

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.664 OF 2016

Lt. Col. Prasad Shrikant Purohit	]	
Aged about 44 Years, Occ.: Service,	]	
R/at : 76/21, Susmriti, Shantishila Society,	]	
Law College Road, Erandawana,	]	
Pune - 411 004.	]	
(At present detained in Taloja Central Jail,	]	 Appellant /
Mumbai.	]	(Org. Accused No.9)

Versus

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

ALONG WITH

CRIMINAL APPLICATION NO.1448 OF 2016

IN

CRIMINAL APPEAL NO.664 OF 2016

Nisar Ahmed Haji Sayed Bilal,	]	
Age : 59 Years, Occ.: Retired,	]	
Permanently R/at 552, Islampura,	]	 Intervenor /
Galli No.12, Malegaon, Dist. Nashik.	]	(Applicant)

In the matter between

Lt. Col. Prasad Shrikant Purohit	]	
Aged about 44 Years, Occ.: Service,	]	
R/at : 76/21, Susmriti, Shantishila Society,	]	
Law College Road, Erandawana,	]	
Pune - 411 004.	]	
(At present detained in Taloja Central Jail,	]	 Appellant /
Mumbai.	]	(Org. Accused No.9)

Versus

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

Mr. Shrikant Shivade, i/by Ms. Yogini Abhay Ugale, for the Appellant-Original Accused No.9.

Mr. Sandesh D. Patil for the Respondent-NIA.

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

Mr. B.A. Desai, Senior Counsel, a/w. Mr. Shaikh Mohammed Sharif, Mr. Ansar Tamboli, Mr. Shahid Nadeem Ansari and Mr. Arshad, for the Intervenor-Applicant in Criminal Application Nos.1448 of 2016.

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

RESERVED ON : 17TH FEBRUARY, 2017.

PRONOUNCED ON : 25TH APRIL 2017.

P.C. :

1. This is an Appeal preferred by original Accused No.9-Lt. Col. Prasad Purohit 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 26th September 2016 passed by the Special Court, constituted under MCOC Act and NIA Act at Mumbai, thereby rejecting his application for bail (Exhibit No.3139).

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 :-

4. 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. As per prosecution case, since it was a month of holy Ramzan and on 30th September 2008, the holy festival of Navratra was to commence, it was apparent that the

bomb-blast was caused with intent to terrorize the people, to cause loss of lives and property and to create communal rift, to endanger the security of the State.

5. 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.

6. During the course of investigation, the exhibits collected from the scene 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.

7. 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.130/2008. On 5th November 2008, the Appellant came to be arrested in the said C.R. 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.

8. 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 Accused No.1-Pragya Singh Thakur is the registered owner of the said vehicle. Accordingly, she was arrested on 23rd October 2008 at Mumbai along with co-accused No.2-Shivnarayan Kalsangra and co-accused No.3-Shyam Sahu.

9. As per the case of the ATS, as disclosed in the report, under Section 173(2) of the Code, filed in the Special Court, the present Appellant i.e. co-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, Sudhakar Dwivedi *alias* Dayanand Pande 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, Appellant 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 Rahirkar, who was 'Treasurer' of 'Abhinav Bharat', who, in turn, disbursed the said amount to other

co-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.

10. As per 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. In the said meeting, co-accused No.1-Pragya Singh Thakur undertook the responsibility of providing her motorcycle and the manpower to cause bomb-blast; whereas, Appellant took the responsibility of providing explosives, in order to take revenge of 'Jihadi' activities by Muslim community.

11. It is, thus, 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. Appellant 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.

12. 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 at the site by using 'LML Freedom Motor-Cycle' owned by Accused No.1-Pragya Singh Thakur. The case of the ATS is further to the effect that the absconding accused Ramji *alias* Ramchandra Kalsangra and Sandip Dange were the men of the Accused No.1-Pragya Singh Thakur and they had acted at her instance. Accused No.1-Pragya Singh provided her own motor-cycle for the said explosion and, thus, as per the case of ATS, Accused No.1-Pragya Singh was 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.

13. As against the Appellant also, according to ATS, he was the main conspirator or the kingpin in this entire offence. He has formed 'Abhinav Bharat Organization', with the sole object of raising

'Guerrilla War' against the 'Jihadi' activities of Muslims. He has taken active part in hatching the conspiracy and also taken active part by supplying necessary RDX for the bomb-blast at Malegaon.

14. The Charge-Sheet to this effect was filed by ATS on 20th January 2009 in the Special Court, after obtaining sanction on 17th January 2009. Thereafter, Government of India, vide its order dated 1st April 2011, transferred the investigation of the case to the 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.

15. Meanwhile, on 21st December 2008, Appellant 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 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 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, Bail Application No.42 of 2008 filed by the Appellant-Prasad Purohit was remanded for hearing to the Special Court. The said Bail Application was then heard and came to be dismissed by the Special Court and Criminal Appeal No.333 of 2011 preferred by the Appellant against the said order in this Court also came to be rejected on 9th November 2011.

16. Meanwhile, the order passed by this Court in Appeal No.866 of 2009, restoring the application of the provisions of MCOC Act, came to be challenged by the present Appellant and other co-accused, including Accused No.1-Pragya Singh Thakur in Appeal before the Hon'ble Apex Court. In these Appeals, the Appellant and Accused No.1-Pragya Singh Thakur also challenged the order passed by this Court of rejecting their Bail Applications. 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. The Hon'ble Apex Court, accordingly, while disposing of these

Appeals, restored the Bail Application of the Appellant, 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.

17. After this decision of the Hon'ble Apex Court dated 15th April 2015, the Appellant filed fresh application for bail vide Exhibit-2295 with Bail Application No.42 of 2008 before the Special Court. Both these Bail Applications were rejected by the Special Court vide its order dated 12th October 2015. Against the said order, Appellant preferred Appeal bearing Criminal Appeal No.138 of 2016 before this Court. During pendency of the said Appeal, NIA submitted Supplementary Report under Section 173(8) of the Code on 13th May 2016, dropping the charges of MCOC against all the accused persons and further exonerating Accused No.1-Pragya Singh Thakur and some other accused persons of all the charges levelled against them.

18. In view of the filing of this Supplementary Report under Section 173(8) of the Code by NIA, vide its order dated 9th June 2016, this Court granted liberty to the Appellant to file fresh Bail Application before the Special Court and, accordingly, disposed of

his Criminal Appeal No.138 of 2016. Pursuant to the said order, the Appellant filed the present application for bail (Exhibit-3139) before the Special Court by contending, *inter alia*, that report filed by NIA constitutes an important change in circumstance.

19. This application of the Appellant was strongly resisted by NIA and also by the Intervenor, namely, the father of the deceased, who has died in the bomb-blast at Malegaon. The Special Court, after hearing learned counsel for the parties and after satisfying itself from the material on record, was pleased to reject the said application of the Appellant vide its impugned order and, hence, the instant Appeal.

20. While challenging the impugned order passed by the Special Court, the submission of learned counsel for the Appellant Shri. Shivade is that, in view of the Supplementary Report filed by NIA, dropping the charges in respect of the offences under MCOC Act, it has to be held that there is no *prima facie* case against the Appellant. It is submitted by him that in the earlier orders, the Appellant's applications for bail were rejected mainly on the basis of the confessional statements of co-accused Nos.7, 10 and 12. Those confessional statements were recorded under the provisions of

MCOC Act. Now, as the charges under MCOC Act are dropped, those confessional statements of co-accused are required to be excluded from consideration and in absence thereof, there is no incriminating material against the Appellant so as to deny him the benefit of bail.

21. Secondly, it is submitted that in the earlier orders of rejecting his Bail Applications, reliance was also placed on the statements of PW-55, PW-79 and PW-112, as recorded by ATS. However, in the investigation conducted by NIA, PW-79 and PW-112 have changed their previous versions by retracting, before the NIA and Metropolitan Magistrate at Delhi, their statements recorded by ATS and before Metropolitan Magistrate, Mumbai. PW-55 has also made complaint regarding harassment and torture by the officers of ATS to the Human Rights Commission and, thus, he has also, in effect, retracted his previous statement made before the ATS officer. Thus, according to the Appellant, this fact that these three co-accused and three material witnesses have retracted their statements recorded by the ATS officers, clearly indicate that the investigation carried out by ATS was not fair, but it was tainted. They have extracted the statements and confessions by subjecting the witnesses and co-accused to the torture and duress, under the threats of implicating

them falsely. Now, in view of the withdrawal of those statements and confessions, there remains nothing on record to implicate the Appellant with the alleged offences.

22. Appellant has further contended that he was illegally detained by ATS officers and the officer of the Army by name Col. Srivastav, though, both, the ATS officers and the Army officer were fully aware that Appellant had participated in the meetings held at various places like Faridabad, Bhopal, etc., in discharge of his duties as a 'Military Intelligence Officer' for collecting intelligence and creating new sources. The said fact has also been revealed in the Report of Court of Inquiry conducted by the Army Officers against him as well as in the reply filed by the Ministry of Defence and the documents filed by the said Ministry in the Special Court. According to the Appellant, isolated sentences uttered by him, during the course of conversations in the said meetings or thereafter, cannot be used against him, in view of the fact that he was discharging his duties as 'Military Intelligence Officer' to create intelligence sources. It is his further contention that there was no sufficient material to show that in the said meetings, any conspiracy was hatched to commit the bomb-blast at Malegaon.

23. In this respect, learned counsel for the Appellant has also drawn attention of this Court to the statement of PW-21, who has stated that, immediately after the alleged conspiracy meeting, he found the Appellant disclosing details of the meeting to his superiors in Military Intelligence. On inquiry by him, Appellant also told him that it was a 'covert operation' of Military Intelligence. According to learned counsel for Appellant, secrecy being the soul of conspiracy, no conspirator will ever divulge the details of the conspiracy to the superior officers in Military Intelligence. The statements of PW-94 and PW-150 are also pointed out in that direction. It is urged that the documents of the Court of Inquiry conducted by the Ministry of Defence and which are brought on record, as per the order of the Special Court itself, were clearly ignored by the learned Special Court on the count that they will be considered at the time of trial.

24. It is submitted by learned counsel for Appellant that, the Report of Inquiry also reveals that the RDX was planted by ATS officer in the house of Accused No.11-Sudhakar Chaturvedi. There are statements to that effect of PW-180 and PW-183, recorded by NIA and, accordingly, NIA has also, after thorough investigation,

disbelieved the story of ATS, that of RDX traces found in the house of Accused No.11-Sudhakar Chaturvedi. According to learned counsel for the Appellant, the Trial Court has, however, ignored these statements of witnesses and also the investigation conducted by the NIA.

25. Learned counsel for the Appellant has then also challenged the applicability of Section 43-D(5) of UAP Act contending, *inter alia*, that it has no retrospective effect, as it affects the substantive right of Accused to get bail. Hence, according to him, restriction on the power of the Court in allowing the bail, as laid down under Section 43-D(5) of the UAP Act, cannot be made applicable to the present case.

26. The learned counsel for the Appellant has further challenged the sanction granted for prosecution of Appellant under Section 45(1) of UAP Act. It is contended that the Trial Court has erred in holding that the question of validity of sanction and possibility of failure of prosecution under UAP Act on the ground of invalid sanction cannot be considered at the stage of deciding the application for bail.

27. Lastly, learned counsel for the Appellant has submitted that the Appellant is in Jail since last about eight years and the delay is sheerly on account of the prolonged time taken by the Investigating Agencies, for which the Appellant is not responsible at all. As on today also, the charges are not framed in this case. It is submitted that there are five hundred witnesses cited by the prosecution and thousands of documents have been filed on record. There are, in all, twelve accused having separate Advocates. Even the arguments on Discharge Application are likely to take few months and, thus, it is impossible to commence the trial for several months. Naturally, it will take few more years to complete the trial. Appellant has already undergone minimum sentence provided for the offences alleged against him. Appellant has no criminal antecedents whatsoever. His service record is clean and he is considered as an asset to the Army. It is, therefore, submitted by learned counsel for Appellant that, it is high time that Appellant should be released on bail; especially when there is no possibility of his absconding. His old mother, wife and two minor sons have been deprived of his company. The offences alleged against him are not punishable with death and there is also no prima facie case in support of the charges. The charge of criminal conspiracy is well-nigh impossible to be proved by the prosecution

and, thus, it is submitted that this is a fit case where the Appellant deserves to be released on bail.

28. According to learned counsel for Appellant, as learned Special Court has not considered all these facets of the case and failed to appreciate the submissions advanced by the learned counsel for the Appellant, the impugned order rejecting the Bail Application of the Appellant needs to be set aside by allowing this Appeal.

29. Per contra, learned Special P.P. for NIA, Mr. Sandesh Patil, has strongly controverted these submissions of learned counsel for the Appellant by contending, *inter alia*, that all these contentions of the learned counsel for the Appellant are properly considered by the Special Court and by giving elaborate, detailed and cogent reasoning, the Special Court has rejected the Bail Application of the Appellant. It is further submitted that, in the earlier Bail Applications also, it was held that, *prima facie*, there is sufficient material to implicate the Appellant, he being the main conspirator. According to learned Special P.P. for NIA, there is no substantial change in the said circumstances. It is submitted that, merely because the MCOC charges are dropped, it does not mean that there is no material against the Appellant in respect of other charges also.

According to learned Special P.P., though NIA has given 'clean-chit' to Accused No.1-Pragya Singh Thakur and some other co-accused, it has not exonerated the Appellant from the charges levelled against him. It clearly reflects that NIA has also found sufficient material to implicate the Appellant. It is submitted that all the contentions raised by the Appellant as to the non-applicability of Section 43-D(5) of UAP Act or want of valid sanction for the prosecution can be definitely considered at the time of trial and not at this stage. Presently, the conclusions about involvement of the Appellant in the offences alleged against him, as drawn by ATS officers, are supplemented and supported by NIA officers also in its detailed investigation. Thus, it is urged that, having regard to the gravity and seriousness of the offences, which were in the nature of waging a war against the unity and integrity of Nation, and, that too, by violent means, Bail Application of the Appellant could not have been allowed and it is rightly rejected by the Special Court.

30. On behalf of the Intervenor, i.e. the father of the deceased, who has died in the bomb-blast, also a detailed note of arguments is filed on record pointing out the incriminating role of the Appellant and supporting the impugned order passed by the Special Court.

31. We have heard at length and in extenso the oral submissions advanced by learned counsel for the Appellant Shri. Shrikant Shivade, learned Special P.P. for NIA, Shri. Sandesh Patil and learned Senior Counsel for the Intervenor, Shri. B.A. Desai. We have also perused the written submissions filed on their behalf and on the basis thereof, we are proceeding to decide this Appeal as follows:-

Applicability of Section 43D(5) of UAP Act

32. 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, 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"*).

33. In this case, it is submitted that the incident took place on 29th

September 2008 and the Appellant was taken into illegal custody on 29th October 2008 and officially shown to have been arrested on 5th November 2008. The first Bail Application, bearing Miscellaneous Application No.42 of 2008, 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 restored the same. It may be true that thereafter again it was rejected, but in the Appeal preferred against the said order, the Appellant was permitted to file fresh Bail Application. Thus, according to learned counsel for the Appellant, the first Bail Application of Appellant, which was filed before 31st December 2008, is yet not finally decided and 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.

34. 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.

35. 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.

36. 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.

37. 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.

38. 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*".

39. 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.

40. Per contra, according to learned Special P.P., 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 his substantive right being affected or curtailed on account of amendment in Section 43-D(5) of the UAP Act.

41. 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 by Special P.P. for NIA that the amendments in the provisions relating to custody and bail are of procedural nature and can have retrospective effect.

42. 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 Special P.P. and learned counsel for Intervenor, there is no substance in the contention raised by learned counsel for Appellant on this score.

43. 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.

44. 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.”*

45. 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]*

46. 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.

47. 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.”

48. 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.

49. 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.

50. Moreover, in this case, admittedly, the offences alleged against the Appellant are non-bailable and punishable with imprisonment for life or death, as he 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.

51. 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.

52. 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 Appellant 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.

53. According to learned counsel for the Appellant, even assuming that Section 43-D(5) of UAP Act is applicable, for considering the Bail Application of the Appellant, this Court should decide the

application as per the parameters laid down by the Hon'ble Apex Court in the case of *Ranjitsing Brahmajeetsing Sharma Vs. State of Maharashtra, 2005 (5) SCC 294*. It is submitted that, while considering similar restrictions placed on the bail, as laid down under MCOC Act, the Hon'ble Apex Court was pleased to observe in this authority 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, Accused may not be ultimately convicted, an order granting bail may be passed”.

54. It is urged that, in this authority, the Hon'ble Apex Court has also opined that, *“Section 21(4) of the MCOC Act 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 would require to 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. It must be so construed that the Court is able to maintain a delicate balance*

between the Judgment of acquittal and conviction and an order granting bail, much before commencement of the trial”.

55. According to learned counsel for the Appellant, these observations of the Hon'ble Apex Court in the case of *Ranjitsing Brahmajeetsing Sharma* needs to be applied while deciding the present application for bail also and the case of the Appellant for bail needs to be considered on the touch-stone of the law laid down in this authority.

56. In our considered opinion, there cannot be any two opinions about the law laid down by the Hon'ble Apex Court. Even otherwise also, whether the provisions of Section 43-D(5) of UAP Act are applied to the Bail Application of the present Appellant or not, the fact remains that this Court has to consider his Bail Application according to the provisions of the Code and the provisions of the Code also mandate that the offences alleged against the Appellant being non-bailable, the Court has to consider his Bail Application on certain parameters, which are laid down in the various authorities of the Hon'ble Apex Court, like, the prima facie case appearing against the Appellant; the nature of the offence; the gravity of the

punishment; the possibility of Applicant tampering of the witnesses, if released on bail, etc. The Hon'ble Apex Court has also in its order dated 15th April 2015 directed the Bail Application of the Appellant and other co-accused to be decided on these parameters.

Applicability of MCOCA Provisions

57. 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.

58. 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 his 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*.

59. 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.

60. 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 other Accused, including Accused No.1-Pragya Singh Thakur, 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]

61. 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 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. 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.

62. 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'?*

63. 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 MCOCA 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*.

64. 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 MCOCA Act, still the confessional statements of co-accused can be considered and relied upon for the purpose of the offences punishable under IPC.”

65. 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.

66. 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.

67. 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.

68. 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

69. 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.

70. 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, was followed and, moreover, it cannot be the point for argument at this stage.

71. 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.

72. 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.*”

73. 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.”

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

75. 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.

76. 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.

77. 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.

78. 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.

79. 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.

80. 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.

81. 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.

82. 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.

83. 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.

84. 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.

85. 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.”

86. 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.

87. 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.”

88. 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]

89. 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

90. In this case it is a matter of record that this is the third Bail Application of the Appellant. Though the Appellant contends that, practically, it is his first Bail Application, it is a matter of record that his first Bail Application bearing Miscellaneous Application No.42 of

2008 was rejected by the Special Court and the Appeal preferred by the Appellant against the said order also came to be rejected by this Court. No doubt, the Hon'ble Apex Court has restored the said Bail Application for a fresh decision in the light of the doubt expressed by the Hon'ble Apex Court about the applicability of MCOC Act, but, it is a matter of record that, after decision of the Hon'ble Apex Court also, the Appellant's Bail Application (Exhibit-2295), with Bail Application No.42 of 2008, came to be rejected by the Special Court. The Appeal preferred against the same, bearing Criminal Appeal No.138 of 2016, came to be withdrawn by the Appellant in view of the report filed by NIA, under Section 173(8) of the Code.

91. This Bail Application is, therefore, mainly on the ground of change in circumstance, as NIA has dropped the charges under MCOC Act against all the Accused, including the present Appellant. It is urged that, as a consequence to dropping of charges under MCOC Act, the confessional statements of co-accused cannot be taken into consideration. Moreover, some material prosecution witnesses have, in investigation by NIA, retracted their statements recorded by ATS. Thus, the main emphasis of the Appellant for seeking bail is now on the investigation conducted by NIA and, in

addition to that, on the Report of the Court of Inquiry conducted against him by the Ministry of Defence, which, according to the Appellant, prima facie, show that he has participated in the meetings as 'Military Intelligence Officer' in discharge of his duties, to create counter intelligence.

Re-investigation / Further Investigation Carried Out by NIA

92. In the present case, admittedly, two Investigating Agencies have conducted the investigation. Initially, ATS has filed Charge-Sheet against, in all, twelve accused persons, including the present Appellant, showing two accused, by name, Ramji @ Ramchandra Gopalsingh Kalsangra and Sandip Dange, as 'absconding accused'. Thereafter, NIA has made investigation in the matter, as per the direction of the Central Government, and has submitted further Investigation Report, under Section 173(8) of the Code. The Report filed by NIA reveals that NIA is not in agreement with the investigation done by ATS on certain points, but, at the same time, NIA has accepted the investigation done by ATS on several other aspects of the matter. NIA has recorded the statements of some more witnesses and re-recorded the statements of the witnesses already examined by ATS. NIA has also exonerated some of the

Accused, like, Accused No.1-Pragya Singh Thakur, Accused No.2-Shivnarayan Kalsangra, Accused No.3-Shyam Sahu, Accused No.12-Praveen Takkalki, Accused No.15-Lokesh Sharma and Accused No.16-Dhan Singh Choudhary, of all the charges levelled against them. However, so far as Appellant is concerned, NIA has, admittedly, not exonerated him from the charges levelled against him, though the charges under MCOC Act are dropped against him also, along with the other co-accused.

93. 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]

94. 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.

95. 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.

96. In such circumstances, the first and foremost question arising for consideration is, '*what can be the effect of further investigation conducted by NIA on the earlier investigation done by the ATS?*' and '*when there are more than two or more investigations conducted by the same or different agencies, what can be the effect?*' In our considered opinion, the answer to this question is clearly found in the landmark decision of *Vinay Tyagi Vs. Irshad Ali alias Deepak and Ors.*, (2013) 5 SCC 762, relied upon by Special P.P. and learned Senior Counsel for Intervenor.

97. It was held by the Hon'ble Apex Court in the said case that neither the Investigating Agency has power to conduct such fresh / *de novo* investigation / re-investigation, nor the Magistrate has power to direct the same. Only the higher judiciary, in exercise of extra-ordinary or inherent jurisdiction, has power to direct such fresh / *de novo* investigation or re-investigation by the same or any other specialized agency.

98. It was held that, if such investigation or *de novo* investigation is directed, then higher Court should pass a specific order regarding the fate of investigation already conducted and the report of such

investigation filed before the Magistrate. It was further held that, if no such specific order is passed in regard to the prior investigation / report, the same remains the part of the record.

99. In this reported authority, initial investigation was carried out and primary report was filed by Delhi Police. Further investigation by CBI was directed by High Court of Delhi, whereon Closure Report was filed by CBI. While directing the investigation by CBI, High Court has not passed any order or direction staying further investigation by Delhi Police or striking out from record the primary report filed by the Delhi Police. In the light of the same, it was held that, once the High Court has not passed any specific order regarding fate of investigation already conducted and the report filed by Delhi Police, then there is no question of treating first report or primary report as being withdrawn, cancelled or capable of being excluded from records by implication. It was, accordingly, held that, the Trial Court has to consider the entire record including, both, the Delhi Police Report filed under Section 173(2) of the Code, as well as Closure Report filed by CBI and the documents filed along with these two reports. The Hon'ble Apex Court has further held that, the Trial Court has three options. Firstly, it may accept application of the

accused for discharge; secondly, it may direct that the trial may proceed further in accordance with law; and, thirdly, if it is dissatisfied on any important aspect of investigation already conducted and in its considered opinion, it is just, proper and necessary in the interest of justice to direct “further investigation”, it may do so.

100. In paragraph No.22 of its Judgment, the Hon'ble Apex Court was pleased to consider the effect of further investigation carried out under Section 173(8) of the Code by observing that,

“Significant feature of further investigation is that it does not have the effect of wiping out directly or impliedly the initial investigation conducted by the Investigating Agency. This is a kind of continuation of the previous investigation. The basis is discovery of fresh evidence and in continuation of the same offence and chain of events relating to the same occurrence incidental thereto. In other words, it has to be understood in complete contradistinction to a “re-investigation”, “fresh”, or, “de novo” investigation.”

[Emphasis Supplied]

101. However, as regards the fresh investigation or re-investigation or de novo investigation, it was held that,

“There has to be a definite order of the Court and such order should unambiguously state as to whether the previous investigation, for reasons to be recorded, is incapable of being acted upon. Neither the Investigating Agency nor the Magistrate has any power to order or conduct “fresh investigation”.

102. It was further held that,

“It is essential that even an order of “fresh” / “de novo” investigation passed by the higher judiciary should always be coupled with a specific direction as to the fate of the investigation already conducted.”

103. According to the Hon'ble Apex Court, such power of ordering “fresh” or “de novo” investigation needs to be exercised by the higher judiciary, sparingly and in the rarest of rare case. In paragraph No.45 of the Judgment, the Hon'ble Apex Court was pleased to observe as follows :-

“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]

104. In paragraph No.46, the Hon'ble Apex Court was further pleased to hold 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. Where there is a specific order made by the court for reasons like the investigation being entirely unfair, tainted, undesirable or being based upon no truth, the court would have to specifically direct that the investigation or proceedings so conducted shall stand

cancelled and will not form part of the record for consideration by the court of competent jurisdiction.”

[Emphasis Supplied]

105. 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]

106. Thus, perusal of this Judgment of the Hon'ble Apex Court makes it more than crystal clear that, even if “fresh” / “*de novo*” or “re-investigation” is carried out by different agency, the earlier investigation report is not wiped out from the record, in the absence of any specific order passed by the higher court to that effect, while ordering such “fresh” / “*de novo*” or “re-investigation”. As a result, the Court has to consider and read conjointly, both, the earlier report and also the subsequent report.

107. In the instant case, the investigation done earlier by ATS, therefore, cannot be said to be wiped out totally from the record merely because, subsequently, NIA has carried out fresh / *de novo* or re-investigation. Admittedly, the NIA has not undertaken such “further”, “fresh” / “*de novo*”, or, re-investigation on the basis of or in pursuance of any order passed by the higher judiciary, but NIA has done so under the provisions of Section 6(5) of the NIA Act, which empowers the Central Government to suo-motu direct the investigation by NIA, if the Central Government is of the opinion that a scheduled offence has been committed. Therefore, as investigation was directed by Central Government, there was no question of higher judiciary making any specific order that the earlier report of investigation carried out by ATS or any part thereof

was to be excluded or struck-off the record and to be treated as *non est*. In such situation, both, the report of the investigation filed by ATS and also the report of investigation filed by NIA are required to be considered and read conjointly to decide whether any prima facie case exists against the Appellant.

108. It is pertinent to note that, in the above said authority, even when the application was for discharge of the Accused, in view of the Closure Report filed by CBI, the Hon'ble Apex Court was pleased to hold, in paragraph No.58, that,

“The application for discharge filed by the accused on the strength of such closure report filed by CBI has to be decided after examining the entire record, including the report filed by Delhi Police under Section 173(2) of the Code.”

109. The contrary view taken by the Delhi High Court that only the closure report filed by the CBI could be taken into consideration was not accepted by the Hon'ble Supreme Court.

110. It was further held in paragraph No.60 that,

“There is no question of treating the first report as being withdrawn, cancelled or capable of being excluded from

the records by the implication. In fact, except by a specific order of a higher court competent to make said orders, the previous as well as supplementary report shall form part of the record, which the Trial Court is expected to consider for arriving at any appropriate conclusion, in accordance with law.”

111. Accordingly, the Trial Court was directed to consider the entire record, including, both, the Delhi Police Report, filed under Section 173(2) of the Code, as well as the Closure Report filed by CBI and the documents filed along with these reports.

112. 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.

Applicability of MCOCA Provisions

113. 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.

114. 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*.

115. 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.

116. 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]

117. 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.

118. 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'?*

119. 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*.

120. 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.”

121. 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.

122. 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.

123. 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.

124. 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.

Criteria For Deciding Bail Application

125. 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.*
- (ii) 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].”

126. Thus, the Hon'ble Apex Court has directed the Special Court to consider the applications of the Appellant and other Accused No.1-Pragya Singh Thakur on merits, keeping in mind the observations made in paragraph Nos.96 and 97 of the Judgment, as referred above. Hence, this Court has now to consider first, *'whether there is*

any prima facie or reasonable ground to believe that the Appellant has committed the offence'.

127. 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.

128. 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.....”

129. Now, '*what can be the prima facie case within the meaning of Section 43-D(5) of the UAP Act?*' In the decision of *Devendra Gupta Vs. N.I.A., 2014 SCC OnLine AP 192*, relied upon by learned counsel for Appellant, the Division Bench of Andhra Pradesh High Court has quoted with approval the observations made by Guwahati High Court in *Jibangshu Paul Vs. National Investigation Agency, 2011 (3) Gau LT 615*, in paragraph No.98, after taking into account the law laid down by the Hon'ble Supreme Court in various cases, as follows :-

“98. The proviso to Section 43-D(5) does not require a positive satisfaction by the Court that the case against the accused is “true”. What is required is a mere formation of opinion by the Court on the basis of the materials placed before it. The formation of opinion cannot be irrational or arbitrary. Such formation of opinion cannot be based on surmises and conjunctures; but must rest on the materials collected against the accused. Since the presumption of innocence runs in favour of the accused, it logically follows that if there are, in given circumstances, grounds for believing that the case against the accused, is true, a case of commission of offence under Chapter IV or Chapter V of the UAP Act, 1967, can be said to have been made out and when such a case is made out, it would be

tantamount to saying that reasonable grounds exist for opining that the accusations are prima-facie true. In such a case, the bar imposed by proviso to Section 43-D(5) on the Courts power to grant bail, gets attracted.”

Circumstances Alleged Against Appellant

130. For proving the prima facie case against the Appellant, the prosecution has relied upon four circumstances, viz. (i) the transcriptions of the conversations in the meetings, obtained from the laptop of Accused No.10-Swami Amrutanand; (ii) statements of PW-55, PW-79 and PW-112, recorded under Section 161 as well as 164(5) of the Code; (iii) intercepted telephonic conversations between the Appellant and the co-accused; and (iv) finding of traces of RDX in the house of co-accused No.11-Sudhakar Chaturvedi.

(i) Transcriptions of the Conversations in the Meetings and Telephonic Calls

131. As to the first piece of material, relied upon by prosecution, according to the Appellant, there is nothing in the transcriptions of the conversation in the meetings to show that he and co-accused hatched the criminal conspiracy to commit bomb-blast at Malegaon. It is his further submission that in the said meetings, the persons

present have expressed their general opinion about the then prevailing political and social situation. Moreover, the Report of the Court of Inquiry as well as the documents filed by the Ministry of Defence and even the statement of PW-121 show that Appellant had informed the details of these meetings to his superiors, as he has attended the said meetings to create the counter intelligence. It is urged that these documents clearly destroy the theory of prosecution that Appellant was present in these meetings as a conspirator. It is further urged that none of the absconding accused, who have allegedly committed the Malegaon bomb-blast, were participants in the meetings or that they were communicated by the Appellant about what was transpired in the said meetings. Thus, it is submitted that there is absolutely no connection between the Malegaon bomb-blast and these meetings, as there is no common thread running through the same.

132. As regards the Call Detail Record, it is submitted that there are no calls exchanged between the absconding accused, who had allegedly caused Malegaon bomb-blast, and the Appellant at any time during the period of conspiracy, though, in the normal course, there would have been increase in frequency of calls between them,

at-least, at the fag-end of the conspiracy; particularly, if the Appellant was the principle conspirator, as alleged by the prosecution.

133. As to the intercepted telephonic conversation, on which the prosecution has placed reliance, it is urged that the object of conspiracy, as per the prosecution case, was to commit Malegaon bomb-blast on 29th September 2008. The ATS has, however, without any reason extended the period of conspiracy from January 2008 till 23rd October 2008. It is submitted that once the object of conspiracy is achieved, the offence of conspiracy comes to an end and the prosecution has, thus, not explained as to why the period of conspiracy is extended upto 23rd October 2008, when the bomb-blast had taken place on 29th September 2008. There is no evidence to show that any acts were done by the accused during this period from 29th September 2008 till 23rd October 2008. The alleged phone calls between the Appellant and Accused No.4-Ramesh Upadhyay show that they were merely trying to take precautions so as to guard the role of 'Military Intelligence' because of international ramifications. It is urged that there is no evidence to show that prior to the date of bomb-blast or subsequent to it, the Appellant was in touch with any

other conspirators. In fact, the statement of PW-105 shows that Appellant was, at the relevant time, at Panchmadhi. Thus, the main contention of the Appellant in respect of these two pieces of evidence, namely, transcriptions of the meetings and the intercepted telephonic conversation between the Appellant and co-accused, is that the Appellant had attended these meetings as a part of his duty and that was the reason why he has reported about the same to his superior officers, otherwise he would not have done so. For substantiating this submission, the learned counsel for Appellant has relied upon the documents filed by the Ministry of Defence and the papers of the Court of inquiry. According to learned counsel for the Appellant, for deciding the Bail Application, these documents are necessary to be considered.

134. Per contra, submission of learned Special P.P. and learned counsel for the Intervenor on this aspect is that, these documents cannot be taken into consideration, as they are in support of the defence of Appellant and they are not part and parcel of the Charge-Sheets submitted by both the Investigating Agencies.

135. In our considered opinion also, there is much substance in these submissions advanced by learned Special P.P. and learned

counsel for the Intervenor. Admittedly, these documents filed by the Ministry of Defence and the papers of Court of Inquiry are not forming part of any of the two Reports, either filed by ATS under Section 173(2) of the Code or by the NIA under Section 173(8) of the Code. Section 43-D(5) of UAP Act, which deals with the provisions relating to bail, as referred above; especially the Proviso thereto, clearly states that,

“Accused persons 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 accusation against such person is prima facie true.”

[Emphasis Supplied]

136. It, therefore, follows that, for formulating the opinion that there are reasonable grounds for believing that the accusation against accused person is prima facie true, the only documents the Court has to peruse are the Case Diary or the Report made under Section 173 of the Code. This Section, thus, nowhere contemplates for the Court to consider any other documents, much less, the documents produced by the accused, to formulate its opinion as to whether there are reasonable grounds for believing that the accusation against such person is prima facie true or not. Section

173 of the Code specifically elaborates as to which documents and material are required to be filed along with the report. In this respect, Sub-section (5) of Section 173 of the Code is very relevant, which states that,

“173(5). When such report is in respect of a case to which Section 170 applies, the police officer shall forward to the Magistrate along with the report -

- (a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;*
- (b) the statements recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses.”*

137. Thus, apart from these documents, which are filed along with the Charge-Sheet, Proviso to Section 43-D(5) of the UAP Act does not contemplate perusal of any other documents at the time of deciding the Bail Application. In other words, the Bail Application of the accused for the offences punishable under UAP Act is to be decided on perusal of the Case Diary or the Report made under Section 173 of the Code. Otherwise, as rightly submitted by learned

Special P.P., it would be a mini-trial. In such situation, when the specific provision is made in the Proviso to Section 43-D(5) of UAP Act as to which material should be considered by the Court while forming the opinion as to whether there is reasonable ground for believing that accusation against the accused is prima facie true, it follows that, at this stage, perusal of no other material is contemplated by the Legislation.

138. In this respect, one can also place reliance on the Judgment of Hon'ble Apex Court in the case of *State of Orissa Vs. Devendranath Padhi*, AIR 2005 SC 359. The said Judgment deals with the provisions of Section 227 of the Code and the issue raised before the Hon'ble Apex Court was, '*whether at the stage of deciding of whether charge is to be framed against the Accused or he is to be discharged, the material produced by the Accused in support of his defence can be taken into consideration or not*'. While answering this legal issue, the Hon'ble Apex Court has considered the scope of Section 227 of the Code and held that, "*as the words in the said Section expects the Court to decide whether charge to be framed or not, only on the consideration of the "record of the case"; as the record of the case means the report under Section 173(2) of the Code, filed along with*

the documents mentioned under Section 173(5) of the Code, there is no scope to consider any material or document produced by the Accused at that stage”.

139. In the present case, therefore, in view of the specific provision made in Proviso to Section 43-D(5) of the UAP Act, as to which documents are required to be considered for deciding the Bail Application of the Accused, it has to be held that no other documents, namely, the documents produced by the Appellant or the Ministry of Defence, need to be considered for this purpose.

140. As regards the authority relied upon by learned counsel for the Appellant that of *Kum. Mahima d/o Santosh Jain Vs. The State of Maharashtra and Ors.*, 2015 SCC OnLine BOM 6161, it is pertinent to note that, in that case, the application was filed by the Complainant under Section 439(2) of the Code for cancellation of the bail granted to the Accused. At the time of deciding the said application, the Accused has produced certain text messages of the chats between him and the Complainant. It was submitted on behalf of learned counsel for the Accused that, these text messages of the chat were handed over by the Accused to the Investigating Officer,

when he was interrogated. However, they were not enclosed or filed with the Charge-Sheet by the Investigating Officer. This particular submission of learned counsel for the Accused was not countered by learned counsel for the Complainant and learned A.P.P. In such situation, the Trial Court has considered all these text messages and text chats between the Complainant/Prosecutrix and Accused, while rejecting the application filed by the Complainant for cancellation of the bail of the accused. The said order was challenged on the count that Trial Court should not have considered these text messages, as they were not forming part of the Charge-Sheet. In that context, it was held by this Court that,

“Merely because these text messages were not forming part and parcel of the Charge-Sheet, the Court cannot be prevented from looking into such material, which was available with the Investigating Officer and for the reasons best known to the Investigating Agency, it does not form the part and parcel of the Charge-Sheet”.

141. In the said context, therefore, it was held that,

“Grant or refusal of bail deals with the personal liberty. While dealing with this delicate issue, Court has to consider each and every aspect. No one can expect from the Court that while deciding such issue, the view of the Court should passed through a narrow lane.”

142. Accordingly, it was held that, there was no reason to brand the order passed by the Trial Court as 'perverse', merely because it has taken into consideration the chat messages, which were not forming part of the Charge-Sheet.

143. It is, therefore, clear that these observations came to be made in the peculiar facts of that case; especially because Accused has produced those text messages before the Investigating Officer and, despite that, Investigating Officer has not produced them along with the Charge-Sheet. Secondly, the said authority is under the provisions of Section 439(2) of the Code, which Section does not contain any specific provision, like, Section 43-D(5) of the UAP Act. As against it, in the present case, the Report of Court of Inquiry and the documents of the Defence Ministry are subsequent to the incident of bomb-blast and, admittedly, they were not produced before the Investigating Agency and, hence, this authority, in our considered opinion, cannot be made applicable to the facts of the present case.

144. Even as regards the other three authorities relied upon by learned counsel for the Appellant that of *Harshendra Kumar D. Vs. Rebatilata Koley & Ors.*, (2011) 3 SCC 351; *Rajiv Thapar & Ors. Vs.*

Madan Lal Kapoor, (2013) 3 SCC 330 and Prashant Bharti Vs. State (NCT of Delhi), (2013) 9 SCC 293, all these authorities pertain to the inherent jurisdiction of the High Court under Section 482 of the Code, which pertains to the quashing of the proceedings. In that context, it was held that, to invoke this inherent jurisdiction of the High Court under Section 482 of the Code, the High Court, can take into consideration the material produced by the Accused; provided (i) such material would lead to the conclusion that the defence of the Accused is based on sound, reasonable and in-debatable facts; (ii) the material produced is such as would rule out and displace the assertions contained in the charges levelled against the Accused; and, (iii) the material produced is such as would clearly reject and overrule the veracity of allegations contained in the accusation levelled by the prosecution.

145. Therefore, both these authorities deal with the inherent powers of the Court under Section 482 of the Code. It is needless to state that, the powers of the High Court under Section 482 of the Code being quite wider and are to be used to prevent the abuse of the process of any Court or otherwise to secure the ends of justice, the observations made here-in-above cannot be made applicable for deciding the Bail Application of the Accused.

146. In the backdrop of these principles, if one sees the transcriptions of the meetings in the files, namely, “Sanatan Bharat”, dated 25th January 2008, 26th January 2008 and 27th January 2008, these transcriptions reveal the conversations that took place between accused persons and some witnesses, who were present in the said meeting at Faridabad. The conversations reflect that the following issues / points were discussed in the said meetings:-

- “(i) Participants in the meeting wanted to establish 'Hindu Rashtra' i.e. “Aryavart”;*
- (iii) Discussion also shows that they wanted to overawe the Government and wanted to establish the Government in exile;*
- (iii) Participants were not ready to accept the present Constitution and wanted to prepare new Constitution suited to their ideology;*
- (iv) The participants were of the view that those resisting their ideology should be ex-communicated i.e. should be killed.”*

147. Even as per paragraph No.4 of the Report filed by NIA, it was the Appellant, who proposed in secret meeting at Faridabad on 25th

and 26th January 2008, a separate 'Constitution' for 'Hindu Rashtra' with separate saffron colour flag. He read over 'Constitution' of 'Abhinav Bharat', which he has prepared. He also discussed about taking revenge of the atrocities committed by the Muslims on Hindus.

148. It is pertinent to note that, these conversations in the meetings was recorded by Accused No.10-Sudhakar on his laptop. During the course of investigation, data retrieved from the laptop was sent to FSL and as per paragraph No.12 of NIA Report, FSL Report discloses that the voice samples of Appellant, Accused No.10-Sudhakar and Accused No.4-Ramesh were positive and matching.

149. The transcriptions, thus, disclose that Appellant has stated in the said meetings that he has made contacts in Israel for implementation of the above ideology. The discussions further show that the participants were of the opinion that there should not be a place for Muslims in 'Hindu Rashtra'. The discussions also show that Appellant, in the said meetings, spoke about the list of 70 persons, who were to be ex-communicated. He also spoke about previous two operations successfully carried out by him and of his capacity to

execute further operations. The care was also taken to maintain secrecy.

150. The statement of PW-94, in this respect, also shows that during the course of his meeting with the Appellant, Appellant was saying that revenge of the atrocities on Hindus is required to be taken and "Abhinav Bharat" should not be developed merely as a political party, but should work as an organization of extremists, having capacity to eliminate the persons opposing the same. If the contention of the Appellant that he was present in the said meeting and participated therein merely as a part of his duty, while working as a 'Military Intelligence Officer', and he has reported about the same to his superior, is to be accepted and if his further contention that 'Abhinav Bharat Organization' was only a political party is also to be accepted, there is no reason for him to express the above views to PW-94, who had funded the amount of Rs.10 lakhs to the said Organization.

(ii) Statements of PW-55, PW-79 and PW-112

151. Even the statements of witnesses, like, PW-79 and PW-112, as recorded by the ATS, reveal that in Faridabad meeting, Appellant

had talked about 'Jihadi' activities in Maharashtra at Aurangabad and Malegaon and he had also talked about preparation of 'Guerrilla War" to take revenge of 'Jihadi' activities. According to PW-112 also, after public meeting at Bhopal, there was another closed door meeting of selected few in one room and in the said meeting, Accused No.1-Pragya Singh Thakur, Accused No.4-Upadhyay, Accused No.5-Sameer Kulkarni, Accused No.11-Sudhakar Chaturvedi and some other were present along with the Appellant. The statement of PW-112, as recorded by ATS officer, shows that in the said meeting, Appellant talked about necessity to take immediate planned action for taking revenge on Muslim community. He also expressed his opinion that at Malegaon, there is Muslim dominating area and if bomb-blast is caused there, it may amount to taking revenge.

152. It may be true that, in his re-examination by the Investigating Officer of NIA, PW-112 has retracted his statement that Accused No.1-Pragya Singh Thakur had shown her readiness for arranging persons for doing the act of bomb-blast. However, he has not retracted the contents of his statement even before NIA to the effect that, in the meeting at Bhopal, issue of growing 'Jihadi' activities in

Aurangabad and Malegaon was discussed. As per his statement recorded by NIA also, in the said meeting, Appellant explained about 'Jihadi' activities in detail and expressed the need to do something for its prevention by expanding "Abhinav Bharat Sanghatana" in the said area. This witness has stated to that effect even in his statements recorded by the Metropolitan Magistrate, Mumbai and Delhi, under Section 164(5) of the Code.

153. PW-79, in his statement recorded before ATS officer and also before Metropolitan Magistrate, Mumbai, has stated about his presence in Bhopal meeting and he has further stated that in the said meeting, Appellant expressed his opinion about necessity to take immediate planned action to take revenge against the Muslim community and also expressed his opinion of causing bomb-blast at Malegaon.

154. It may be true that PW-79 has in his statements recorded by NIA and before the Metropolitan Magistrate, Delhi, denied his presence in Bhopal meeting.

155. There is also the statement of PW-55 recorded by ATS and

Metropolitan Magistrate, Mumbai, who has also stated about Appellant showing him the bag containing RDX kept in the house in March 2007. Appellant had also stated to him that there would be big action in August and September in Nashik District. This witness has further stated about the Appellant being disturbed on account of arrest of Accused No.1-Pragya Singh Thakur and further making extra-judicial confession to him about causing of bomb-blast at Malegaon. This witness is, however, re-examined by NIA and in that statement, he has retracted the statement made before ATS.

156. In our considered opinion, even if the statements of these three witnesses are excluded from consideration, in view of the contradictory stands taken by them, at this stage, there is more than other sufficient evidence on record, like, the transcriptions of the conversations, that took place in the various meetings, and also on the Call Detail Record i.e. intercepted telephonic conversation between the Appellant and Accused No.4-Ramesh Upadhyay.

(iii) Intercepted Telephonic Conversations

157. These telephonic conversations are dated 23rd October 2008 at about 11:23 am, 4:10 pm, 4:12 pm and 5:54 pm. These

conversations refer to the news in the Times of India and Indian Express about Malegaon bomb-blast and then Appellant telling to Accused No.4 that *“cat is out of the bag”*, thereby informing that Accused No.1-Pragya Singh Thakur was found and arrested. This conversation also reflects that Appellant was under pressure and tension when he came to know that Accused No.1-Pragya Singh was arrested. In this conversation, Appellant also talked about the need for changing of his phone number and also the need of engaging the Advocate. In the further telephonic conversation, Appellant and Accused No.4-Ramesh Upadhyay instructed each other to be more careful as they were under apprehension of being on radar of the Police. NIA has also, in paragraph Nos.13 and 14 of its Report, confirmed these facts and this post-conduct of Appellant, prima facie, shows the guilt in his mind and his active participation in crime.

158. One cannot, therefore, ignore these intercepted telephonic conversations, which do not, prima facie, support the contention of the Appellant that he was acting under the 'Covert Military Operation' and was also working in discharge of his duties. If it was so, he would have immediately contacted his superior officers in the Army or, at-least, appraised the Police, who were investigating the

case, about his role. At-least, he would not have any apprehension of being arrested in the case.

159. According to the submission of learned counsel for the Appellant, as all these telephonic talks are subsequent to Malegaon bomb-blast, they have to be excluded from consideration because the object of conspiracy was achieved on 29th September 2008 itself and, hence, whatever has happened subsequent to the object being achieved, cannot be a part of conspiracy.

160. However, in this respect, the law relating to the conspiracy, which is laid down by the Hon'ble Apex Court in the case of *Tamil Nadu Vs. Nalini & Ors.*, (1999) 5 SCC 253, can be of much relevance and one of the guiding principles laid down in the said authority is as follows :-

“An act subsequent to the achieving of the object of conspiracy may tend to prove that a particular accused was party to the conspiracy. Once the object of conspiracy has been achieved, any subsequent act, which may be unlawful, would not make the accused a part of the conspiracy like giving shelter to an accused.”
[Emphasis Supplied]

161. Here, we are not concerned with any unlawful act of the Appellant subsequent to achieving of the object of controversy, but his “subsequent conduct” after achieving the object of conspiracy, which is held to be relevant by the Hon'ble Apex Court and this conduct leads to the inference of accused being a party to the conspiracy.

162. The law laid down in this authority of *State of Tamil Nadu Vs. Nalini & Ors. (Supra)* also squarely meets the contention of learned counsel for the Appellant that none of the absconding accused were present in the meetings at Faridabad or Bhopal and there was no contact between the Appellant and those Accused. In paragraph No.6 of the Judgment of *Nalini (Supra)*, it is held that,

“6. It is not necessary that all conspirators should agree to the common purpose at the same time. They may join with the other conspirators at any time before the consummation of the intended objects and all are equally responsible. What part the conspirator is to play may not be known to everyone or the fact as to when a conspirator joined the conspiracy and when he left.”

[Emphasis Supplied]

163. As held in this authority, it is the unlawful agreement, which is

the gravamen of the crime of conspiracy. Such agreement need not be formal or express, but may be inherent and inferred from the circumstances; especially, declaration, acts and conduct of the conspirators. It is a partnership in crime and, hence, everything said or done by any of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done or written by each of them and this joint responsibility extends not only to what is done by any of the conspirators present to the original agreement, but also to collateral acts incidental to and growing out of the original purpose.

(iv) Finding of Traces of RDX

164. The fourth incriminating circumstance alleged against the Appellant, is that of '*ATS officers finding the traces of the RDX in the house of the co-accused No.11-Sudhakar Chaturvedi*'. As per the contention of the Appellant, the Indian Army does not use RDX and it is not available off the shelf and hence it was impossible for him to get the RDX, as alleged by the prosecution, and such RDX was planted in the house of co-accused No.11 by the ATS. It is submitted that even NIA has accepted the fact that RDX has been planted by ATS officer and, accordingly, discharged Accused No.15 and

Accused No.16, who had procured and transported the RDX. According to Appellant, therefore, this circumstance cannot be considered against him and, hence, prima facie, there is no case made out under Section 18 of the UAP Act.

165. In our considered opinion, both these versions of ATS and NIA are required to be tested at the time of trial. At this stage, this Court cannot pick-up or choose one version over the other. That is what is said by the Hon'ble Apex Court in the case of *Vinay Tyagi (Supra)* that, even at the time of trial, the Court has to consider conjointly both the versions of the investigation conducted by two different Agencies and then decide which one is correct and true. In this case also, only the Trial Court, after full-fledged hearing, can decide whether the ATS has fabricated the evidence relating to the RDX or the investigation conducted by the ATS is correct. At this stage, one cannot do so.

166. Moreover, even if we exclude these two circumstances from our consideration, viz. Statements of PW-55, PW-79 and PW-112 and the finding of RDX traces in the house of co-accused No.11, in our considered opinion, there is, prima facie, more than sufficient material on record against the Appellant so as to hold that there are

reasonable grounds for believing that accusations made against the Appellant are prima facie true and that appears to be the reason as to why NIA has also not given a 'clean-chit' to the Appellant, though it has done so in respect of some of the other co-accused, like, Accused Nos.1, 2, 3, 12, 15 and 16.

Applicability of Charges under UAP Act

167. Next submission of learned counsel for the Appellant is that, there is no prima facie case against the Appellant to attract any of the offences punishable under UAP Act. It is submitted that, as regards the charge under Sections 15 and 16 of the UAP Act, Section 15 only defines a '*terrorist act*' and is, thus, not punishable as an offence; whereas, Section 16 provides '*punishment to the Accused, who commits a terrorist act*'. It is submitted that, according to the prosecution case also, the present Appellant has not committed the terrorist act of planting the bomb or causing the blast. As per the case of the prosecution, the actual bomb-blast was committed by two absconding accused, namely, Ramji *alias* Ramchandra Kalsangra and Sandip Dange. Therefore, when Section 16 punishes the actual commission of the terrorist act by the Accused and as Appellant has actually not committed the said act,

he cannot be held, in any way, liable for the punishment, either the death or life imprisonment, provided for such offence.

168. Learned counsel for the Appellant has further submitted that for application of Section 17 of the UAP Act, as it was then prevailing, there must be evidence to show that Accused has raised fund for the purpose of committing a terrorist act. In the instant case, it is submitted that there is no evidence to prove prima facie also that Accused has received any money for the purpose of commission of terrorist act i.e. Malegaon bomb-blast. At the most, the allegation against the Appellant is that he has collected the funds for the purpose of “unlawful activities”, like, for the organization of 'Abhinav Bharat'. The said organization was a registered Charitable Trust and, therefore, prima facie also, charge under Section 17 of the UAP Act is not attracted.

169. Further, it is submitted by learned counsel for the Appellant that, to attract the charge under Section 20 of the UAP Act, a person has to be a member of the “terrorist gang” or a “terrorist organization”, which is involved in “terrorist act”. In the instant case, it is submitted that, nowhere it is the case of prosecution that 'Abhinav Bharat' was a terrorist gang or a terrorist organization.

Thus, according to learned counsel for the Appellant, there is no prima facie material or evidence to attract any of the charges levelled against the Appellant for the offences punishable under UAP Act.

170. However, in our considered opinion, this submission of learned counsel for the Appellant cannot be accepted at this stage, as Section 18 of the UAP Act provides punishment even for the person who conspires or attempts to commit, or advocates, abets, advises or incites, directs or knowingly facilitates the commission of a terrorist act or any act preparatory to the commission of a terrorist act. The term 'terrorist act' is defined in Section 15 of UAP Act as follows :-

“15. Terrorist act - [1] Whoever does any act with intent to threaten or likely to threaten the unity, integrity, security, economic security or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country -

(a) by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisonous or noxious gases or other chemicals or by any other substances (whether biological radioactive, nuclear or otherwise) of a hazardous nature or by any

other means of whatever nature to cause or likely to cause -

- (i) death of, or injuries to, any person or persons; or*
 - (ii) loss of, or damage to, or destruction of, property; or*
 - (iii) disruption of any supplies or services essential to the life of the community in India or in any foreign country; or*
 - (iiia) damage to, the monetary stability of India by way of production or smuggling or circulation of high quality counterfeit Indian paper currency, coin or of any other material; or*
 - (iv) damage or destruction of any property in India or in a foreign country used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies; or*
- (b) overawes by means of criminal force or the show of criminal force or attempts to do so or causes death of any public functionary or attempts to cause death of any public functionary; or*
- (c) detains, kidnaps or abducts any person and threatens to kill or injure such person or does*

any other act in order to compel the Government of India, any State Government or the Government of a foreign country or an international or inter-governmental organisation or any other person to do or abstain from doing any act; or commits a terrorist act.”

171. If one has regard to the nature of the allegations against the Appellant and other accused of using the bomb, or, explosive substance, with intent to threaten, or, likely to threaten, the unity, integrity, security or sovereignty of India and with intent to strike terror or likely to strike terror in the people or particular community of the people in India, like, the Muslim community, it falls within the definition of 'terrorist act'. Therefore, at this prima facie stage, the argument advanced by learned counsel for the Appellant that the provisions of UAP Act are not attracted, cannot be accepted. Moreover, charge in the case is also of conspiracy, punishable under Section 120B IPC and to attract the said charge, as held in the above-said authority of *State of Tamil Nadu Vs. Nalini (Supra)*, in paragraph No.5, a crime is committed by each and every one, who joins the agreement.

172. The above pieces of evidence, therefore, on which prosecution

is relying, in our opinion, are sufficient, at this stage, to make out prima facie case against the Appellant.

173. The next consideration for deciding the application for bail is *'the nature and gravity of the charge'*. In the instant case, it is needless to state that the charge levelled against the Appellant is serious and grave one. It is of waging war against the integrity and unity of the State and, that too, by the violent means like exploding the bomb, so as to create terror in the minds of the people. The bomb-blast has caused not only the loss of lives of 6 persons, but also more than 100 people were injured. The offences alleged against the Appellant are, therefore, 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. Therefore, even if the offences under the MCOC Act are excluded from consideration, the gravity of the charges levelled against the Appellant cannot be ignored.

174. The third criteria is of *'severity of the punishment in the event of conviction'*. Needless to state, that the punishment to which Appellant will be liable, on conviction, may extend to death or

imprisonment for life and other serious forms of the imprisonment.

175. As regards the other parameters to be considered while deciding the application of bail, like, '*reasonable apprehension of the witnesses being tampered with and danger, of-course, of justice being thwarted by grant of bail*', needless to state that, already some of the witnesses have retracted their statements made before the ATS. Therefore, this apprehension also cannot be called as 'unreasonable' or 'groundless'.

176. Therefore, in case of such serious offence, the Hon'ble Apex Court itself has in the case of *Kalyan Chandra Sarkar Vs. Rajesh Ranjan @ Pappu Yadav and Anr. (Supra)*, held that, the discretion is to be exercised in a judicious manner and not as a matter of course and there is a need to indicate in such order, the reasons for prima facie concluding as to why the bail was being granted; particularly where the accused is charged of having committed a serious offence. In our considered opinion, no such grounds are made out for granting the bail in such serious offences, which are levelled against the Appellant.

177. Lastly, learned counsel for the Appellant has sought bail on the

ground of delay caused in the trial, by placing reliance on the following authorities :-

- (a) *Shaheen Welfare Association Vs. Union of India & Ors.*, (1996) 2 SCC 616
- (b) *Giani Pratap Singh Vs. State of Rajasthan & Anr.*, 1995 SCC (Cri) 992
- (c) *Sanghian Pandian Rajkumar Vs. Central Bureau of Investigation & Anr.*, a/w. connected matter, (2014) 12 SCC 23
- (d) *Sanjay Chandra Vs. Central Bureau of Investigation*, (2012) 1 SCC 40
- (e) *Thana Singh Vs. Central Bureau of Narcotics*, (2013) 2 SCC 603
- (f) *Izharul Haq Abdul Hamid Shaikh & Anr. Vs. State of Gujarat*, (2009) 5 SCC 283
- (g) *Supreme Court Legal Aid Committee, representing Under-Trial Prisoners Vs. Union of India & Ors.*, (1994) 6 SCC 731
- (h) *State of Kerala Vs. Raneef*, (2011) 1 SCC 784
- (i) *Sandip Kalangutkar Vs. State, represented by Officer-in-Charge, Calangute Police Statem, Calangute, Goa & Anr.*, 2012 SCC OnLine Bom 795
- (j) *Akhtari BI (Smt.) Vs. State of M.P.*, (2001) 4 SCC 355
- (k) *Dipak Shubhashchandra Mehta Vs. Central Bureau of Investigation & Anr.*, (2012) 4 SCC 134
- (l) *State of Punjab Vs. Ajaib Singh*, (1995) 2 SCC 486

178. It is submitted that the delay caused in the instant case is substantial as it is of more than eight years and for the said delay,

no fault can be attributed to the Appellant. Therefore, the Appellant needs to be released on bail. However, in our considered opinion, mere delay in the trial cannot be a ground for releasing the Appellant on bail; especially when the delay was on account of the factors, which were not in the hands of the prosecution or, may be, even the accused. Record shows that since 2011 to July 2015, 'Record and Proceedings' in this case was in the Hon'ble Apex Court in the Appeals preferred by Appellant and co-accused. Therefore, NIA could not proceed with further investigation.

179. It may also be stated that, all the authorities relied upon by learned counsel for Appellant deal with particular facts of the case placed before the Court. For example, in the case of Giani Pratap Singh (Supra), Accused was in Jail for more than 4 years and 8 months, whereas, minimum sentence provided for the offence was only 5 years. Similarly, in the case of Thanu Singh (Supra), Accused was in Jail for more than 12 years for the offence under Section 8 r/w. Section 29 of NDPS Act and the trial was not likely to be concluded in the near future. In such circumstances, Accused was released on bail. Thus, each case depends on its own facts. In the present case, the offences charged against Accused are serious and

grave one, inviting even punishment of death or life imprisonment. Moreover, the trial is also likely to be commenced as the Special Court is already established for the said purpose, as per the order passed by the Hon'ble Supreme Court.

180. In our considered opinion, therefore, the Trial Court has considered and dealt with all these aspects in detail and effectively while rejecting the Appellant's application for bail. The discretion exercised by the Trial Court, therefore, does not call for any interference, as, independently also, when we consider the application of the Appellant for bail, we find that he is not entitled to be released on bail. Hence, this Appeal stands dismissed.

181. 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.

182. In view of dismissal of the Appeal, Criminal Application No.1448 of 2016 no more survives and, hence, stands disposed off.

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