see as to whether the accused has misused the privilege of bail granted to him. Only in exceptional cases where the order granting bail is vitiated by any serious infirmity and in the interest of justice it becomes necessary to interfere with the discretion exercised in granting bail that the order would be interfered with on merits."

65. Further explaining the scope of Section 34(4), the Supreme Court observed, in ***Salimbhai Abdulgaffar Shaikh*** (supra), at para 10 and 11, thus:

"10. Sub-section (4) of Section 34 of POTA provides for an appeal to the High Court against an order of the Special Court granting or refusing bail. Though the word "appeal" is used both in the Code of Criminal Procedure and the Code of Civil Procedure and in many other statutes but it has not been defined anywhere. Over a period of time, it has acquired a definite connotation and meaning which is as under:

A proceeding undertaken to have a decision reconsidered by bringing it to a higher authority, especially the submission

of a lower court's decision to a higher court for review and possible reversal.

An appeal, strictly so-called, is one in which the question is, whether the order of the court from which the appeal is brought was right on the material which the court had before it.

An appeal is removal of the cause from an inferior to one of superior jurisdiction for the purposes of obtaining a review or retrial.

An appeal, generally speaking, is a rehearing by a superior court on both law and fact.

11. Broadly speaking, therefore, an appeal is a proceeding taken to rectify an erroneous decision of a court by submitting the question to a higher court, and in view of the express language used in Sub-section (1) of Section 34 of POTA the appeal would lie both on facts and on law. Therefore even an order granting bail can be examined on merits by the High Court without any kind of fetters on its powers and it can come to an independent conclusion whether the accused deserves to be released on bail on the merits of the case. The considerations which are generally relevant in the matter of

cancellation of bail under Sub-section (2) of Section 439 of the Code will not come in the way of the High Court in setting aside an order of the Special Court granting bail. It is, therefore, evident that the provisions of POTA are in clear contradistinction with that of the Code of Criminal Procedure where no appeal is provided against an order granting bail. The appeal can lie only against an order of the Special Court and unless there is an order of the Special Court refusing bail, the accused will have no right to file an appeal before the High Court praying for grant of bail to them. Existence of an order of the Special Court is, therefore, a sine qua non for approaching the High Court."

66. In the light of the observations made above, it becomes clear that an appeal is a proceeding to rectify an erroneous decision of a Court both on facts as well as on law. An order, granting or refusing bail, could have been, in the light of the provisions of Section 34(4), examined on merit by the High Court without any other fetters and while considering a question of cancellation of bail the general principles, governing Section 439(2) of the Code, would not come in the way. The Supreme Court, in **Salimbhai Abdulgaffar Shaikh** (supra), while laying down that the scheme for appeal, under the POTA, is in contradistinction to that of

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the Code, pointed out that an appeal can lie only against an order of the Special Court and unless there is an order of the Special Court refusing or granting bail, the accused cannot prefer appeal to the High Court seeking bail. What, further, follows from the above discussion is that even a High court could not have invoked its power, under the Section 439, to grant bail to a person, accused of an offence under the POTA. Consequently, in order to obtain release on bail, an accused person, arrested under the POTA, was required to, first, apply for bail to the Special court, where the Special Court was constituted, or to the Court of Session, where the Special Court was not constituted, and, if his application for bail was rejected, then and then only he could have preferred an appeal against the order refusing bail. Similarly, even the State could have preferred an appeal if the Special Court or the Court of Session, as the case may be, happened to grant bail to such an accused person in exercise of powers under Section 437 of the Code.

67. Though it was contended, in ***Salimbhai Abdulgaffar Shaikh*** (supra), that TADA had not taken away the High Court's power under Section 439, the Supreme Court, referring to ***Usmanbhai Dawoodbhai Memon*** (supra), held that there was complete exclusion of the jurisdiction of the High Court, under the TADA, to entertain a bail application made under Section 439 and that this view was reiterated in ***State of Punjab v.***

Kewal Singh reported in: 1990 Supp SCC 147. The Supreme Court concluded, at para 14, in ***Salimbhai Abdulgaffar Shaikh*** (supra), thus:

> *"14. That apart, if the argument of the learned Counsel for the Respondents is accepted, it would mean that a person whose bail under POTA has been rejected by the Special Court will have two remedies and he can avail any one of them at his sweet will. He may move a bail application before the High Court under Section 439 Code of Criminal Procedure in the original or concurrent jurisdiction, which may be heard by a Single Judge or may prefer an appeal under Sub-section (4) of Section 34 of POTA which would be heard by a Bench of two Judges. To interpret a statutory provision in such a manner that a court can exercise both appellate and original jurisdiction in respect of the same matter will lead to an incongruous situation. The contention is therefore fallacious."*

68. In the light of what has been laid down in ***Salimbhai Abdulgaffar Shaikh*** (supra), there can be no escape from the conclusion that Section 34(4) of the POTA had made provisions for appeal if an application for bail made to the Special Court was rejected or if bail was granted. In either case, provisions

for appeal were, thus, made.

69. It is, now, imperative to point out that Section 21(4) of the NIA Act is in no way different from Section 34(4) of the POTA. Both the provisions are not only similar, but also same. Hence, the provisions, contained in Section 21(4) of the NIA Act, and the provisions, contained in Section 34(4), of the POTA, can be given one and the same meaning. Situated thus, it becomes clear that when a person is forwarded to a Special Court, where the Special Court is constituted, or to the Court of Session, where no Special Court is constituted, the accused can make an application for bail; but this application would fall under Section 437 and not under Section 439, though even a Court of Session, in the absence of constitution of a Special Court, may be the Court to which such an accused is forwarded. An accused, who has been taken into custody in connection with any offence under the NIA Act, cannot apply to the High Court seeking bail, under Section 439 of the Code, without making any application to the Special Court or Court of Session, as the case may be, under Section 437 nor can the accused, on rejection of his application for bail by the Special or the Court of Session, as the case may be, under the NIA Act, apply to the High Court to invoke the High Court's jurisdiction under Section 439. However, an accused may, in terms of provisions of Section 21(4) of the NIA Act, prefer an appeal to the

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High Court, against an order passed by the Special Court, or the Court of Session, as the case may be, refusing to enlarge him on bail. If a Special Court or Court of Session, as the case may be, grants bail under the NIA Act, the State cannot invoke High Court's powers, under Section 439(2) for cancellation of such bail. The remedy of the State lies, in such a case, in preferring an appeal, in terms of Section 21(4) of the NIA Act, to the High Court for cancellation of bail and if such an appeal is preferred, it would remain open to the High Court to examine the order, granting bail, on merit and determine if bail could at all have been granted to the accused by the Special Court or the Court of Session, as the case may be. At the same time, it would also remain open to the High Court to determine if the accused, having received bail, has misused his liberty and, whether his bail should, therefore, be cancelled or not.

70. We have already pointed out above that while conducting investigation, holding enquiry or trial or, otherwise, dealing with a case, even under a special law, the provisions of the Code would apply so far as the provisions of the Code may remain applicable in the face of the scheme of the special enactment.

71. The provisions for appeal, against acquittal, have been made in Section 378 of the Code. An appeal against acquittal

is not admissible without leave having been granted by the High Court in terms of Sub-section (3) of Section 378.

72. When an order, granting or refusing bail, has been made appealable by Sub-section (4) of Section 21 of the NIA Act, a question could have arisen as to whether a State's appeal, against granting of bail, would require leave of the High Court. It is to override any such objections, which might have been raised, or the impediments, which the State might have suffered from, it appears that the Parliament, as a measure of abundant caution, deemed it appropriate to introduce, into Sub-section (4) of Section 21 of the NIA Act, *non obstante* clause by using the expression, *"notwithstanding anything contained in Sub-section (3) of Section 378 of the Code"* so that the State's appeal against an order granting bail does not require leave of the High Court. Thus, Sub-section (4) of Section 21 of the NIA Act has overriding effect on the limitations placed by Sub-section (3) of Section 378 of the Code. In view, therefore, of the fact that a reference to Sub-section (3) of Section 378 has been made in Sub-section (4) of the Section 21 of the NIA Act, it does not mean that an order of the Special Court, granting or refusing bail, in a pending proceeding, is not an appealable order.

73. In the light of the discussions, held above, there is

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no escape from the conclusion that even if an appeal, against an order granting bail, may require leave of the High Court, Sub-section (4) of Section 21 of the NIA Act removes such a constraint and makes it clear that though an order, granting or refusing bail, passed by a Special Court or a Court of Session, as the case may be, is an interlocutory order, an appeal would, nevertheless, lie to the High Court and such an appeal, being an exception to an appeal, under Sub-section (1) of Section 21 of the NIA Act, which bars an appeal against an interlocutory order, has to be heard, in the light of the provisions of Sub-section (2) of Section 21, by a Division Bench.

74. What surfaces from the above discussion, held, as a whole, is that except as provided in Section 167(2-A) of the Code, a person, arrested in connection with an offence, under the NIA Act, can be remanded to custody, police or judicial, by the Special Court, where the Special Court has been constituted, or by the Court of Session, where the Special Court has not been constituted. In view of the fact that the NIA Act envisages a situation, wherein an investigation, as in the present case, may be entrusted to the National Investigation Agency after the State police had made some investigation, it further follows that once the investigation, under the scheme of the NIA Act, is taken over by the Agency, it is the Special Court or the Court of Session, as the case may be,

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which can authorize further detention of an arrested accused. When such an arrested accused applies for bail to the Special Court or the Court of Session, as the case may be, the source of power to consider such an application for bail lies in Section 437 and not Section 439 of the Code. Even a High Court cannot invoke its powers under Section 439, to grant bail if it has been refused by the Special Court or the Court of Session, as the case may be, nor can the High Court, in exercise of its power, under Section 439, cancel bail if bail has been granted to such an accused by the Special Court or the Court of Session, as the case may be. If the bail has been refused or granted by the Special Court or the Court of Session, as the case may be, the aggrieved party may, however, prefer an appeal, in terms of Section 21, to the High Court. Such an appeal has to be heard by a Division Bench of the High Court and in such an appeal, the merit of the order, granting or refusing bail, can be questioned.

CONCEPT OF PROVISO TO SECTION 43D (5)

75. Before proceeding further, it is also, to our mind, necessary to ascertain as to what the scope of the proviso to Section 43D (5) is and when would this proviso be attracted. While dealing with this aspect of the appeal, it is necessary to bear in mind that the proviso to Section 43D (5) states that such accused person shall not be released on bail or on his own bond if the

Court, on a perusal of the case diary or the report made under Section 173 of the Code, is of the opinion that there are reasonable grounds for believing that the accusation against such person is *"prima facie true"*. The expression, *'prima facie true'* is an expression, which does not, ordinarily, appear in penal statutes.

76. Let us, therefore, ascertain as to what the word 'prima facie' means. The word, '*prima facie'*, has been described in the Black's Law Dictionary as: *"sufficient to establish fact or raise a presumption unless disproved or rebutted"*. Rebuttable presumption means an inference drawn from certain facts that establish a *prima facie* case, which may be overcome by the introduction of contrary evidence. Rebuttable resumption also means *prima facie* presumption or disputable presumption or conditional presumption.

77. The Concise Dictionary of Collins has defined, *prima facie*, as an adjective thus: "At first sight; as it seems at first." "And *prima facie* evidence is an evidence that is sufficient to establish a fact or to raise a presumption of the truth unless controverted."

78. Walton's Law Lexicon defines that a *prima facie* case does not mean a case proved to the hilt, but a case, which can be said to be established if the evidence, which is led in support of

the same, are believed.

79. The Supreme Court, in **Marlin Burn Ltd. v. R.N. Banerjee**, 1958 SCR 514 at p. 530 (AIR 1958 SC 79 at p. 85), observed thus: "...A *prima facie* case does not mean a case proved to the hilt, but a case, which can be said to be established if the evidence, which is led in support of the same, were believed. While determining whether a *prima facie* case had been made out, the relevant consideration is whether, on the evidence led, it was possible to arrive at the conclusion, in question, and not whether that was the only conclusion, which could be arrived at on that evidence."

80. The meaning of the word, *'prima facie'*, given in **Martin Burn Ltd.** (supra), has been followed by the Supreme Court, in its later decision, in The **Management of the Bangalore Woollen Cotton and Silk Mills Co. Ltd. v. B. Dasappa, M.T.** represented by the Binny Mills Labour Association, reported in AIR 1960 SC 1352.

81. From the meaning, attributed to the word, *'prima facie'*, by various dictionaries, as indicated above, and the observations, made by the Supreme Court, in its decisions, in ***The Management of the Bangalore Woollen Cotton and Silk Mills*** (supra), what clearly follows is that *prima facie* is a Latin word,

which means, *'At first sight or glance or on its face'* and, in common law, it is referred to as *'the first piece of evidence of fact'*, i.e., considered true unless revoked or contradicted.

82. In the face of the above observations made by the Supreme Court, it may be construed that *prima facie* case would mean whether the inference drawn is a possible inference or not.

83. The word, *'true'*, according to Collins Dictionary, means something, which is not false, fictional or illusory, but factual and confirming with reality or exactly in tune. Webster's Third New International Dictionary defines True as: *"Something, which is in accordance with fact or reality"*.

84. The word, *'true'* has been defined, in World Book Dictionary, as *"Agreeing with fact, not false"*.

85. Thus, the expression, *'prima facie true'* would mean that the court shall undertake an exercise to determine as to whether the accusations made against the accused, are inherently improbable and/or wholly unbelievable. Ordinarily, while considering a complaint, made against an accused, the Court assumes the contents of the complaint to be true and correct and, then, proceed to decide as to whether the allegations, made in the complaint, make out a case of commission of offence by the accused or not. No exercise is required to be undertaken by the

Court to determine the truthfulness or veracity of the accusations. However, when the word, 'prima facie', is coupled with the word *'true'*, it implies that the Court has to undertake an exercise of cross-checking the truthfulness of the allegations, made, in the, complaint, on the basis of the materials on record. If the court finds, on such analysis, that the accusations made are inherently improbable, or wholly unbelievable, it may be difficult to say that a case, which is *prima facie true*, has been made out.

86. The term '*true'* would mean a proposition that the accusation brought against the accused person, on the face of the materials collected during investigation, is not false. The term false again would mean a proposition, the existence of which cannot be a reality. While arriving at a finding whether there are reasonable grounds for believing that the accusation against the accused is *prima facie* true or false, the Court can only look into the materials collected during investigation; and, on its bare perusal, should come to a finding that the accusation is inherently improbable. However, while so arriving at a finding, the Court does not have the liberty to come to a conclusion, which may virtually amount to an acquittal of the accused.

87. In the case of ***State of Gujrat v. Gadhvi Rambhai Nathabai***, reported in (1994)5 SCC 111, the Supreme Court while

dealing with the principles governing the granting of bail under the TADA, observed:

> *"8. It is true that for the purpose of grant of bail, the framers of the Act require the Designated Court to be satisfied that there were reasonable grounds for believing that the accused concerned was not guilty of such offence but this power cannot be exercised for grant of bail in a manner which amounts virtually to an order of acquittal, giving benefit of doubt to the accused person after weighing the evidence collected during the investigation or produced before the court At that stage the Designated Court is expected to apply its mind as to whether accepting the allegations made on behalf of the prosecution on their face, there are reasonable grounds for believing that the accused concerned was not guilty of the offence. At that stage the Designated Court is not required to weigh the material collected during the investigation."*

88. In short, thus, on a bare reading of the materials, as may have been collected during investigation, if the Special Court finds that the materials, so collected, are sufficient to form, when assumed to be true, an opinion that there are reasonable grounds to believe that the accusations, made against the accused, are *prima facie true*, the Special Court will be disempowered from releasing the accused on bail. At the stage of bail, no minute scrutiny or

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microscopic dissection of the materials, collected during investigation, shall be undertaken by the Special Court. Credibility or otherwise of the materials collected would not be the subject-matter of scrutiny. What, at best, the Special Court can do, and shall do, is to examine if the accusations made, on the basis of the materials collected, are wholly improbable. When the materials, on examination by the Special Court, are found to be not wholly improbable and the Special Court finds, on assuming such materials to be true, that the accusations, made against an accused, as regards commission of an offence under Chapter IV and/or Chapter VI of the UA(P) Act, are *prima facie true*, such materials would be enough to attract the bar imposed by the proviso to Section 43D(5).

89. To put it a little differently, the Special Court is required to examine the materials, collected during investigation, assuming the same to be true and if, such materials, on such examination and consideration, are found to make out a case against the accused, the Special Court has to determine if there is any such thing in the materials, so collected, which would make the case, which has been made out against the accused, as a wholly improbable case. If the Special Court on undertaking such an exercise finds reasonable grounds to infer that the case, which has been made out against the accused, is not wholly improbable, the

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case would be treated as a case, which is sufficient for the Special Court to form an opinion that there are reasonable grounds to believe that the accusations, made against the accused, are prima facie true.

90. The expression, *'reasonable ground'* means something more than *prima facie* ground, which contemplates a substantially probable case for believing that the accused is guilty of the offence (s) alleged. Under Section 437 Cr.P.C., an accused is not to be released on bail if there appear reasonable grounds for believing that he has been guilty of an offence, which is punishable with death or imprisonment for life. Under Section 437 Cr.P.C., the burden is on the prosecution to show existence of reasonable ground for believing that the accused is guilty. Hence, the presumption of innocence, which always runs in favour of the accused, is displaced only on the prosecution showing existence of reasonable ground to believe that the accused is guilty. (See ***Union of India v. Thamissharasi***, reported in (1995) 4 SCC 190, and ***Union of India v. Shiv Shankar Kesari***, reported in (2007) 7 SCC 798).

91. Coupled with the above, the proviso to Section 43D (5) does not require a positive satisfaction by the court that the case against the accused is true. What is required is a mere formation of

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opinion by the court on the basis of the materials placed before it. The formation of opinion cannot be irrational or arbitrary. Such formation of opinion cannot be based on surmises and conjectures; but must rest on the materials collected against the accused. Since the presumption of innocence runs in favour of the accused, it logically follows that if there are, in given circumstances, grounds for believing that the case, against the accused, is true, a case of commission of offence under Chapter IV or Chapter VI of the UA(P) Act 1967 can be said to have been made out and when such a case is made out, it would be tantamount to saying that reasonable grounds exist for opining that the accusations are prima facie true. In such a case, the bar, imposed by the proviso to Section 43D (5) on the court's power to grant bail, gets attracted.

92. We may point out that Section 20(8) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as 'the TADA Act') (since repealed), laid down that no person, accused of an offence punishable under the said Act, or any rule made thereunder, shall, if in custody, be released on bail, or on his own bond, unless, amongst others, the court is satisfied, where the Public Prosecutor opposes the application, that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence, while on bail. Section 20(9) of the Act made it clear that

the limitation on granting of bail, specified in Sub-section (8) of Section 20, is in addition to the restrictions, which the Code of Criminal Procedure, or any other law, in force, imposes.

93. There are no corresponding provisions, in the NIA Act, as were present in Section 20(8) and Section 20(9) of the TADA Act. Notwithstanding, however, the fact that the provisions (as contained in Sub-section (8) and/or Sub-section (9) of Section 20 of the TADA Act) no longer find place in the NIA Act, the fact remains that even under the scheme of the NIA Act, the Special Court, as already discussed above, is a 'Court' other than the High Court and Court of Session. In such circumstances, the limitations, imposed by Clauses (i) and (ii) of Sub-section (1) of Section 437 Cr.P.C. are applicable to the Special Court too. In addition thereto, when a case falls within the ambit of the proviso to Section 43D (5), mere would be an additional bar, on the part of the Special Court to release an accused on bail the bar being that the Special Court shall not release the accused on bail or on his own bond if the Court on perusal of the case diary or the report made under Section 173 of the Code, is of the opinion that there are 'reasonable grounds' for believing that the accusation against such person is *prima facie true*.

(Emphasis is added)

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Whether the restrictions imposed on a Court by the proviso to section 43D(5) of the UA(P) ACT apply to the High Court, when the High Court exercises its appellate jurisdiction under section 21(4) of the NIA ACT or whether the High Court can, while exercising its appellate jurisdiction, under section 21(4) of the NIA ACT take recourse to its special power, under section 439 Cr.P.C.., for granting bail to a person, accused of an offence, whose case is covered by the proviso to section 43D(5)?

94. Coming to the question as to whether the High Court can, while exercising its appellate jurisdiction under Section 21 of the NIA Act, grant bail to an accused, whose case is covered by the proviso to Section 43D(5) of the UA(P) Act by taking resort to, if necessary, its special power under Section 439. It is worth noting that as against the order of granting bail, or refusing to grant bail, to an accused by a Special Court, constituted under the NIA Act, the remedy to an aggrieved accused has been made available, by way of appeal, under Section 21(4) of the NIA Act, and this power of appeal is co-extensive with the power of the trial Court and, in exercise of its power, what the High Court is required to determine is as to whether the order, granting bail, or the order, refusing to grant bail, is, in the light of the facts on record and the law relevant thereto, was or was not justified and sustainable. If the High Court finds that the order, which stands impugned in an

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appeal under Section 21(4), is an order, which is in tune with the materials available in the case diary, or the police report submitted under Section 173 Cr.P.C. *vis-a-vis* the law relevant thereto, then, the High Court would have no reason to interfere with such an order of the Special Court; but, if the order is, otherwise; the High Court, in exercise of its appellate power, can interfere with the order of the Special Court.

95. While considering an appeal under Section 21(4), the High Court cannot take aid of, or take recourse to, its special power of granting bail, as embodied in Section 439 of the Code. Reference may be made to the decision, in ***Redaul Hussain Khan & Ors. v. State of Assam & Ors.***, reported in **2009 (3) GLT 855** and ***Jayanta Kumar Ghosh & Anr. v. State Assam & Ors.***, reported in 2010 (4) GLT and ***National Investigation Agency v. Redaul Hussain Khan***, reported in 2010 (3) GLT 302.

96. Whether the word *'Court'* does not include a High Court and (ii) whether even while exercising appellate jurisdiction, under Section 21(4), the High Court can take the aid of its special power, under Section 439 of the Code, to grant bail is correct and sustainable in law?

97. Our quest for an answer to the above question brings us to the scheme of the Code of Criminal Procedure, 1973

and, particularly, to the question as to whether the High Court, while considering an application for bail, under Section 439 of the Code, can exercise its special power overriding the restrictive provisions, which may have been made in a special penal statute.

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98. In other words, what this Court is required to determine is: ***When a High Court considers an application for bail, under Section 439 of the Code, arising out of a case covered by a special enactment, whether the High Court can take recourse to its special power, embodied in Section 439 of the Code, overriding the restrictive provisions, which may have been made by the special enactment?***

99. While considering the question, which we have posed above, it may be of some significance to note that unlike TADA or POTA, the UA(P) Act defines *'Court'* and, hence, the question is: **Whether the word, *'Court'*, which stands defined in Section 2(d) of the UA(P) Act, would or would not include a High Court?**

100. We may point out that there was no necessity in the TADA, to define a *'Court'* inasmuch as TADA created offences, prescribed punishments as well as the procedures for investigation, remand of an accused and trial and, thus, the designated Court, under TADA, was the singular Court, which had

the power to deal with the applications for bail, pass orders of remand, etc., in terms of Section 167 of the Code, and there was, therefore, no requirement to define as to what a 'Court' meant.

101. However, as far as POTA was concerned, offences, created by POTA, prescribed not merely punishments, but also the procedure for investigation and trial and that POTA also contained the power of the Special Court, during investigation as well as trial, and, hence, neither in the case of TADA nor in the case of POTA, there was necessity of defining *'Court'*, because TADA as well as POTA envisaged creation of a singular Court, which was to deal with not only remand of an accused in terms of Section 167 of the Code, but also in respect of matters relating to granting or refusing bail and no Court, other than Designated Court, in TADA, and no Court, other than Special Court, constituted in POTA, could have dealt with offences under the TADA or POTA, as the case may be. Coupled with the above, the significant difference between the two, namely, Designated Court, under the TADA, and the Special Court, under the POTA, was that while, in the case of TADA, refusal of bail could have been challenged before the Supreme Court, POTA made, same as in the case of NIA Act, specific provisions for appeal to the High Court and in this regard, there is no difference between Special Court, constituted under the POTA, and the Special Court, constituted

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under the NIA Act; whereas offences, under the UA(P) Act, (before the UA(P) Act underwent amendment, in the year 2008), were triable by ordinary Criminal Courts and, in fact, some of the offences, under the un-amended UA(P) Act, could have been tried even by a Magistrate and not necessarily by a Sessions Court. However, with the amendment, introduced in the year 2008, since a Special Court, constituted under the NIA Act, was required to exercise the power given to an ordinary Court, on account of the legislative scheme of the NIA Act, to try offences under the UA(P) Act, it became necessary to include a Special Court, constituted under the NIA Act within the meaning of the term *'Court'*. Obviously, therefore, the definition of 'Court', as appearing in Section 2(d) of the UA(P) Act, had to be expanded in order to include, within the expression *'Court'*, a *'Special Court'*, constituted under the NIA Act.

102. Moreover, let us, first, clearly understand the meaning and effect of the expression *'Court'*, which, in the light of the definition of *'Court'*, as given by Section 2(d) of the UA(P) Act, means, *'a Criminal Court having jurisdiction, under the Code, to try offences under this Act and includes a Special Court constituted under Section 11 or under Section 21 of the National investigation Agency Act, 2008.'*

103. While considering the question as to what the definition of *'Court'*, given in the UA(P) Act, means and conveys, when it states that *'Court'* means a Criminal Court having jurisdiction, under the Code, to try offences under this Act (i.e., the UA(P) Act), it is exceedingly important to bear in mind that it is the Code, which gives us classification of Courts. Section 6 of the Code reads:

> *"CONSTITUTION OF CRIMINAL COURTS AND OFFICES:*
>
> *6. Classes of Criminal Courts. - Besides the High Courts and the Courts constituted under any law, other than this Code, there shall be. in every State, the following classes of Criminal Courts, namely:--*
>
> *(i) Courts of Session;*
>
> *(ii) Judicial Magistrates of the first class and in any metropolitan area. Metropolitan Magistrates;*
>
> *(iii) Judicial Magistrates of the second class: and*
>
> *(iv) Executive Magistrates."*

104. From a bare reading of what Section 6 embodies, it is clear that within the classes of Criminal Courts fall not merely Court of Session or Judicial Magistrates of First Class or

Metropolitan Magistrates or Judicial Magistrate of Second Class and Executive Magistrates, but also High Courts and Courts, which are constituted under any law other than the Code.

105. The expression, *'Court'*, therefore, would include not merely Courts, which, ordinarily, exercise criminal jurisdiction, but also High Court inasmuch as Section 6 read with Section 407(1)(iv) of the Code makes it crystal clear that *'High Court'* has the power to transfer *'any case'* to itself and *'try'* the same. Necessarily, therefore, in a given situation, High Court can try a case, covered by the UA(P) Act, provided that the case is triable or is being tried by an ordinary Criminal Court other than a Special Court, constituted under the NIA Act. What it cannot try, in the light of ***A.R. Antulay*** (supra), is a case, which is triable by the Special Court constituted under the NIA Act, for, in terms of Section 13(2), a case, pending in the Special Court, can be transferred, in terms of Section 13(2), to a Special Court only either within the same State or to any other State.

106. The expression *'Court'*, which appears in the proviso to Section 43D(5), does not, therefore, exclude the High Court within whose jurisdiction the Special Court, constituted under the NIA Act, is situated. When the High Court falls within the definition of *'Court'* as given by Section 2(d) of the UA(P) Act,

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it is not only undesirable, but wholly impermissible to exclude from the expression *'Court'*, which appears in the proviso to Section 43D(5), a High Court, within whose territorial jurisdiction, a given Special Court, under the NIA Act, is situated. A glaring example, in this regard, is the role of the High Court in matters of bail to be granted to a person, accused of an offence under the Narcotic Drugs and Psychotropic Substances Act, 1985.

107. **Can the High Court, by taking recourse to its special power under Section 439 of the Code, grant bail to a person, accused of an offence, when the case of such a person falls within the restrictive provisions of Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985?** The answer to this question has to be an emphatic 'no'.

108. The Unlawful Activities (Prevention) Act, 1967, which is being referred to in these appeals as the UA(P) Act, is a Special Act, as amended in the year 2008, with a view to provide stringent measures to combat terrorism and secure thereby the resolution adopted by the Security Council of the United Nations on 28th September, 2001.

109. To find a correct answer to the question as to whether High Court, under Section 439 of the Code, or under its appellate jurisdiction, under Section 21(4) of the NIA Act, has the

power to override the statutory provisions embodied in Section 43D(5) of the UA(P) Act, which is a *'special enactment'*, one must bear in mind that Section 43D(5) starts with non obstante clause, stating that:

> *"notwithstanding anything contained in the Code, no person, accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released, on bail or on his own bond, unless the Public Prosecutor has been given an opportunity of being heard on the application for such release provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under Section 173 of the Code, is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true."*

110. With regard to the above, one has to also bear in mind Section 4 of the Code, which reads as under:

> *"Trial of offences under the Indian Penal Code and other laws:*
>
> *(1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.*

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> *(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."*

111. From the provisions, embodied in Section 4 of the Code, it can be clearly seen that when there is a special enactment, in force, relating to the manner of the investigation, enquiry or otherwise dealing with such offence, the other powers of the Code should be subjected to the provisions of the special enactment.

112. What logically follows from the above is that the power to grant bail, even under the provisions of Section 439 of the Code, is subject to the conditions, which the proviso to Section 43D(5) imposes.

113. Coupled with the above, one also needs to bear in mind that when a particular Section starts with *non obstante* clause, it must be given its due meaning and in case of inconsistency between the provisions of Section 439 of the Code and Section 43(D)(5) of the UA(P) Act, Section 43(D)(5) shall prevail over Section 439 of the Code as per Section 4 of the Code itself. It is, therefore, not difficult to conclude that the proviso to Section 43 D (5) would prevail over the special power of the High

Court under Section 439 of the Code.

114. Moreover, the limitations, on granting bail specified in Section 43(D)(5) of the UA(P) Act, are in addition to the limitations under the Code or any other law for the time being in force as per provisions of Section 43(D)(6) of the UA(P) Act itself, for, Section 43(D)(6) of the UA(P) Act reads:

> *"The restrictions on granting of bail in Sub-Section 5 are in addition to the restrictions under the Code or any other law for the time being in force on granting of bail."*

115. One may pause, at this stage, and refer to the provisions of Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short, the 'NDPS Act') inasmuch as Section 37 of the NDPS Act, too, is a Special Act and imposes certain restrictions, as does the UA(P) Act, on the grant of bail to an accused. One needs to note, in this regard, that both the provisions, namely, Section 37 of the NDPS Act as well as Section 43D(5) start with *non obstante* clause and, therefore, provide, logically speaking, additional restrictions on the Court's power apart from the restrictions, which are imposed by the Code on the Court's power to release a person on bail.

116. No High Court can, therefore, exercise its special power, under Section 439 of the Code, ignoring the restrictions,

which may have been imposed on the Court's power to grant bail by a Special Act, particularly, when Sub-section (6) of Section 43(D) makes it clear that the limitations, on the Court's power to grant bail, are in addition to the limitations, which exist under the Code or under any other law for the time being in force.

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117. The above position of law may be looked into from yet another angle. For this purpose, Section 37 of the N.D.P.S. Act is reproduced below:

> *"(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-*
>
> *(a) every offence punishable under this Act shall be cognizable;*
>
> *(b) no person accused of an offence punishable for [offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless –*
>
> *(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and*
>
> *(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not*

likely to commit any offence while on bail.

(2) The limitations on granting bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail."

118. Section 37 of the N.D.P.S. Act starts with *non obstante* clause meaning thereby that notwithstanding anything contained in the Code, no person, accused of an offence, shall be released on bail unless the conditions prescribed therein are satisfied.

119. It is abundantly clear that the provisions of the Section 37 of the NDPS Act limits, in negative terms, the scope of applicability of the provisions of the Code regarding bail and it cannot, therefore, be held that the special power of the High Court to grant bail, under Section 439 of the Code, is not subject to the limitations prescribed by Section 37 of the N.D.P.S. Act.

120. The *non obstante* clause, with which Section 37 starts, clearly intends to restrict the special power, given under Section 439, to grant bail. Moreover, if there is any inconsistency between the provisions of Section 439 of the Code and the other provisions of bail, incorporated in the special enactment, the

provisions, embodied in the special enactment, shall, in the light of the provisions of Section 37 of the NDPS Act, read with Section 4 of the Code, prevail over Section 439 of the Code.

121. What may, now, be noted is that the N.D.P.S. Act provides, under Sub-section (3) of Section 36A, a special power, as regards granting of bail. Section 36A(3) of the NDPS Act reads as under:

> *"Nothing contained in this Section shall be deemed to effect the special power of the High Court regarding bail under Sec 439 of the Code of Criminal Procedure, 1973, and the High Court may exercise such powers including the powers under clause (b) of Sub-section (1) of that Section as if the reference to "Magistrate" in that Section included also a reference to a "Special Court" constituted under Section 36."*

122. In ***Narcotic Control Bureau v. Kishan Lal,*** reported in (1991) 1 SCC 705, a contention was raised that the limitations, placed on the High Court's power by Section 36A(3) of the NDPS Act, cannot create any fetters in the exercise of the High Court's power under Section 439 of the Code. Commenting on this contention, the Supreme Court, in ***Kishan Lal*** (supra), held that the powers of the High Court to grant bail, under Section 439 of the Code, to a person arrested under N.D.P.S. Act, is subject to the

limitations contained in the provisions of Section 37 of the N.D.P.S. Act and the restrictions placed, on the powers of the Court under the said Section, are applicable to the High Court, too, in the matter of granting bail.

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123. The Supreme Court, in the case of ***Union of India v. Abdullah***, reported in (2004) 13 SCC 504, relying on its previous decision, in ***Superintendent NCB v. R. Paul Swamy***, reported in (2000) 9 SCC 549, held that in matters arising out of the NDPS Act, grant of bail is controlled by Section 37 of the Act and it is mandatory for the Court to hear public prosecutor and come to a *prima facie* conclusion that there is no material to come to the conclusion that the accused could be held guilty of the charges levelled against him and if the said provision is not complied with, High Court cannot release a person on bail.

124. The decision, in ***Abdullah*** (supra), ***R. Paul Swamy*** (supra) and ***Kishan Lal*** (supra), furnish glaring examples of the High Court's power being subject to the limitations, which may be imposed on the power to grant bail by a Special Act even when Section 439 of the Code, otherwise, applies; whereas the case at hand is one, where Section 439 of the Code does not apply, when the High Court considers, in an appeal, the correctness of the order of the Special Court, constituted under the NIA Act, granting

or refusing to grant bail.

125. Leaving none in doubt, the Supreme Court, in ***NCB v. Karma Phuntsok***, reported in (2005) 12 SCC 480, further held that Section 37 of the NDPS Act has an overriding effect over other provisions of the Code and, hence, the High Court must follow the provisions of Section 37 of the NDPS Act, while considering the application for bail even under its appellate jurisdiction under Section 389 of the Code.

126. With regard to the above, one may also refer to Rule 184 of the Defence and Internal Security of India Rules, 1971, which had imposed special restrictions on the power to grant bail.

127. Rule 184 of the Defence and Internal Security of India Rules, 1971, read as follows:

> *"184: Special Provision regarding bail: Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898) no person accused or convicted of a contravention of these Rules or orders made thereunder shall, if in custody, be released on bail or his own bond unless –*
>
> *(a) The prosecution has been given an opportunity to oppose the application for such release, and*

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> *(b) Where the prosecution opposes the application and the contravention is of any such provision of these rules or orders made thereunder as the Central Government or the State Government may by notified order specify in this behalf, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such contravention."*

128. Considering the fact that Rule 184 of the Defence and Internal Security of India Rules, 1971, commences with a *non obstante* clause and its operative part imposes a ban on release of an arrested person on bail or on release of a person convicted for contravention of the Rules, the Supreme Court held, in ***Balchand Jain v. State of M.P.,*** reported in (1976) 4 SCC 572, that though Rule 184 does not stand in the way of Court of Sessions or High Court in granting anticipatory bail on the ground that the two provisions operate at two different stages, yet the policy, behind this Rule, would have to be borne in mind by the Court, while exercising its power to grant anticipatory bail under Section 438 of the Code too.

129. In ***Balchand Jain*** (supra), it was pointed out by the Supreme Court that the rule making authority obviously thought that offences, arising out of contravention of the said Rules and Orders made thereunder, were serious offences as they might

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imperil the defence of India or civil defence or internal security or public safety or maintenance of public order or hamper maintenance of supplies or services to the life of the community and, hence, it provided in Rule 184 that no person, accused or convicted of contravention of any Rule or Order made under the Rules, shall be released on bail unless the prosecution is given an opportunity to oppose the application of such release and, in case of contravention of a Rule or Order specified, in this behalf, in a notified order, there are reasonable grounds for believing that the person concerned is not guilty of such contravention. If these are the conditions provided by the Rule making authority for releasing, on bail, a person arrested on an accusation of having committed contravention of any Rule or Order made under the Rules, it must follow a fortiori, concludes the Supreme Court, that the same conditions must provide the guidelines, while exercising the power to grant anticipatory bail to a person apprehending arrest on such accusations, though they would not be strictly applicable.

130. The restrictions, imposed by the *proviso* to Section 43(D)(5) of the UA(P) Act to grant bail, are applicable not only to the Special Court constituted under the NIA Act, but would apply, with equal vigour, to each and every Court, which has the jurisdiction under the Code to try an offence under the UA(P) Act, for, the UA(P) Act has clearly defined the meaning of the word,

'Court' under Section 2(d) of the Act.

131. The limitations, imposed on the grant of bail by the proviso to Section 43D(5), apply to every Court, which has jurisdiction to try offences under the UA(P) Act and this power would apply as much to the High Court as the same apply to any ordinary Criminal Court, for, the High Court, under Section 407(1)(iv) of the Code, can withdraw any criminal case and try the same.

132. When an ordinary Criminal Court, other than the Special Court, constituted under the NIA Act, deals with a case, under the provisions of the UA(P) Act, such a case, as already pointed out above, can be withdrawn by the High Court in exercise of its power under Section 407(1)(iv) and the High Court would be free to try such a case. The limitations, which are, thus, created for the Court, in general, by the proviso to Section 43D(5), would apply even to the High Court. It may, now, be noted that since the NDPS Act does not make any provisions for bail as against the order granting or refusing to grant bail by a Court dealing with an offence under the NDPS Act, the application for bail is made to the High Court for invoking its special power under Section 439 of the Code. However, while exercising it special power under Section 439 of the Code, the High Court cannot override special

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restrictions, which have been imposed on the Court's power to grant bail by the NDPS Act. Same is the situation in the present case, because even the High Court, while exercising power under Section 439 of the Code, would not be able to release a person if such a person's case falls within the ambit of the proviso to Section 43D(5).

133. From the reading of the Section 21 of the NIA Act, it can be seen that when a scheduled offence, under the NIA Act, is being investigated by National Investigating Agency, which we have referred to as NIA, a person, arrested by the NIA, would, automatically, lose his right to approach High Court or Court of Session under Section 439 of the Code for his release on bail. On the other hand, when a person is arrested by police personnel, other than the personnel of the NIA, for the commission of the same scheduled offence and same is investigated by an investigating authority other than the National Investigating Agency, then, such a person can approach the High Court under Section 439 of the Code for his release on bail; but, while considering a bail application, even the High Court would not be able to ignore the limitations imposed on the power to grant bail by the proviso to Section 43D(5) of the UA(P)Act.

134. The legislature has created the above procedural

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difference, with regard to the provisions of bail, with some underlying principle so as to bring more stringent provisions for release of a person on bail, while the offence is being investigated by the National Investigating Agency. The legislature by virtue of Section 21(4) of National Investigation Agency Act, 2008, has, therefore, with its underlying principle, intentionally restricted the right of an individual to seek bail under section 439 of the Code, which is, otherwise, a special power conferred upon the High Court.

135. The procedural difference for investigation, trial and enquiry by two different investigating agencies, while investigating a particular offence, under the same statute, may be different at different points of time. This is well recognized and accepted principle in criminal jurisprudence. For example, when an offence, under the NDPS Act, is being investigated by Customs Officials, the statement of an accused, recorded by customs officials during investigation, is admissible in evidence as per Section 108 of the Customs Act, 1962, inasmuch as the customs officials are not police officials as per Section 25 of the Evidence Act. (See ***Illias v. Collector of Customs*** (AIR 1970 SC 1065), and ***Raj Kumar Karwal v. Union of India*** (AIR 1991 SC 45). (See also ***State of Punjab v. Barkat Ram*** (AIR 1962 SC 276), ***Raja Ram Jaiswal v. State of Bihar*** (AIR 1964 SC 828), ***Badaku Joti Savant***

v. State of Mysore (AIR 1966 SC 1746), ***State of U.P. v. Vyas Tewari*** (AIR 1981 SC 635), ***Raju Premji v. Customs***, ***NER, Shillong Unit,*** [(2009) 16 SCC 496], ***Pyare Lal Bhargava v. State of Rajasthan*** (AIR 1963 SC 1094), and ***Kanhaiyalal v. Union of India,*** reported in (2008) 4 SCC 668). Moreover, as the said customs officials are not police officials, they are not empowered to file charge-sheet under Section 173 of the Code and, therefore, they can only file a complaint within the meaning of Section 2(d) of the Code on completion of investigation under Section 36A(d) of the NDPS Act. On the other hand, when the same offence is being investigated by police officials under NDPS Act, the statement of an accused, recorded during investigation, is inadmissible in evidence due to the specific bar contained in Section 25 of the Evidence Act. This principle of law has been further reiterated by the Supreme Court in ***Rajkumar Karwal v. Union of India***, reported in (1990) 2 SCC 409.

136. The legislature, while curtailing some right of an individual to apply for bail, under Section 439 of the Code, has simultaneously incorporated the provisions of appeal under Section 21(4) of NIA Act in order to bring perfect balance between the conflicting interests.

137. When there is a special enactment, in force, the

N.I.A. Act, relating to the manner of the investigation, enquiry or otherwise dealing with any offence or class of offences, the power, under the Code, should be subject to such special enactment. In interpreting the scope of such a statute, the dominant purpose, underlying the statute, has to be borne in mind.

138. The Supreme Court, therefore, in ***Lt. Colonel Prithi Pal Singh Bedi v. Union of India***, reported in (1982) 3 SCC 140, observed as follows:

> *"The dominant purpose in construing a statute is to ascertain the intention of the Parliament. One of the well recognized canons of construction is that the legislature speaks its mind by use of correct expression and unless there is any ambiguity in the language of the provision, the Court should adopt literal construction if it does not lead to any absurdity".*

139. By enacting the NIA Act, the legislature has treated terrorism as one of the scheduled offences and thereby created a Special Court to deal with the special problem and also provided a special procedure for release of a person on bail booked under the scheduled offences. The Parliament, in its wisdom, has, thus, created a new class of offences under its schedule and provided a special procedure for trial of such offences and special procedure for bail as well. The manifest intention of the Parliament

is to minimize the scope of the power of the High Court, with regard to the provisions of bail in respect of the scheduled offences under the NIA Act. Otherwise, the legislature would not have made provisions for appeal to the High Court restricting use of the special power embodied in Section 439 of the code.

WEB NOT

140. While interpreting Section 34(4) of POTA, the Supreme Court has held, in ***Salimbhai Abdulgaffar Shaikh*** (supra), that while exercising the appellate jurisdiction, even an order granting bail can be examined, on merit, by the High Court without any kind of fetters on its powers and it can come to an independent conclusion whether the accused deserves to be released on bail on the merits of the case or not.

141. While considering the above observations, made in ***Salimbhai Abdulgaffar Shaikh*** (supra), it needs to be noted that while sitting, in an appeal, against an order of the Special Court, the High Court has to exercise the appellate Court's power without any kind of fetters on its powers. The expression, *'without any kind of fetters on its powers',* which appears in the observations made in ***Salimbhai Abdulgaffar Shaikh*** (supra), would not mean that the High Court's appellate powers would not be co-extensive with the Special Court's power or that the High Court's appellate power would be far in excess of the Special Court's power.

WEB NOT

142. It is important to note, at this stage, that the High Court's power, under Section 439 of the Code, can be taken recourse to not merely for the purpose of seeking bail, but also for the purpose of cancellation of bail. In the case of cancellation of bail, the High Court would not, ordinarily, interfere unless the accused is shown to have abused his liberty of bail; whereas this limitation does not apply at all to the High Court, when the High Court, in exercise of its appellate power, examines the Special Court's order allowing an accused to go on bail. If an accused did not, on the basis of the facts of a given case, deserved to go on bail, the High Court, while sitting as an appellate Court, can interfere with such an order even if the accused has not abused his liberty of bail. This is what had been precisely done, in ***Redaul Hussain Khan's*** case (supra).

143. What needs to be borne in mind is that, ordinarily, when a Court, subject to the territorial jurisdiction of a High Court, grants bail, the High Court would not interfere with such an order under Section 439 of the Code even if it takes the view that it would have been more reasonable, on the part of the lower Court, to have not allowed bail. However, sitting as an appellate Court, the High Court can, when there are two views possible, take the view that it was not reasonable to grant bail and can, therefore, cancel bail even if the accused did not abuse the liberty of bail.

WEB NOT

Leaving none in doubt, the Supreme Court had, in fact, in ***Salimbhai Abdulgaffar Shaikh*** (supra), observed that the provisions of POTA are in clear contradistinction with that of the Code, where no appeal has been provided against an order granting bail and that existence of an order of the Special Court, either allowing bail or refusing bail, is a *sine qua non* for approaching High Court for bail. In the face of such a clear declaration of law, it is impossible to take the view, as contended on behalf of the appellant, that the High Court, while exercising its appellate jurisdiction under Section 21(4) is not denuded of its special power under Section 439 of the Code and/or can freely take the aid of its special power, under Section 439 of the Code, to allow an accused to go on bail even if his case happened to be covered by the restrictive provisions of the proviso to Section 43D(5).

144. Because of the fact that we find that even when a Court, other than Special Court, considers the question of bail of a person, accused of an offence under the UA(P) Act, the restrictive provisions of the proviso to Section 43D(5) would apply and that even the High Court cannot ignore the restrictions, which have been imposed on the power to grant bail by the proviso to Section 43D(5), we do not find that there is any unreasonable classification, more particularly, when the constitutionality or the validity of none of the provisions of the UA(P) Act or the NIA Act

is under challenge in the present appeals.

145. What crystallizes from the above discussion is that the restrictive provisions, embodied in Section 43D(5), would apply to all situations, both in original application for bail and also in the appellate consideration of the bail orders. When a special statute commences with a *non-obstante* clause overriding the provisions of the Code, particularly, the provisions with regard to bail, then, it is the special statute, which would prevail upon the Code.

146. Reverting to the merit of the appeals, we may point out that in the case at hand, apart from the fact that the order, taking cognizance by the learned Special Judge, NIA, Patna, was never challenged by the present appellants, they, in fact, even against the framing of charges by the learned trial Court, expressed no grievance.

147. There is, therefore, admittedly, enough material to apply the restrictive provisions contained in Proviso to Section 43D (5) of the Unlawful Activities (Prevention) Act, 1967, which lays down that if, in the opinion of the Court, there is reasonable grounds, believing that the accusation against the accused is prima facie true, the Court cannot grant bail to the accused.

148. In the case at hand, the appellants were already on bail. As they defaulted in appearing in the learned trial Court, their

WEB NOT

bail bonds were forfeited and their bail were cancelled. Against the order, forfeiting their bail bonds and cancelling their bail, the appellants never made any grievance. They, in fact, applied afresh for bail and their applications for bail has been rejected by the learned trial Court on the ground that having regard to the materials on record and, more particularly, quantum of recovery of various objectionable items, it would not be in the interest of justice to enlarge them (i.e., the appellants) on bail.

149. We find no illegality and/or infirmity in the order of the learned trial Court refusing to grant bail to the appellants. In fact, it has not been argued before us that there was no material against the present appellants warranting framing of charges by the learned trial Court and/or warranting their trial. The bail applications were, therefore, required to be considered afresh and when considered afresh by the learned trial Court, the learned trial Court was bound by the restrictive provisions of the Proviso to Section 43D (5) of the Unlawful Activities (Prevention) Act, 1967.

150. As this Court is considering the appeal against the order refusing to grant bail made by a Special Court, under the National Investigation Agency Act, 2008, it needs to be pointed out that this appellate power is co-extensive with the power of the trial Court and when the learned trial Court is debarred, under the law, from granting bail to an accused in a case of present nature,

this Court, as High Court, cannot ignore the restrictions, which have been imposed by the legislation.

WEB NOT

151. Consequently, the impugned order, dated 16.01.2016, passed by the learned Special Judge, NIA, Patna, in Special Case No.04 of 2013/R.C. No.01 of 2013, refusing to grant bail, needs to be upheld and maintained until further order.

152. In the result, these appeals fail and, accordingly, stand dismissed.

153. However, there shall be no order as to costs.

(I. A. Ansari, CJ)

Chakradhari Sharan Singh, J: I agree.

(Chakradhari Sharan Singh, J)

J.Alam/-

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