

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.545 OF 2016

Pragya Singh Chandrapalsingh Thakur]
alias Sadhvi *alias* Swami Purnchetanand]
Giri, D/o. Shri. Chandrapal Singh Thakur,]
Aged about 44 Years, Occ.: Sadhwi,]
R/at : C/o. Shri. Soman Jha, 19, Ganga]
Sagar Row House, Opp. Saroli Bus Stand,]
Poona Kumbharia Road, Surat, Gujarat.]
(At present lodged in Bhopal Central Jail]
at Bhopal in Case No.458/2011, pending] Appellant /
before the Sessions Court, Devas, M.P.)] (Org. Accused No.1)

Versus

State of Maharashtra,]
Through National Investigating Agency (NIA),]
New Delhi.] Respondent

ALONG WITH

CRIMINAL APPLICATION NO.1440 OF 2016

AND

CRIMINAL APPLICATION NO.71 OF 2017

IN

CRIMINAL APPEAL NO.545 OF 2016

Nisar Ahmed Haji Sayed Bilal,]
Age : 64 Years, Occ.: Retired,]
Permanently R/at 552, Islampura,] Intervenor /
Galli No.12, Malegaon, Nashik-423203.] (Applicant)

In the matter between

Pragya Singh Chandrapalsingh Thakur]
alias Sadhvi *alias* Swami Purnchetanand]
Giri, D/o. Shri. Chandrapal Singh Thakur,]
Aged about 44 Years, Occ.: Sadhwi,]
R/at : C/o. Shri. Soman Jha, 19, Ganga]
Sagar Row House, Opp. Saroli Bus Stand,]
Poona Kumbharia Road, Surat, Gujarat.]

(At present lodged in Bhopal Central Jail
at Bhopal in Case No.458/2011, pending
before the Sessions Court, Devas, M.P.)]
] Appellant /
] (Org. Accused No.1)

Versus

State of Maharashtra,]
Through National Investigating Agency (NIA),]
New Delhi.] Respondent

Mr. Avinash Gupta, Senior Advocate, i/by Mr. J.P. Mishra, a/w.
Mr. Shyam Dewani, Mr. Prashant Muggu, Ms. Akanksha Helaskar,
Mr. Aakash Gupta, Mr. V.S. Uberoi and Mr. Sujender Yadav, i/by
M/s. Dewani Associates, for the Appellant-Original Accused No.1.

Mr. Anil C. Singh, A.S.G., a/w. Mr. S.D. Patil and Ms. Indrayani
Deshmukh, for the Respondent-NIA.

Mr. J.P. Yagnik, A.P.P., for State of Maharashtra.

Mr. B.A. Desai, Senior Counsel, a/w. Mr. Abdul Wahab Khan,
Mr. Sharif Shaikh, Mr. Wahab Khan, Mr. Ansar Tamboli, Ms. Naina
Shaikh, Mr. Shahid Ansari and Mr. Afzal, for the Intervenor-
Applicant in Criminal Application Nos.1440 of 2016 and 71 of 2017.

**CORAM : RANJIT MORE &
DR. SHALINI PHANSALKAR-JOSHI, J.J.**

RESERVED ON : 20TH FEBRUARY, 2017.

PRONOUNCED ON : 25TH APRIL, 2017.

P.C. :

1. This is an Appeal preferred by original Accused No.1-Pragyasingh Thakur in M.C.O.C. Special Case No.1 of 2009 *alias* M.C.O.C. Special Case No.8 of 2011 *alias* N.I.A. Special Case No.1 of 2016, challenging the order dated 28th June 2016 passed by the Special Court, constituted under MCOC Act and NIA Act at Mumbai, thereby rejecting her application for bail (Exhibit No.3021).

2. Appellant is one of the twelve accused, who are charge-sheeted by 'Anti Terrorist Squad, Mumbai', (*for short*, “ATS”), under Sections 302, 307, 326, 324, 427, 153A and 120B of the Indian Penal Code, (*for short*, “IPC”), r/w. Sections 3, 4, 5 and 6 of the Explosive Substances Act, 1908, (*for short*, “ES Act”), r/w. Sections 3, 5 and 25 of the Arms Act, 1959, (*for short*, “Arms Act”), r/w. Sections 15, 16, 17, 18, 20 and 23 of Unlawful Activities (Prevention) Act, 1967, (*for short*, “UAP Act”), r/w. Sections 3(1)(i), 3(1)(ii), 3(2), 3(4) and 3(5) of the Maharashtra Control of Organized Crime Act, 1999, (*for short*, “MCOC Act”).

3. Brief facts of the case, which may be relevant for deciding this Appeal and which are summarized by Special Court in its order and which are otherwise also not controverted, can be stated as follows :-

. On 29th September 2008, at about 9:35 pm, the bomb explosion took place at Malegaon, District Nashik, opposite Shakil Goods Transport Company, between Anjuman Chowk and Bhiku Chowk. The blast was caused on account of explosive device fitted in 'LML Freedom Motor-Cycle', bearing registration No.MH-15-P-4572. In the said blast, 6 innocent persons lost their lives and about 101 persons had received injuries of various nature, coupled with the damage caused to the property.

4. On the same night, at about 3 a.m., offence came to be registered in respect of this bomb-blast under C.R. No.130/2008 in Azad Nagar Police Station, Malegaon, Dist. Nashik, for the offences punishable under Sections 302, 307, 326, 324, 427, 153A and 120B of IPC, r/w. Sections 3, 4, 5 and 6 of ES Act r/w. Sections 3, 5 and 25 of the Arms Act.

5. During the course of investigation, the exhibits collected from the place of offence were sent to the Forensic Science Laboratory at Nashik, (*for short, "FSL"*), and as per the report of the FSL, those exhibits were found to be containing Cyclonite (RDX) and Ammonium Nitrate, which are used as highly explosive substances.

6. On 18th October 2008, the provisions of Sections 15, 16, 17, 18, 20 and 23 of the UAP Act were invoked and investigation of the case was entrusted to Dy.S.P. (Head Quarter), Nashik Rural, as per the provisions of UAP Act. Thereafter, on 26th October 2008, A.C.P. and Chief Investigating Officer of ATS, Mumbai, took the charge of the investigation and the case was registered as C.R. No.18/2008. On 29th November 2008, the provisions of MCOC Act were also invoked. After carrying out due investigation, ATS filed Charge-Sheet in the Court on 20th September 2009 against eleven Accused, including the Appellant and sought permission to continue further investigation under Section 173(8) of the Code. Accused No.12-Praveen Takkalki was arrested subsequent thereto and, accordingly, Supplementary Charge-Sheet came to be filed against him by ATS on 20th April 2011.

7. During the course of investigation, it was transpired that registration number of 'LML Freedom Motor-Cycle', used in the crime, was bogus. The Chassis and Engine Number of the said motor-cycle were found to be erased. The parts of the motor-cycle were sent to the FSL. The FSL could successfully restore the engine number of the said motor-cycle and it was revealed that original registration number of the said motor-cycle was "GJ-05-BR-1920". It

was further transpired that Appellant is the registered owner of the said vehicle. Accordingly, Appellant was arrested on 23rd October 2008 at Mumbai along with Accused No.2-Shivnarayan Kalsangra and Accused No.3-Shyam Sahu.

8. As per the case of the ATS, as disclosed in the report under Section 173 of the Code filed in the Court, Accused No.9-Prasad Purohit, who was serving as 'Lt. Colonel' in the Army and was associated with Military Intelligence and Interior Terrorism (Insurgency Activities), has floated an organization in the name of "Abhinav Bharat" on 9th February 2007. Accused No.4-Ramesh Upadhyay, Accused No.10-Swami Amrutanand *alias* Sudhakar Dwivedi *alias* Dayanand Pandey and other co-accused, including some of the prosecution witnesses, were members of the said organization. The object of the said accused persons was to turn India into 'Hindu Rashtra' called as "*Aryavart*". They wanted to form Government in exile. They were dissatisfied with the Constitution of India and wanted to prepare their own Constitution. They had also planned to train the persons for 'Guerrilla War'. They had decided to eliminate the persons opposing their object of formation of 'Hindu Rashtra'. To achieve this object, Accused No.9-Prasad Purohit had collected huge amount of funds to the tune of Rs.21,00,000/- for

himself and his 'Abhinav Bharat Organization' to promote his fundamentalist ideology. The amount so collected was given to Accused No.6-Ajay *alias* Raja Rahirkar, who was 'Treasurer' of 'Abhinav Bharat', who, in turn, disbursed the said amount to other Accused for procuring hand-grenades to commit unlawful activities. With that object in mind, from time to time, they were holding meetings at several places, like, Faridabad, Kolkata, Bhopal, Jabalpur, Indore, Nasik etc., to discuss various aspects for achieving their goals.

9. As per the further case of ATS, in one of the meetings at Bhopal, on 11th / 12th April 2008, the criminal conspiracy to cause bomb-blast at Malegaon was hatched and in the said meeting, Appellant undertook the responsibility of providing her motor-cycle and manpower to cause bomb-blast; whereas, Accused No.9-Prasad Purohit took the responsibility of providing explosives, in order to take revenge of 'Jihadi' activities by Muslim community.

10. It is the case of ATS that Appellant and co-accused had entered into criminal conspiracy between January 2008 to 23rd October 2008 with the common object to strike terror in the minds of people by exploding bomb at Malegaon and other places and overawe the

Government. Accused No.9-Prasad Purohit had brought RDX with him from Kashmir and the said explosives were assembled at the house of Accused No.11-Sudhakar Chaturvedi. During the search by ATS, the traces of RDX were found in the house of Accused No.11-Sudhakar Chaturvedi at Devlali Camp, Nashik. As per FSL's Report, the explosive ingredients detected in bomb-blast are similar to the samples found from the house of Accused No.11-Sudhakar Chaturvedi.

11. According to the ATS, the absconding accused Ramji *alias* Ramchandra Kalsangra and Sandip Dange and Accused No.12-Praveen Takkalki, in pursuance of the said conspiracy, had planted the explosive device by using 'LML Freedom Motor-Cycle' owned by the Appellant. The case of the ATS is further to the effect that the absconding accused Ramji *alias* Ramchandra Kalsangra and Sandip Dange are the men of the Appellant and they had acted at her instance. Appellant provided her own motor-cycle for the said explosion and, thus, as per the case of ATS, Appellant is one of the principal conspirators and had also taken active part in the bomb-blast at Malegaon by providing planters as well as her motor-cycle for planting the explosive device.

12. After the Charge-Sheet to this effect was filed by ATS on 20th January 2009 in the Special Court, Government of India, vide its order dated 1st April 2011, transferred the investigation of the case to National Investigation Agency, (*for short*, “NIA”). Accordingly, on 13th April 2011, NIA re-registered the offence in respect of the said incident as C.R. No.5/2011.

13. Meanwhile, Accused No.9-Prasad Purohit had filed Bail Application No.42 of 2008 in the Special Court on 3rd December 2008. While deciding the said Bail Application, the Special Court, vide its order dated 31st July 2009, discharged the present Appellant and all the co-accused from the offences under MCOC Act and directed to transfer the case to the regular court at Nashik, as per Section 11 of the MCOC Act. Being aggrieved by the said order, the State preferred Criminal Appeal bearing No.866 of 2009 before this Court under Section 12 of the MCOC Act. The said Appeal was allowed by the Division Bench of this Court by order dated 19th July 2010 and, accordingly, the impugned order of the Special Court dated 31st July 2009 was set aside and the case was restored to the file of the Special Court under MCOC Act for decision on merit. As a result, Appellant preferred fresh application for bail, which came to be rejected by the Special Court vide its order dated 25th September

2012. The Criminal Appeal No.1305 of 2013 preferred by her against the said order also came to be dismissed by this Court vide order dated 4th April 2014.

14. Meanwhile, the order passed by this Court in Criminal Appeal No.866 of 2009, restoring the application of the provisions of MCOC Act, came to be challenged by the present Appellant and Accused No.9-Prasad Purohit in Appeal before the Hon'ble Apex Court. The Hon'ble Apex Court, by its common order dated 15th April 2015 passed in Criminal Appeal No.1969-1970 of 2010, decided all the Appeals filed by the Appellant and other co-accused raising doubt about applicability of the provisions of MCOC Act to these Accused, except Accused No.7-Rakesh Dhawde. The Hon'ble Apex Court, accordingly, while disposing of these Appeals, restored the Bail Application of Accused No.9-Prasad Purohit, bearing Miscellaneous Application No.42 of 2008, to the file of the Special Court for a fresh decision on its own merit, excluding the applicability of the provisions of MCOC Act. In the said Judgment, the Hon'ble Apex Court further held that, the Appellant is also entitled for the same relief of consideration of her Bail Application on its own merits, excluding the provisions of MCOC Act.

15. After this decision of the Hon'ble Apex Court dated 15th April 2015, the Appellant filed fresh application for bail at Exhibit-2400 on 21st September 2015 before the Special Court. That Bail Application was rejected by the Special Court on 7th November 2015. Appellant had not preferred any Appeal against the said order.

16. Subsequent thereto, on 13th May 2016, NIA has filed Supplementary Report, under Section 173(8) of the Code, informing that during the course of further investigation, it was transpired that Appellant has no concern with the offence and, accordingly, she was exonerated of all the charges levelled against her by ATS, as no case was made out against her. NIA also dropped the charges of MCOC Act against all the accused persons, thereby concluding that no offence under MCOC Act is attracted in this case.

17. Treating this report of NIA as a change in the circumstance, Appellant filed this fresh application for bail before the Special Court, at Exhibit-3021, contending, *inter alia*, that when Investigating Agency like NIA itself has concluded that she has no concern with the offence and, accordingly, she is exonerated from all the charges, *prima facie*, there is no case against her and hence

she becomes entitled to be released on bail. It is submitted by her that once it is held by NIA that charges under MCOC Act are not attracted; in other words, those charges are dropped, then the confessional statements of Accused Nos.7, 10 and 12 also cannot be considered so as to implicate the Appellant with the alleged offences.

18. Further it is submitted that PW-79 and PW-112, on whose statements the Appellant was implicated by ATS, have also retracted their statements made before ATS, in their fresh statements recorded by NIA and also recorded under Section 164(5) of the Code before the Metropolitan Magistrate at Delhi. Next it is submitted that even PW-55, on whose statement Appellant was implicated, has also made complaint regarding harassment and torture at the hands of ATS to the Human Rights Commission. Similarly, PW-22 has also made similar complaint of torture and harassment by ATS Officers before the Judicial Magistrate, Indore. In such circumstances, it is submitted by Appellant that the statements of these witnesses, on the basis of which the Appellant was implicated by ATS, cannot be relied upon to prove prima facie case against her.

19. Lastly, it is submitted by the Appellant that NIA has confirmed

that the motor-cycle involved in the bomb-blast was not in her possession. It was used by the absconding accused Ramji *alias* Ramchandra Kalsangra since two years prior to the incident and in such circumstances, there is no reason or ground to hold that she was, in any way, concerned with the bomb-blast.

20. On this application of the Appellant seeking fresh bail in view of the change in circumstance, the learned Special P.P. for NIA has given before the Special Court 'no objection' for release of the Appellant on bail, having regard to the report filed by NIA exonerating her of all the charges.

21. In this Appeal also, the learned ASG Shri. Anil Singh has continued the said stand of NIA by conceding that prosecution has no objection for release of Appellant on bail. According to learned ASG, NIA has already dropped the charges under MCOC Act, considering that there was no sufficient material on record to apply those charges. It is submitted that, Accused No.10-Swami Amrutanand Devtirth has retracted the confessional statement made before the Metropolitan Magistrate, Mumbai, on 25th November 2008. Similarly, Accused No.7-Rakesh Dhawde has also retracted his confessional statement made before the Metropolitan

Magistrate, Mumbai, on 6th December 2008. He has also denied the contents of the statement made before the ATS officer relating to supply of RDX and bomb for the Malegaon blast. Thus, it is submitted that these confessional statements, which are already retracted, rules out the applicability of MCOC Act and, accordingly, NIA has dropped those charges.

22. It is further submitted by learned ASG that, though it was revealed during the course of investigation by NIA also, that 'LML Freedom Motor-Cycle No.GJ-05-BR-1920' used in the commission of the bomb-blast at Malegaon stands registered in the name of the Appellant, being purchased by her, the material collected during the course of investigation revealed that the said motor-cycle was in possession of the absconding accused - Ramji @ Ramchandra Kalsangra and was being used by him well before the blast. Reliance is placed on the statements of PW-21, PW-23, PW-30 and PW-32, as recorded by the ATS officer, to submit that it was absconding accused - Ramji @ Ramchandra Kalsangra, who was in possession of the said motor-cycle.

23. Thus, as per the written submissions filed on behalf of NIA, it is

submitted that not only Accused No.10-Swami Amrutanand Devtirth has retracted his statement recorded by ATS officer, but even PW-79, PW-22 and PW-112 have also retracted their statements, which were initially made before the ATS officer. Thus, according to NIA, there is no incriminating material against the Appellant and as a result, NIA has given clean-chit to not only the Appellant but also to some other co-accused, namely, Accused Nos.2, 3, 12, 15 and 16, as no sufficient evidence was found against them. Thus, it is submitted on behalf of NIA by the learned ASG that prosecution has no objection for granting bail to the Appellant, as she is exonerated from all the charges levelled against her.

24. The application of the Appellant for bail is, however, strongly resisted by the Intervenor before the Special Court and this Court also. It may be stated that the Intervenor in the case is the father of the deceased, who had died in the bomb-blast at Malegaon. The Special Court has, vide its detail order dated 17th June 2016, allowed the Intervention Application, considering that as prosecution is giving its 'no objection' for release of the Appellant on bail, practically, there was no one opposing the Bail Application and, hence, in order to have fair hearing on the point of Bail Application,

it would be appropriate to give an opportunity of hearing to the Intervenor, who was the real aggrieved person, as his son has succumbed to death in the bomb-blast. In this Appeal also, on the same grounds, we have also allowed the Intervention Application and heard learned Senior Counsel for the Intervenor Shri. B.A. Desai, who has strongly resisted the request of the Appellant to be released on bail.

25. According to learned Senior Counsel for Intervenor, prima facie, there is sufficient material on record implicating the Appellant even at this stage, as the report of the investigation carried out by ATS has to be read conjointly with the Investigation Report submitted by NIA. It is submitted by him that, when earlier Bail Application was filed by the Appellant before the Special Court bearing Exhibit-2400, the Special P.P. on behalf of NIA has strongly resisted the said Bail Application. Since then, there is no substantial change in the circumstances and despite that, this time, NIA has given 'no objection' for allowing Appellant's Bail Application. It is urged that under the garb of carrying out further investigation, NIA has conducted re-investigation and, that too, not of the offence but of the investigation made by the ATS. As this re-investigation is made

by NIA without the order of the higher courts, that investigation itself is illegal. According to learned counsel for the Intervenor, the investigation conducted by NIA is unfair and tainted. NIA has no power to question the reliability of the investigation conducted by the ATS. According to learned counsel for the Intervenor, both, the Trial Court and this Court, have already held, while deciding previous Bail Applications of the Appellant, that, there is sufficient material on record to show involvement of the Appellant in commission of the offences. It is held that, Appellant is the principal conspirator, as having supplied not only the motor-cycle but also the manpower for causing the bomb-blast. Hence, according to learned Senior Counsel for Intervenor, merely because NIA has dropped the charges against Appellant, she cannot be released on bail; especially having regard to the gravity and seriousness of the offence, and the apprehension of Appellant further tampering the prosecution witnesses and thereby thwarting the course of justice.

26. The Special Court, after hearing at length learned counsel for the Appellant, learned counsel for the Intervenor and learned Special P.P., was pleased to reject the application of the Appellant for bail by the impugned order holding that the investigation

conducted by ATS, implicating the Appellant, cannot be wiped out totally from the record. It was held that the report of the investigation done by NIA is required to be considered conjointly with the report of investigation made by ATS and if it is done so, then, according to the Special Court, no case was made out for releasing the Appellant on bail.

27. This order of the Special Court is challenged in this Appeal by learned counsel for the Appellant; whereas, supported by learned counsel for the Intervenor. Their arguments were heard at length by this Court. This Court has also perused the written submissions filed on record by them, on the conclusion of oral submissions. Learned Additional Solicitor General has, as stated above, conceded in this Court also that, in view of the report of the NIA exonerating the Appellant of all the charges, prosecution has no objection to allow her application for bail.

Applicability of Section 43-D(5) of the UAP Act

28. The first and foremost contention raised by learned counsel for the Appellant, in this case, is relating to '*applicability of Section 43-D(5) of the UAP Act*'. It is submitted that, in view of two

contradictory Reports; one submitted by ATS and another by NIA, an opinion that there are reasonable grounds for believing that the accusation against the Appellant is prima facie true, cannot be formed. Therefore, it is submitted that, bar under sub-section (5) of Section 43-D of UAP Act would not be attracted in the present case. In the alternate, it is submitted that the said sub-section (5) of Section 43-D of UAP Act cannot have any retrospective operation. It is submitted that, though the UAP Act was promulgated on 30th December 1967 and it was amended on 21st September 2004, the stringent provisions pertaining to the bail, namely, sub-section (5) of Section 43-D of UAP Act, were introduced only with effect from 31st December 2008 by the Amendment Act No.35 of 2008. It is urged that, prior to the said amendment, matters relating to arrest, detention and bail were governed by the provisions of the Code of Criminal Procedure, 1973, (*for short, "the Code"*).

29. In this case, it is submitted that the incident took place on 29th September 2008 and the Appellant was arrested on 23rd August 2008. The first Bail Application was filed prior to 31st December 2008. Though the said application came to be rejected by the Trial Court, the Hon'ble Apex Court has permitted her to file fresh application. It may be true that thereafter again it was rejected, but

in view of change in circumstances, she is entitled to file fresh application for bail. Hence, as her plea of bail is yet pending, in view thereof, the effect of this amended stringent provision of Section 43-D(5) of UAP Act cannot be made applicable to Appellant's Bail Application.

30. Learned counsel for the Appellant has, in this respect, relied upon the various provisions of the Constitution to submit that no person can be convicted for an offence, except for violation of law in force at the time of commission of the act, charged as an offence, nor he can be subjected to a penalty, greater than that, which might have been inflicted under the law in force at the time of commission of the offence. According to learned counsel for Appellant, as these amended provisions of Section 43-D(5) of the UAP Act put further restrictions on the right of the accused to be released on bail, they are as good as creating higher punishment or penalty other than that, which was imposed at the time of commission of the offence and, hence, those provisions cannot be made applicable to the case of the Appellant. He has further submitted that 'right to bail' being a substantive right of the Accused, as the amended provisions affects this right, those provisions cannot have any retrospective operation.

31. In this respect, the reliance is placed on the authority of *Keshavan Vs. State of Bombay, AIR 1951 SC 128*, wherein the Hon'ble Apex Court has held that, Article 13(1) of the Constitution cannot have retrospective effect, as every Statute is prima facie prospective, unless it is expressly or by necessary implications made to have retrospective operation.

32. Learned counsel for the Appellant has also relied upon the decision of the Hon'ble Apex Court in *Bishun Narain Misra Vs. The State of U.P., AIR 1965 SC 1567*, wherein the notification of reducing the age of retirement or superannuation was held to be having no retrospective effect.

33. He has also placed reliance on the decision of the Hon'ble Apex Court in *M/s. West Ramnad Electric Distribution Company Ltd. Vs. The State of Madras, AIR 1962 SC 1753*, to submit that void legislation cannot be validated by the Government by subsequent legislation.

34. Further, he has placed reliance on the decision of the Hon'ble Supreme Court in the case of *Sukhdev Singh Vs. State of Haryana,*

(2013) 2 SCC 212, which pertain to the amendment in sub-section (2) of Section 42 of the Narcotic Drugs and Psychotropic Substances Act, 1985, wherein it was held that, *“it is a settled principle of interpretation of Criminal Jurisprudence that the provisions have to be strictly construed and cannot be given a retrospective effect, unless legislative intent and expression is clear beyond ambiguity”*.

35. Thus, sum and substance of the submission of learned counsel for the Appellant is that, as the amended provisions of Section 43-D(5) of the UAP Act have the effect of curtailing Appellant's right to bail, they cannot have the retrospective effect and the Appellant's application has to be decided as per the provisions of the Code, as was the law prior to the amendment in UAP Act.

36. Per contra, according to learned counsel for Intervenor, as, on the date of amendment in Section 43-D(5) of UAP Act, the Bail Application of the Appellant was not decided, amended provisions can be made applicable for the decision of his Bail Application. Further, it is submitted that the amended provision is purely procedural in nature relating to the bail and custody of the accused. It does not affect any substantive right of the Appellant. It is urged

that the Appellant is arrested and charged for the commission of non-bailable offences like Sections 302 and 307 of IPC and Accused in a non-bailable offence does not have any vested right to be released on bail. Therefore, Appellant cannot raise any grievance of her substantive right being affected or curtailed on account of amendment in Section 43-D(5) of the UAP Act.

37. By placing reliance on the landmark decision of the Hon'ble Apex Court in the case of *Hitendra Vishnu Thakur Vs. State of Maharashtra, AIR 1994 SC 2623*, it is urged that the amendments in the provisions relating to custody and bail are of procedural nature and can have retrospective effect.

38. Learned counsel for the Intervenor has also placed reliance on the decision of the Hon'ble Apex Court in the case of *Gurubachan Singh Vs. Satpal Singh, AIR 1996 SC 290*, wherein the retrospective effect was given to the amended Section 113A of the Indian Evidence Act, laying down presumption in case of abatement of suicide by a married woman within seven years from the date of her marriage. It is urged that, in the said decision, it was held by the Hon'ble Apex Court that, the amended provision under Section 113A

does not create any new offence and, hence, it can be made applicable even to the death of a married woman occurred prior to the Amendment Act came into place. Thus, according to learned counsel for Intervenor, there is no substance in the contention raised by learned counsel for Appellant on this score.

39. In our considered opinion, in order to appreciate these rival submissions, it would be fruitful to refer to the decision of the Hon'ble Apex Court in the case of *Hitendra Vishnu Thakur (Supra)*, which has laid down the settled principles regarding “prospective” or “retrospective” operation of the legislation or the amendments in the legislation, as these principles of law can be fairly well applicable to the present case also.

40. The question involved in the said case was, '*as to whether the Amendment Act No.43 of 1993 is retrospective in operation?*'. By the said Amendment, clause (b) of sub-section (4) of Section 20 of TADA Act was amended, thereby reducing the maximum period during which an accused under TADA can be kept in custody pending investigation from one year to 180 days. The Amendment Act also introduced clause (bb) to sub-section (4) of Section 20 of

TADA Act, thereby enabling the prosecution to seek extension of time for completion of investigation. When application of these provisions was challenged before the Hon'ble Apex Court on the count that they do not have the effect on pending proceedings, the Hon'ble Apex Court has laid down following test for deciding the “retrospective” and “prospective” operation of such amending Acts.

- “(i) A Statute which affects substantive rights is presumed to be prospective in operation, unless made retrospective, either expressly or by necessary intendment, whereas a Statute which merely affects procedure, unless such a construction is textually impossible is presumed to be retrospective in its application, should not be given an extended meaning, and should be strictly confined to its clearly defined limits.*
- (ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal, even though remedial, is substantive in nature.*
- (iii) Every litigant has a vested right in substantive law, but no such right exists in procedural law.*
- (iv) A procedural Statute should not generally speaking be applied retrospectively, where the result would be to create new disabilities or obligations, or to impose new duties in respect of transactions already accomplished.*

(v) *A Statute which not only changes the procedure but also creates new rights and liabilities, shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication.”*

41. In the light of these principles, the Hon'ble Apex Court was pleased to hold that the Amendment Act No.43 of 1993, regulating the period of compulsory detention and the procedure for grant of bail being procedural in nature, would operate retrospectively. It was further held that the said Amendment Act is applicable to the pending proceedings also. *[Emphasis Supplied]*

42. Similarly, in the case of *Gurubachan Singh (Supra)* also, the Hon'ble Apex Court was pleased to hold that Section 113A of the Indian Evidence Act, which was inserted in Statute by Amendment Act No.46 of 1983, does not create any new offence and, as such, it does not affect any substantive right, but it is merely a matter of procedure of evidence and as such, it was retrospective and was applicable to the death of a woman that had taken place prior to the Amendment Act came into force.

43. In the light of these decisions, one has to consider the provisions of Section 43-D(5) of the UAP Act. They read as follows :-

“43-D. Modified application of certain provisions of the Code -

- (1)*
- (2)*
- (3)*
- (4)*

(5) 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 of 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.

(6) The restrictions on granting of bail specified in sub-section (5) is in addition to the restrictions under the Code or any other law for the time being in force on granting of bail.

(7) Notwithstanding anything contained in sub-sections (5) and (6), no bail shall be granted to a person accused of an offence punishable under this Act, if he is not an Indian citizen and has entered the country unauthorizedly or illegally except in very exceptional circumstances and for reasons to be recorded in writing.”

44. Perusal of these provisions, thus, makes it clear that, prior to the amendment of Section 43-D(5), which came into effect from 31st December 2008, the Bail Applications of the accused persons charged for the offences under UAP Act were required to be considered within the scope of the provisions of the Code; whereas, now, after the amendment, such Bail Applications are to be considered as per these provisions of sub-clause (5) of Section 43-D. By way of this Amendment, two additional conditions are laid down, like, opportunity of being heard on the application of bail being extended to the P.P. before passing any order on the Bail Application of the Accused and second condition to the effect that the accused shall not be released on bail, if, on perusal of the Case Diary or the Report made under Section 173 of the Code, the Court is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true.

45. No doubt, these two conditions are in addition to the conditions laid down under the Code on granting of bail; however, these conditions, in our considered opinion, do not, in any way, affect or restrict the right, if any, of the Appellant to be released on bail. Even while deciding the Bail Application of the Accused, as per the provisions of the Code, Public Prosecutor is heard and; secondly, under the provisions of the Code also, the Court always ensures as to whether the accusation against the accused person is prima facie true. If it is so, then his right to get the bail becomes restricted. Therefore, effectually, there are no such further restrictions laid down by the Amendment Act on the Appellant's right, if any, of the bail. Hence, this Amendment cannot be considered as substantively affecting the right of Appellant.

46. Moreover, in this case, admittedly, the offences alleged against the Appellant are non-bailable and punishable with imprisonment for life or death, as she is also charged for the offences under Section 302, 120B etc. of IPC. Therefore, under the provisions of the Code also, it cannot be said that the Appellant has any substantive right to be released on bail, similar to the right the accused is having in the case of bailable offences. Therefore, the Trial Court has rightly

concluded that Appellant cannot claim to have any “vested right” to be released on bail under the provisions of the Code.

47. It is pertinent to note that in the above-said decision of *Hitendra Thakur (Supra)* also, the Hon'ble Apex Court has clearly held that, “*the procedure for grant of bail is procedural in nature and can have retrospective operation*”. Therefore, we have to hold that, whatever alleged restrictions are put on the rights of the accused to get bail under the provisions of Section 43-D(5) of the UAP Act, they are required to be held as procedural in nature and, therefore, can be said to be having retrospective effect. It is pertinent to note in this context that, even in respect of Section 113A of the Indian Evidence Act, which has created presumption against the innocence of the accused, the Hon'ble Apex Court has held in the case of *Gurubachan Singh (Supra)* that the said provision has retrospective effect and can be applied to the death of a woman that has taken place before the amendment. The Hon'ble Apex Court has refused to accept the argument advanced in the said case that Accused had vested right to get decided his case as per the provisions prevailing on the date of offence.

48. In the instant case, therefore, it has to be held that, as the Bail

Application of the Appellant is being decided after the Amendment Act came into effect and as the provisions relating to bail are considered to be procedural in nature and, otherwise also, these provisions are not, in any way, affecting the right of the Accused to seek bail, it has to be held that sub-section (5) of Section 43-D of UAP Act is applicable to this case and the present application is required to be decided within the scope of the said provisions.

Applicability of MCOCA Provisions

49. At this stage, it may also be necessary to consider the applicability of the provisions of the MCOC Act to the present case. According to learned counsel for the Intervenor, though NIA has dropped the charges under the provisions of MCOC Act, accused in the case, including the Appellant, cannot be discharged from the said offences, as already this Court has taken cognizance of the case under the provisions of MCOC Act. According to learned counsel for the Intervenor, even in the judgment of the Hon'ble Apex Court dated 15th April 2015 passed in Criminal Appeal No.1169-1970 of 2010, the Hon'ble Apex Court has, though raised doubt about the applicability of the provisions of the MCOC Act, to the present Appellant and other co-accused are concerned, except Accused No.7-

Rakesh Dhawde, these accused are not discharged from the offences registered under MCOC Act. In such circumstances, according to him, no clean-chit can be given to the Appellant or other co-accused from the offences registered under the MCOC Act.

50. It is further submitted by learned counsel for the Intervenor that, at this stage, when the investigation conducted by the ATS, implicating the accused with the offences under MCOC Act and the investigation conducted by NIA stand side by side, they have to be read conjointly. It is, therefore, submission of learned counsel for the Intervenor that the confessional statements of Accused Nos.7, 10 and 12 are required to be considered, along with other material on record, while deciding prima facie case of the prosecution against the Appellant for the purpose of deciding her Bail Application. In support of this submission, learned counsel for the Intervenor, has relied upon the judgment of the Hon'ble Apex Court in the case of *State of Tamil Nadu Vs. Nalini & Ors., (1999) 5 SCC 253*.

51. This submission of learned counsel for the Intervenor is strongly controverted by learned counsel for the Appellant on the count that, the Hon'ble Apex Court has already expressed doubts

about the applicability of MCOC Act to these accused and now the clean-chit is given by NIA by dropping those charges under the MCOC Act against all the Accused. Hence, according to him, there is no question of this Court taking into consideration the confessional statements of Accused Nos.7, 10 and 12, which could have been admissible only if the provisions of MCOC Act were applicable.

52. In our considered opinion, in order to appreciate these rival submissions, this Court has to consider the observations made by the Hon'ble Apex Court in the above referred Judgment dated 15th April 2015 passed in Criminal Appeal No.1969-1970 of 2010, against the order passed by this Court. In these Appeals, Appellant and Accused No.9-Prasad Purohit had challenged the very applicability of the provisions of MCOC Act to the present case and while deciding the said issue raised for its consideration, the Hon'ble Apex Court was pleased to observe in paragraph No.95 of its Judgment as follows :-

95. In the light of our above conclusions on the various submissions, we are convinced that in respect of the appellant in Criminal Appeal No.1971 of 2010, namely, A-7, there is no scope even for the limited purpose of Section 21(4)(b) to hold that application of MCOC Act is doubtful. We have held that the said

appellant A-7 had every nexus with all the three crimes, namely, Parbhani, Jalna and Malegaon and, therefore, the bar for grant of bail under Section 21 would clearly operate against him and there is no scope for granting any bail. Insofar as the rest of the appellants are concerned, for the purpose of invoking Section 21(4)(b), namely, to consider their claim for bail, it can be held that for the present juncture with the available materials on record, it is not possible to show any nexus of the appellants who have been proceeded against for their involvement in Malegaon blast with the two earlier cases, namely, Parbhani and Jalna. There is considerable doubt about their involvement in Parbhani and Jalna and, therefore, they are entitled for their bail applications to be considered on merits. [Emphasis Supplied]

53. The Appellant herein was also, accordingly, held entitled for similar relief of consideration of her Bail Application on merits.

54. It may be true that Hon'ble Apex Court has not dropped the charges under MCOC Act, but it appears to be so, as investigation by NIA at that time was in progress. Hence, the Hon'ble Apex Court has not dropped the charges of MCOC against the Appellant and other co-accused. However, the Hon'ble Apex Court has clearly raised a considerable doubt about the applicability of those charges and has

directed that so far as the Bail Applications of the present Appellant and other co-accused, except Accused No.7-Rakesh Dhawde, are concerned, they should be decided on their own merit. This observation of the Hon'ble Apex Court could be further found in paragraph No.98 of its judgment, wherein the Hon'ble Apex Court set aside the orders of rejection of the bail of the Appellant therein, namely, Prasad Purohit, by holding that there is enough scope to doubt as to the application of MCOC Act under Section 21(4)(b) for the purpose of grant of bail and, accordingly, the Hon'ble Apex Court directed the Special Judge to consider their application for bail on merits, keeping in mind the law laid down in the reported authorities, which were referred in paragraph Nos.96 and 97 of the Judgment, and directed to pass the orders accordingly. In the said paragraph itself, it was directed that the bail application of the present Appellant is also restored to the file of the learned Special Judge for passing orders on merit. The Appellant herein was, thus, also held entitled for the same relief, as was granted to the Appellant therein, of consideration of her application for grant of bail. Thus, the Hon'ble Apex Court has made the things very clear by directing that the Bail Application of the present Appellant is to be decided on merits, without considering the provisions of MCOC Act.

55. Once it is held that the provisions of the MCOC Act are not to be considered for deciding the Bail Application, then the next question arising for consideration is, *'whether the confessional statements of Accused Nos.7, 10 and 12 can be taken into consideration for deciding these Bail Applications'?*

56. As stated above, according to learned counsel for the Intervenor, these confessional statements can be taken into consideration even if the provisions of MCOC Act are held to be not applicable, as that observation of the Hon'ble Apex Court pertains only in respect of applicability of Section 21(b) of MCOC Act, which pertains to stringent provisions of bail. According to learned counsel for the Intervenor, the order of the Hon'ble Apex Court nowhere reflects that, while deciding the Bail Application of the Appellant, confessional statements of co-accused should be excluded from consideration. According to learned counsel for Intervenor, further observations made by Hon'ble Apex Court in paragraph No.96 make it clear that the Bail Applications of Appellant and other co-accused were to be decided not on the touch-stone of Section 21(b) of MCOC Act, but on its own merits, as the Hon'ble Apex Court has then referred to the parameters for granting bail, as laid down in the

landmark decisions of *State of U.P., through CBI, Vs. Amarmani Tripathi, 2005 (8) SCC 21*, and *Kalyan Chandra Sarkar Vs. Rajesh Ranjan @ Pappu Yadav & Anr., AIR 2005 SC 921*.

57. In support of his submission, as the learned counsel for Intervenor has placed reliance on the observations of the Hon'ble Apex Court in the case of *State of Tamil Nadu Vs. Nalini and Ors. (Supra)*, it is necessary to refer to those observations also. In this case it was held that,

“Even if the accused persons, at the end of trial, are acquitted for the offences under MCOC Act, still the confessional statements of co-accused can be considered and relied upon for the purpose of the offences punishable under IPC.”

58. According to learned counsel for the Intervenor, therefore, if confessional statements of co-accused can be relied upon even after their acquittal for the charges under TADA and in this case MCOC Act, then the confessional statements of co-accused in this case cannot be kept away at the stage of deciding Bail Applications. According to learned counsel for Intervenor, as the Hon'ble Apex Court has not set aside the order of this Court holding that provisions of MCOC Act are applicable, it has to be held that

confessional statements of co-accused need to be considered while deciding this application for bail.

59. In our considered opinion, at this stage, this point should not detain us for long, because the observations of the Hon'ble Supreme Court in the case of *State of Tamil Nadu vs. Nalini (Supra)* make it clear that the question of considering the confessional statements of co-accused, recorded under MCOC Act for the purpose of the offences punishable under IPC, arises only if the accused persons, at the end of trial, are acquitted of the charges under MCOC Act. The material words are '*at the end of the trial*'. Hence, there has to be joint trial of Accused and the co-accused, who have made confessional statements under MCOC Act. Hence, at this stage, these observations of the Hon'ble Apex Court cannot be of any help to learned counsel for the Intervenor.

60. Secondly and most importantly, the observations made by Hon'ble Apex Court in the Appeal preferred by the Appellant are very clear and categorical to the effect that the Bail Applications of the Appellant and other co-accused are to be decided on their own merits, excluding the applicability of the MCOC Act. Hence, at this stage, we deem it proper not to enter into the controversy or

prejudge the issue, *“as to whether the confessional statements of the co-accused can be taken into consideration for deciding the charges under IPC, even if Accused are acquitted under TADA or MCOC Act”*, especially when the trial and applications for discharge filed by the Accused are pending before the Special Court.

61. Admittedly, in this case, the confessional statements of co-accused were recorded as the provisions of MCOC Act were invoked and once those provisions are not to be considered for the purpose of deciding this Bail Application, as per the order of Hon'ble Apex Court, then, to be on safer side, it would be proper on our part to exclude those confessional statements from our consideration while deciding this Appeal, as was rightly done by the Special Court. Moreover, in our opinion, even if those confessional statements of co-accused are excluded from consideration, still there is more than sufficient material on record to infer prima facie case against the present Appellant.

Validity of Sanction for Prosecution

62. Before advertng to the facts of this case, it is necessary to consider one more leg of the argument advanced by learned counsel

for Appellant and it pertains to the 'sanction' for prosecution of the Appellant. According to learned counsel for the Appellant, the sanction accorded in this case is not legal and valid for two reasons; the first reason being, the State Government had no power to accord sanction under Section 45(2) of UAP Act and, secondly, the Sanctioning Authority of the State Government did not follow the mandatory provisions laid under Section 45(2) of the UAP Act.

63. Per contra, according to learned Special P.P. and learned counsel for the Intervenor, the question of validity of sanction cannot be gone into at this stage, as it needs to be decided at the time of final hearing and; secondly, the sanction granted by the State Government was valid one and it cannot be said that by way of amendment dated 31st December 2008, this authority of the State Government was taken away. It is also submitted that mandatory procedure, as laid under Section 45(2) of the UAP Act, it was followed and, moreover, it cannot be the point for argument at this stage.

64. In order to properly appreciate the submissions advanced at bar by learned counsel for the parties, in our opinion, it would be

useful to reproduce Section 45 of the UAP Act, which reads as follows :-

“45. Cognizance of Offences :-

- (1) No Court shall take cognizance of any offence -*
 - (i) under Chapter III without the previous sanction of the Central Government or any officer authorized by the Central Government in this behalf;*
 - (ii) under Chapters IV and VI without the previous sanction of the Central Government or, as the case may be, the State Government, and where such offence is committed against the Government of a foreign country without the previous sanction of the Central Government.*

65. At this stage, it may be stated that sub-section (2) of Section 45 of UAP Act is inserted with effect from 31st December 2008 and it reads as follows :-

- (2) Sanction for prosecution under sub-section (1) shall be given within such time as may be prescribed only after considering the report of such authority appointed by the Central Government, or, as the case may be, the State Government which shall make an independent review of the evidence gathered in the course of*

investigation and make a recommendation within such time, as may be prescribed to the Central Government, or, as the case may be, the State Government.”

66. The relevant Rules made by the Central Government under the title “*Unlawful Activities (Prevention) (Recommendation and Sanction of Prosecution) Rules, 2008*”, are as follows :-

“2. Definitions :-

(1) *In these rules, unless the context otherwise requires -*

(a)

(b) “*Authority*” means the Authority to be appointed by the Central Government, (or, as the case may be, the State Government, under sub-section (2) of Section 45);

(c)

(2)

3. Time limit for making a recommendation by the Authority :-

The Authority shall, under sub-section (2) of Section 45 of the Act, make its report containing the recommendations to the Central Government, (or, as the case may be, the State Government), within seven working days of the receipt of the evidence gathered by the investigating officer under the Code.

4. Time limit for sanction of prosecution :-

The Central Government, (or, as the case may be, the State Government), shall, under sub-section (2) of Section 45 of the Act, take a decision regarding sanction for prosecution within seven working days after receipt of the recommendations of the Authority.”

67. It may be stated that bracketed portion in these Rules is introduced by Government Notification dated 31st March 2009.

68. According to learned counsel for the Appellant, as, till 31st March 2009, in the Unlawful Activities (Prevention) (Recommendation and Sanction) Rules, 2008, there was no reference to the 'State Government' in definition of authority as well as in the Rules 3 and 4, which prescribe time limit for recommendation of sanction for prosecution, the State Government had no authority to grant sanction under sub-section (2) of Section 45 of the UAP Act for the prosecution of the Appellant. According to him, prior to Amendment in the Rules with effect from 31st March 2009, only the Central Government was competent to grant sanction. Hence, sanction accorded in this case by the Additional Chief Secretary (Home) of the Government of Maharashtra, Mumbai, on 17th January 2009, under Section 45(2) of the UAP Act, is without jurisdiction and invalid.

69. We are, however, not inclined to accept this submission, as the plain reading of Section 45(1)(ii) of UAP Act shows that, so far as the offences under Chapters IV and VI of the UAP Act are concerned, the cognizance can be taken only if there was previous sanction of the Central Government, or, as the case may be, of the State Government. It clearly shows that, “State Government” is also authorized to accord sanction under this provision. It is clear that from 31st December 2008, sub-section (2) of Section 45 of UAP Act was inserted, thereby directing both, the Central and State Government, to create one independent Reviewing Authority and casting obligation on the Sanctioning Authority of Central Government, or, as the case may be, the State Government to consider the report of this Authority before according the sanction. Thus, it can be seen that both the Central Government as well as the State Government are empowered to appoint the said Reviewing Authority, thereby indicating that both the Central Government and State Government are competent to accord the sanction. Otherwise, there was no reason for directing the State Government also to appoint such independent Authority.

70. In our considered opinion, therefore, the absence of the words,

the 'State Government', while defining the “authority” as well as while prescribing the “time limit for making recommendation by the authority” and “time limit for sanction of prosecution” in the Rules, cannot take away the authority of the State Government, given to it under the Section. In our considered opinion, such Rules, which are framed in exercise of delegated legislation, cannot take away the authority, which was vested in the State Government in view of Section 45(ii) of UAP Act. Hence, it cannot be accepted that from 31st December 2008 to 31st March 2009, State Government had no authority to accord sanction under Section 45(ii) of the UAP Act. Hence, the sanction accorded in this case by the Additional Chief Secretary (Home), Government of Maharashtra, cannot be called as without authority or jurisdiction.

71. As regards the next submission that the 'sanction' produced in the case does not reflect that independent Reviewing Authority, which was created to act as a filter to prevent the frivolous prosecutions under the Act, was appointed and its report was considered, as required under Section 45(2) of UAP Act, in our considered opinion, as rightly submitted by the learned Special P.P and as held by the Special Court, this question cannot be decided at

this stage, even prima facie, because, it is the Sanctioning Authority alone, which can say whether such report of the Reviewing Authority was considered by it at the time of granting sanction. Such opportunity needs to be given not only to the prosecution but also to the Sanctioning Authority. Merely because in the 'sanction' there is no reference to the report of the Reviewing Authority, inference of non-compliance of sub-section (2) of Section 45 of the UAP Act cannot be drawn.

72. As to the reliance placed by learned counsel for Appellant on the decision of Single Judge of the Orissa High Court in *Subhashree Das @ Mili Panda & Ors. Vs. State of Orissa, 2011 SCC OnLine Ori 61*, to submit that this issue can be considered at the stage of deciding Bail Application also, the facts thereof reveal that, in that case, the High Court was exercising its inherent power under Section 482 of the Code, as the application was for quashing of F.I.R.. Moreover, in the said case, the Additional Government Advocate has fairly conceded that no such formal appointment order appointing the Special Secretary for the purpose of reviewing cases under Section 45 of the Act is available on record. To a further query of the Court as to whether the State has prescribed any time limit for the

purpose of producing such report by the reviewing authority, learned Addl. Government Advocate for the State also responded in the negative.

73. As against it, in the present case, we don't get any such unequivocal assertion from the Special P.P. to hold that no such independent authority was appointed or that report of such independent authority was not before the Sanctioning Authority, when sanction order was passed.

74. As regards the other authorities relied upon by learned counsel for the Appellant, that of *Anirudhsinhji Karansinhji Jadeja Vs. State of Gujarat*, (1995) 5 SCC 302, *Hussain Ghadiyali Vs. State of Gujarat*, (2014) 8 SCC 425, and *Ashraf Khan @ Babu Munnekhan Pathan Vs. State of Gujarat*, (2012) 11 SCC 606, they reveal that, in those cases, the approval for registration of the offences under Section 20-A(1) of the TADA Act was not granted by the Superintendent of Police but by some other officer. Hence, it was held that such 'sanction' was invalid. Moreover, the sanction was held to be invalid in these cases after full-fledged trial and not at the time of deciding Bail Application of the Accused. Moreover, in those

cases, the sanction order suffered from lack of jurisdiction, which was clear from the perusal of the 'Sanction Order' itself, as the sanction was granted by the authority, which was not competent to do so and, hence, it was considered to be invalid. As against it, in the instant case, one has to ascertain, at the time of trial, from the Sanctioning Authority as to whether there was compliance of considering the report of independent authority.

75. Learned counsel for the Appellant has then placed reliance on the Judgment of the Division Bench of this Court in *Mohammad Gausuddin s/o. Wali Mohammad Vs. State of Maharashtra, 2003 ALL MR (Cri) 1107*, to submit that, when a Statute provides certain guidelines to be followed, they are required to be followed strictly. In the instant case, it is submitted that such guidelines, as are required to be followed by the Sanctioning Authority, that of obtaining an independent review from the authority constituted under Section 45(2) of the Act, being not followed, the 'sanction' obtained in the case is not valid.

76. Learned counsel for the Appellant has in this respect also placed reliance on another decision of the Division Bench of this

Court in *Chandrayya Narayan Sadanpu Vs. State of Maharashtra*, 2004 Supp2 BomCR 698, wherein it was held that, cognizance taken by the Court in the absence of the sanction from prosecution was in breach of mandatory provisions of Section 50 of POTA. Hence, Accused was entitled to be released on bail.

77. Needless to state that, both these authorities pertained to absence of sanction for prosecution and, therefore, they cannot be made applicable to the instant case, as in the present case, the sanction is very much available on record.

78. According to learned counsel for the Appellant, the objection to 'sanction' can be raised at any time and it needs to be considered by the Court. To substantiate this submission, learned counsel for the Appellant has relied upon the decision of the Hon'ble Apex Court in the case of *P.K. Pradhan Vs. State of Sikkim*, (2001) 6 SCC 704. In this case, no doubt, the Hon'ble Apex Court has held that, the question of sanction can be raised at any time after cognizance, may be immediately after cognizance or framing of charge or even at the time of conclusion of trial and after conviction as well. Hon'ble Apex Court has, however, also observed that,

“There may be, however, certain cases where it may not be possible to decide the question effectively and at preliminary stage and in such eventuality, the question of sanction can be left open to be decided at the time of judgment, which may be delivered upon conclusion of the trial.”

79. According to learned Special P.P., as held by the Hon'ble Apex Court in the case of *C.B.I. Vs. Ashok Kumar Aggarwal*, AIR 2014 SC 827, the stage of examining the validity of the sanction is during the trial and it cannot be during the stage of inquiry or at pre-trial stage. To support this submission, he has further placed reliance on the Judgment of Division Bench of this Court in the case of *Rasiklal Manikchand Dhariwal and Jagdish M. Joshi Vs. Central Bureau of Investigation and The State of Maharashtra*, MANU/MH/1604/2010, wherein also the argument of learned counsel for the Petitioner that, question regarding validity of sanction could be gone into even at the pre-trial stage was rejected, while observing that the scope of the challenge at pre-trial stage would be very limited. If challenge is raised to the issue, which is mixed question of fact and law, that could not be decided at pre-trial stage, unless prosecution was given an opportunity to lead evidence. It was held that the law relating thereto was sufficiently crystallized on this aspect.

80. Learned counsel for the Intervenor has relied upon the Judgment of the Division Bench of Calcutta High Court in *Kangujam Ravi Kumar Singh Vs. Union of India*, 2014 Cri.L.J. 3103, wherein the challenge to prosecution of the Accused under the provisions of UAP Act was raised on the similar ground that the report which persuaded the independent authority to grant a sanction to prosecute the accused was not produced. While deciding this challenge, it was held that, “*at the stage of deciding Bail Application, it is not mandatory for the prosecution to place before the Court the report of authority disclosing its independent review of the evidence garnered in the course of investigation*”. It was held that, “*this satisfaction of the authority or report recommending sanction for prosecution is not necessary to be placed before the Court when the Court is deciding the Bail Application.*”

81. Therefore, what follows from the discussion of above decisions is that, it depends upon the nature of objection raised to the Sanctioned Order as to when it can be decided. In this respect, one can safely place reliance on the Judgment of our own High Court in *Anil Sadashiv Nanduskar Vs. State of Maharashtra*, Laws (Bom) – 2007-11-96, cited by learned counsel for Intervenor. In this case,

the 'sanction' granted under the provisions of Section 21A and 23(2) of the MCOC Act was challenged on the ground that concerned authorities had not applied the mind properly. It was contended that the letter of approval did not disclose the material placed before the Sanctioning Authority and the Sanction Order, ex-facie, did not disclose that the concerned authority has considered as to whether the Appellant was member of the alleged syndicate involved in commission of the offence. While dealing with these submissions, after taking into consideration the law laid down by the Hon'ble Apex Court in various authorities, the Division Bench of this Court was pleased to observe as follows :-

“The settled law by a catena of decisions of Apex Court is to the effect that it is desirable that every order whether the approval or sanction, it should speak for itself, i.e. ex-facie, it should disclose consideration of the materials placed before it and application of mind thereto. However, failure to reproduce or refer those recitals in the resolution or order itself would not render the order of approval or sanction to be invalid unless the prosecution fails to establish by leading evidence that all the materials necessary for the grant of approval or sanction were placed before the concerned authority for due application of mind by such authority before the grant of approval and or sanction. It apparently discloses that question of

validity of approval or sanction cannot be decided unless the prosecution is afforded opportunity to lead evidence in that regard. Undoubtedly, an accused desiring to raise objection regarding the defects in such approval or sanction, or, grant, he can raise such objection; however, for conclusive decision on the said point, the accused has to wait till the trial is complete and on that ground, he cannot insist for discharge unless the objection relates to inherent lack of jurisdiction to the concerned authority to grant sanction or approval and such issue can be decided on undisputed facts. The law being well settled to the effect that the prosecution in a case where sanction or the approval order does not ex-facie show consideration of all the materials and/or application of mind, is entitled to establish the same by leading necessary evidence regarding production of materials before the concerned authority, the question of discharge of accused merely on the basis of such objection being raised cannot arise. The decision on the point of defect, if any, in the order of approval or sanction will have to be at the conclusion of the trial.”

[Emphasis Supplied]

82. In view of this settled position of law, in our opinion, in the instant case also, merely because there is no reference to the report of the Reviewing Authority in the Sanction Order, at this stage, this Court cannot come to the conclusion that the review report was not considered by the Sanctioning Authority and, hence, the 'sanction' is

invalid. Whether Sanctioning Authority has considered such report or not can be decided only after the Sanctioning Authority is given an opportunity to state so, at the time of trial. Hence, at this stage, this contention raised by learned counsel for the Appellant challenging the sanction order cannot be accepted.

Factual Aspects of this Case qua the Appellant

83. At this stage, it may be stated that this Bail Petition has checkered history of litigation. The very first Bail Application preferred by the Appellant was under Section 167(2) of the Code, which came to be rejected upto Hon'ble Supreme Court. Thereafter, the Appellant has preferred two applications for bail on merits; out of which, one filed at Exhibit-993 came to be rejected on 25th September 2012 by the Special Court and Criminal Appeal No.1305 of 2013, preferred against the same, also came to be dismissed on 4th April 2014 by this Court. Her second application for bail filed at Exhibit-2400 also came to be rejected on 21st September 2015 by the Special Court, against which she has not preferred any Appeal to this Court. Her application for bail on medical ground is also rejected by the Special Court.

Change in Circumstances

84. Now, for maintainability of this fresh application for bail, the entire reliance of the Appellant, as stated above, is on the 'clean-chit' given to her by the NIA, which has carried out further investigation, under Section 173(8) of the Code. In its investigation, NIA has re-recorded the statements of some of the witnesses. Some part of the investigation done by ATS is accepted by NIA; whereas, some part of the investigation done by ATS is not relied upon by NIA. NIA has not only exonerated the Appellant, but also Accused Nos.2, 3, 12, 15 and 16, from all the charges. NIA has also dropped the MCOCA charge against all the Accused. Thus, it is clear that NIA has found itself to be not in agreement on certain points with the investigation done by ATS.

85. The question for consideration is whether this report can be said to be change in the circumstances so as to entitle the Appellant to apply for bail afresh. The Apex Court in *Babu Singh v. State of UP* [1978 SCC(Cri) 133] held that order refusing application for bail does not necessarily preclude another on later occasion. It was further held that if there is more material, further development and different considerations, the second consideration at later stage is always permissible.

86. In our considered view, these observations of the Apex Court are squarely applicable to the facts of the present case. Mr. Gupta, the learned Senior Counsel for the Appellant also invited our attention to the judgment and order dated 9th June 2016 passed in Criminal Appeal No. 138 of 2016. This appeal was filed by co-accused Prasad Purohit. In the said order, this Court observed that charge-sheet filed by the NIA is material development and is to be termed as material change in circumstances and accordingly directed the special Court to deal with the application of accused Prasad Purohit for bail without being influenced by the observations made in its earlier order of rejection of bail application. .

87. In the light of decision of the Apex Court in *Babu Sing (supra)* and observations of this Court in Criminal Appeal No. 138 of 2016, we find ourselves unable to agree with the submission of Mr. Desai, the learned Senior Counsel for the Intervenor that there is no change in the the circumstances and we hold that the present application of the Appellant is maintainable in view of the change in the circumstances, namely, filing of report by NIA under section 173(8) of the Code, under which Appellant is exonerated.

Re-investigation / Further Investigation Carried Out by NIA

88. Mr. Desai, the learned Senior Counsel for the intervenor in this regard vehemently argued that fresh / re-investigation can be undertaken at the instance of the higher Courts only. He submitted that whatever investigation is carried out by the NIA is without authority from higher Courts and therefore it is illegal. He heavily relied upon the decision of the Apex Court in *Vinjay Tyagi v. Irshad Ali @ Deepak* [(2013) 5 SCC 762]. In this case one of the question which fell for consideration before the Apex Court was, '*whether CBI is empowered to conduct fresh investigation / re-investigation when cognizance has already been taken by the Court of competent jurisdiction on the basis of a police report under section 173 of the Code?*' The Apex Court thus observed in paragraph 45 :

“45. The power to order/direct “reinvestigation” or “de novo” investigation falls in the domain of higher courts, that too in exceptional cases. If one examines the provisions of the Code, there is no specific provision for cancellation of the reports, except that the investigating agency can file a closure report (where according to the investigating agency, no offence is made out). Even such a report is subject to acceptance by the learned Magistrate, who, in his wisdom, may or may not accept such a report. For valid reasons, the Court may, by declining to accept

such a report, direct “further investigation”, or even on the basis of the record of the case and the documents annexed thereto, summon the accused.”[Emphasis Supplied]

89. Reading of above observations make it clear that power of ordering fresh or *de novo* investigation needs to be exercised by the higher judiciary sparingly and in the rarest of rare cases. There is no dispute that NIA in the present case has not undertaken such further investigation on the basis of any order passed by the higher judiciary but the Central Government in exercise of powers under section 6(5) of the NIA Act, by the order dated 1st April 2011 transferred the investigation of the subject crime to the NIA and accordingly NIA re-registered the offence and started further investigation. The order of the Central Government transferring the investigation of the subject crime to the NIA was challenged by the present Appellant by filing Criminal Writ Petition No.4049 of 2012 which was decided by this Court by its order dated 11th October 2013. In the said writ petition the Appellant herein challenged the handing over of the investigation to the NIA and sought a writ restraining NIA from exercising any power in pursuance of the NIA Act for doing fresh or further investigation of the subject crime. However, after hearing the parties and analysing the provisions of

NIA Act, this Court concluded that the power of NIA to investigate is absolute and it is a matter of procedure, then there is no vested right created in the accused to object to the course permitted by the statute and there is no need to read down section 6 of the NIA Act. It was further held by this Court that when the NIA comes into picture for the purpose of investigation and prosecution of the scheduled offence, then, that very object and purpose will be defeated if the investigating agency is prevented from investigating the crime.

90. In the light of the same, we hold that, at present, the challenge raised to the investigation carried out by NIA is difficult to be accepted.

91. As regards the Appellant, as stated above, NIA is not in agreement with the conclusion drawn by ATS and it has completely exonerated the Appellant from all the charges. Hence, the necessary question arising for consideration is, *'as to the investigation of which Investigating Agency is to be accepted or relied upon for deciding the present Bail Application of the Appellant?'* The answer to this question need not detain us any more, as it is clearly found in the above-said landmark decision of the Hon'ble Apex Court in the

case of *Vinay Tyagi Vs. Irshad Ali alias Deepak and Ors.*, (2013) 5 SCC 762. In this reported authority, the Hon'ble Apex Court was pleased to hold, in paragraph No.46, as follows :-

“46. The superior courts can direct conduct of a “fresh”/”de novo” investigation, but unless it specifically directs that the report already prepared or the investigation so far conducted will not form part of the record of the case, such report would be deemed to be part of the record. Once it is part of the record, the learned Magistrate has no jurisdiction to exclude the same from the record of the case. In other words, but for a specific order by the superior court, the reports, whether a primary report or a report upon “further investigation” or a report upon “fresh investigation”, shall have to be construed and read conjointly.”

[Emphasis Supplied]

92. Ultimately, in paragraph No.53 of its Judgment, the Hon'ble Apex Court specifically answered Question No.1, which was formulated for its consideration, '*as to which report to be considered by the Magistrate when there are more than one investigation*', as follows :-

“53. The court of competent jurisdiction is duty-bound to consider all reports, entire records and documents submitted therewith by the investigating agency as

its report in terms of Section 173(2) of the Code. This rule is subject to only the following exceptions :

- (a) Where a specific order has been passed by the learned Magistrate at the request of the prosecution limited to exclude any document or statement or any part thereof;*
- (b) Where an order is passed by the higher courts in exercise of its extra-ordinary or inherent jurisdiction directing that any of the reports i.e. primary report, supplementary report or the report submitted on “fresh investigation” or “re-investigation” or any part of it be excluded, struck off the court record and be treated as non est.”* *[Emphasis Supplied]*

93. In the instant case, therefore, the unequivocal legal position is that, the Court has to consider the investigation report along with the record filed by ATS and also the report filed by NIA along with the documents.

94. The law relating to the factors or parameters, which are required to be considered at the stage of deciding the Bail Application, are very well crystallized and laid down by the Hon'ble Apex Court in plethora of its authorities and two of those authorities are relied upon by the Hon'ble Apex Court itself in its Judgment in

the case of *Prasad Purohit (supra)*, in paragraph No.96, and direction to the Special Court was also given to the effect that the Special Court should decide the application of the Appellant and other accused for bail, keeping in mind those considerations and parameters. Therefore, it would be useful to reproduce those observations as follows :-

96. *When once we are able to steer clear of the said position, the other question to be considered is the grant of bail on its own merits. For which purpose, the submission of Mr. Mariarputham, learned Senior Counsel who appeared for the State of Maharashtra and NIA, based on the decision relied upon by him in State of U.P. Vs. Amarmani Tripathi, (2005) 8 SCC 21, should be kept in mind, in particular para 18, which reads as under :-*

“18. *It is well settled that the matters to be considered in an application for bail are (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail [Pralhad Singh Bhati Vs.*

NCT, Delhi, (2001) 4 SCC 280, and Gurcharan Singh Vs. State (Delhi Admn.), (1978) 1 SCC 118].

While a vague allegation that the accused may tamper with the evidence or witnesses may not be a ground to refuse bail, if the accused is of such character that his mere presence at large would intimidate the witnesses or if there is material to show that he will use his liberty to subvert justice or tamper with the evidence, then bail will be refused. We may also refer to the following principles relating to grant or refusal of bail stated in Kalyan Chandra Sarkar Vs. Rajesh Ranjan, (2004) 7 SCC 528.

'11. The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail, a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are :

- (a) *The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.*
- (b) *Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.*
- (c) *Prima facie satisfaction of the court in support of the charge.*

[Ram Govind Upadhyay Vs. Sudarshan Singh, (2002) 3 SCC 598, and Puran V. Rambilas, (2001) 6 SCC 338].”

95. Thus, as the Hon'ble Apex Court has directed the Special Court to consider the applications of the Appellant and other co-accused Prasad Purohit on merits, keeping in mind the observations made in paragraph Nos.96 and 97 of the Judgment, as referred above, this Court has now to consider the first and foremost consideration as to *'whether there is any prima facie or reasonable ground to believe that the Appellant has committed the offence'.*

96. As rightly submitted by learned counsel for the Appellant, Section 43-D(5) of the Unlawful Activities (Prevention) Act, 1967 has also some relevance in this regard. Under this section, notwithstanding anything contained in the Code of Criminal

Procedure, 1973, no person accused of an offence punishable under Chapters IV and VI of this Act (UAP 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 of such release. Proviso to this sub-section makes it abundantly clear that accused person shall not be released on bail or on his bond if the Court on a perusal of the case diary or the report made under section 173 of the Cr.P.C is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true. Thus it is clear that the opinion that there are reasonable grounds for believing that accusations against the accused person is prima facie true is to be arrived at on the basis of case diary or report made under section 173 of the Cr.P.C.. In that view of the matter, in our opinion while considering the present bail application of the Appellant we must take into consideration the earlier charge-sheet filed by the ATS, report filed by the ATS and subsequent report filed under section 173(8) by the NIA after re-investigation / further investigation.

97. According to the learned Counsel for the Appellant, Appellant's application for bail is also required to be decided as per

the parameters laid down by the apex in *Ranjitsingh Brahmajeetsingh Sharma v. State of Maharashtra 2005(2) Bom.C.R. (Crim) 567*. In this decision, the Hon'ble Apex Court, while considering the similar restrictions placed on bail under section 21(4) of the Maharashtra Control of Organised Crime Act, 1999 (for short 'MCOCA'), made following observations in paragraph Nos. 46, 49 and 55.

“46. Presumption of innocence is a human right. [See Narendra Singh and Another Vs. State of M.P., (2004) 10 SCC 699, para 31] [Article 21](#) in view of its expansive meaning not only protects life and liberty but also envisages a fair procedure. Liberty of a person should not ordinarily be interfered with unless there exist cogent grounds therefor. Sub-Section (4) of [Section 21](#) must be interpreted keeping in view the aforementioned salutary principles. Giving an opportunity to the public prosecutor to oppose an application for release of an accused appears to be reasonable restriction but Clause (b) of Sub-section (4) of [Section 21](#) must be given a proper meaning.

49. We are furthermore of the opinion that the restrictions on the power of the Court to grant bail should not be pushed too far. If the Court, having regard to the materials brought on

record, is satisfied that in all probability he may not be ultimately convicted, an order granting bail may be passed.

55. The wording of [Section 21\(4\)](#), in our opinion, does not lead to the conclusion that the Court must arrive at a positive finding that the applicant for bail has not committed an offence under the Act. If such a construction is placed, the court intending to grant bail must arrive at a finding that the applicant has not committed such an offence. In such an event, it will be impossible for the prosecution to obtain a judgment of conviction of the applicant. Such cannot be the intention of the Legislature. Section 21(4) of MCOCA, therefore, must be construed reasonably. It must be so construed that the Court is able to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial.....”

98. In the light of decision of the Apex Court in Tyagi's case (supra) and Ranjitsingh's case (supra), therefore, we have to consider Appellant's bail application.

Prima Facie Case Against Appellant

99. The ATS has implicated the Appellant in the subject crime,

firstly, on the allegation of providing motorcycle to absconding accused Ramji, which motorcycle was used for planting bombs and causing bomb blast and, secondly, for her participation in Bhopal meetings in which conspiracy to strike terror by exploding bomb in Malegaon was hatched.

100. It is alleged by ATS that, 'LML Freedom Motor-Cycle', bearing Registration No.MH-15-P-4572, was found at the spot of the incident in a severely damaged condition. According to prosecution, number "MH-15-P-4572" was a fake number. The engine number as also the chassis number was also not visible. Hence, the motorcycle was referred to the FSL Nasik for determining its engine and chassis numbers. As per the report of FSL Nasik dated 7th October 2008, it was not possible to find out the chassis number and even the engine number could not be determined with certainty. The report suggested that engine number of the said vehicle could be any of the following three numbers :

- i] 50K261886
- ii] 50K267686
- iii] 50K261686

101. The prosecution thereafter enquired with LML Company - the

manufacturer, about the details of customers to whom the vehicles with above engine numbers were sold. The manufacturer stated that the above said three numbers did not correspond to any vehicle manufactured by them. Further LML stated that engine numbers that closely resemble actual vehicles manufactured by them were :

I] E550K261886

II] E550K261686

102. They further informed that these vehicles were sold to the dealers at Surat and Badayu respectively. On 10th November 2008 on the basis of statement of PW-45 the financier, the prosecution for the first time came to know that vehicle bearing Engine No.E550K261886 was registered in the name of Appellant and its number was "GJ-05 BR-1920".

103. Thus, there is enough doubt about motorcycle of which the Appellant is the registered owner, was found at the spot of incident. Even assuming the said motorcycle was found at the place of the incident, the fact that Appellant is the registered owner of it by itself cannot be sufficient in the light of material on record brought by the prosecution itself. In this regard, reference must be made to the statements of PW-21, PW-23 and PW-46. Statement of PW-21 was

recorded by the ATS on 20th October 2008. PW-21 is ITI electrical diploma holder and has a motorcycle garage at Indore, wherein he carries on his business of repair of motorcycle and scooter. He has stated that absconding accused Ramji since 2 years used to bring motorcycle No. GJ-05 BR-1920 to his garage for servicing. He has further stated that in July 2008 also Ramji had brought the said motorcycle.

104. The statement of PW-21 is supported by contemporaneous record maintained by him and seized by ATS. PW-23 is the cousin of absconding accused Ramji and his statement is recorded by ATS on 20th October 2008. PW-23 has also stated that he has seen Ramji using the said motorcycle in question for the period of one year prior to the date of recording of his statement. Statement of PW-23 is also recorded under section 164 of the CR.P.C.

105. Further, there is statement of PW-46, which was recorded by ATS on 12th November 2008. He has stated that absconding accused Ramji initially was using black colour motorcycle of SS Honda company. In the year 2004, he sold this motorcycle and purchased gray colour Maruti van. Ramji used Maruti van for the period of 1 and 1/2 years and thereafter he sold it and bought one second hand

LLM 4 stroke golden colour scooter. He has also stated that in Diwali of 2007 he saw golden LLM freedom scooter No. GJ-05 BR-1920 at the house of Ramji.

106. PW-45 is a financier, through whom the said motorcycle was got financed. His statement shows that on 4-9-2004 repayments were made of the outstanding amount and original papers were taken back by the Appellant.

107. Statements of PW-21, PW-23, PW-46 and PW-45, thus, do show that the Appellant was not in possession of the said motorcycle since much prior to the incident. The trial Court in this regard observed that the motorcycle was being used by accused Ramji much prior to the date of incident is the defence of the Appellant which can be proved during trial. However, we find that this is not the defence of the Appellant but these facts are borne out from the material collected by the ATS itself.

108. This takes us to consider the second allegation against Appellant of her participation in Bhopal meeting in which alleged conspiracy to strike terror at Malegaon was hatched. In this regard, ATS has relied upon statements of PW-55, PW-79 and PW-112.

109. PW-55 in his statement under section 161 and 164(5) of the Code recorded by ATS has stated that Accused No.9-Prasad Purohit once told him that he himself, absconding accused Ramji and Sudhakar Chaturvedi fitted bomb in the motorcycle provided by present Appellant. In his further examination by NIA, however, this witness has retracted from his earlier statement recorded by the ATS. This witness has also lodged complaint against ATS in Maharashtra Human Right Commission that his statement under Section 164(5) of the Code was got recorded forcibly by ATS.

110. PW-79 in his statement, recorded under Sections 161 and 164(5) of the Code by ATS, has stated that in Bhopal meeting Accused No.9-Prasad Purohit discussed taking revenge by carrying out bomb blasts especially in muslim populated area. He has also stated that thereupon Appellant assured to provide men for this purpose. NIA reexamined this witness as witness No. 182. During his examination he stated that he did not attend any meeting of Abhinav Bharat. He also stated that he had not visited Bhopal until ATS took him to a Ram Mandir at Bhopal in the month of May 2009. As such statement of this witness was also recorded under section

164(5) of the Code at Delhi before learned Metropolitan Magistrate by NIA. In this statement before learned Metropolitan Magistrate, Delhi, PW-79 (new PW-182) confirmed that he did not attend the Bhopal meeting. This witness has also alleged torture by ATS.

111. Statement of PW-112 was recorded by ATS under section 161 as well as under section 164(5) of the Code. He has stated that he attended Abhinav Bharat meeting at Bhopal held in the month of April 2008. In the said meeting, Accused No.9-Prasad Purohit told about Jihadi activities against which they have to do something and urged to do something and told that preparation for guerrilla war is on. At this time, the Appellant said that some people are ready for this task. This witness also stated that PW79 was looking after refreshment or catering arrangement in the said building. PW-112 was re-examined by NIA as Witness No.184. In this re-examination this witness did not support his earlier statement to ATS which was subsequently recorded under section 164(5) of the Code. He stated that he was forced to make statement and expressed his willingness to depose before the Magistrate. As such, his statement was recorded by NIA under section 164(5) of the Code before learned Metropolitan Magistrate, Patiala House, New Delhi. PW-112 (New

PW-184) retracted the contents of his earlier statement implicating the Appellant.

112. At this stage, reference deserves to be made to the statement of PW-121 and PW-150 recorded by ATS on 27.12.2008 and 17.3.2009 respectively. These witnesses are alleged to be present at Bhopal meeting. Statements of these witnesses recorded by ATS do not disclose any objectionable and incriminating material against the Appellant.

113. Reference also deserves to be made to the statement of PW-22 recorded by ATS on 20.10.2008 under Sections 161 and 164 of the Code. In these statements, this witness has stated about the meeting between the Appellant and absconding accused Ramji at Ujjain on 8.10.2008 after the incident in question. In the said meeting absconding accused Ramji is alleged to have confessed that he committed blast at Malegaon by using the motorcycle of Appellant and also told her to inform the police. It is however pertinent to note that this witness (PW-22) had lodged complaint before JMFC, Indore, on 26.11.2011 stating that he was illegally detained and tortured by ATS to give statements. PW-22 has given statement on

oath before the JMFC, Indore, in support of complaint filed by him charging ATS officials with various offences.

114. Thus, in respect of above witnesses, apart from retraction and allegation of torture, their statements give two contradictory versions. Though there is some material on record that Appellant was present at the Bhopal meeting, this material, however, shows that apart from the Appellant several other persons were also present at the said meeting. In our view, the same cannot be considered as circumstance against the Appellant alone, excluding the other participants, especially, now in the absence of any objectionable and incriminating material attributed to her.

115. In above facts and circumstances, in our considered opinion, if both the Reports of ATS and NIA are considered conjointly, so far as the Appellant is concerned, it cannot be said that there are reasonable grounds for believing that accusation made against her are *prima facie* true. Once it is held so, then the benefit of bail cannot be withheld to the Appellant, even if the offences alleged against her by ATS are grave and serious one.

116. Moreover, the Appellant in this case is a woman. She was arrested on 23rd October 2008 and is in custody since last more than 8 years. Medical certificate annexed to the petition and written submissions show that appellant is suffering from breast cancer. The medical report of the Appellant indicates that she has become infirm and cannot even walk without support. The medical certificate further shows that Appellant is being given treatment in Ayurvedic hospital. In our opinion, Ayurvedic Hospital cannot give proper treatment to the Appellant, who is suffering from cancer.

117. Taking, therefore, totality of the facts and circumstances of the case mentioned here-in-above, we are of the considered opinion that the Appellant has made out a case for bail under sub-section (5) of section 43D of the UAP Act. We, accordingly, allow the Appeal and Appellant is directed to be released on bail on her furnishing bail bond of Rs.5,00,000/-, with with one or two sureties of like amount, subject to following conditions :

[a] Appellant shall deposit her passport, if any, with the Special Court.

[b] Appellant shall report to the NIA as and when required.

[c] Appellant shall not tamper with the evidence or prosecution witnesses.

[d] Appellant shall remain present at the time of hearing of the case before the Special Court.

118. At this stage, it is clarified that whatever observations made here-in-above about the merits of the case, they are made for the purpose of deciding this Appeal only and Trial Court is not to be influenced by them in any way.

119. In view of dismissal of the Appeal, Criminal Application Nos.1440 of 2016 and 71 of 2017 no more survive and, hence, stand disposed off.

120. At this stage, Mr. Gupta, learned Senior Counsel for the Appellant, submits that it will take time for furnishing bail bond of Rs.5,00,000/- and, therefore, Appellant be allowed to be released on furnishing cash security of Rs.5,00,000/- for a period of one month from today, within which time the Appellant will furnish bail bond, as directed.

121. In the light of the above submissions, Appellant is at liberty to furnish cash security of Rs.5,00,000/-, in lieu of bail bond, only for a period of one month from today and within the said period of one month, Appellant to furnish bail bond of Rs.5,00,000/-, as directed.

122. Mr. Desai, learned Senior Counsel for the Applicant-Intervenor, at this stage, prays for stay of this order. Since we have recorded the conclusions for the purpose of this Appeal that there is no material on record to prove prima facie case against the Appellant, the prayer for stay is rejected.

[DR. SHALINI PHANSALKAR-JOSHI, J.] [RANJIT MORE, J.]