

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL ANTICIPATORY BAIL APPLICATION NO.2461 OF 2019

Gautam Navlakha, Age 67 years,
R/o.Flat No.2, R-3 Nehru Enclave,
New Delhi-110 019.

Applicant

versus

The State of Maharashtra

Respondent

**WITH
INTERIM APPLICATION NO.1 OF 2019**

IN

CRIMINAL ANTICIPATORY BAIL APPLICATION NO.2461 OF 2019

The State of Maharashtra

Applicant

versus

Gautam Navlakha

Respondent

Dr.Yug Mohit Chaudhry with Ms.Ragini Ahuja with Ms.Payoshi Roy
for applicant in ABA No.2461 of 2019 and for Respondent in I.A.
No.1/2019.

Smt.Aruna S. Pai, Special Public Prosecutor for State/Respondent.

Dr.Shivaji Pawar, ACP and Investigating Officer.

CORAM : PRAKASH D. NAIK, J.

Date of Reserving the Order : 18th December 2019

Date of Pronouncing the Order : 14th February 2020

PC :

1. This is an application for anticipatory bail under Section 438 of
Code of Criminal Procedure, 1983 (`Cr.PC'). The applicant is

apprehending arrest in connection with CR No.4 of 2018 registered with Vishrambagh Police Station, Pune. The first information report ('FIR') was lodged on 8th January 2018. The offences were registered under Sections 153-A, 505(1)(b), 117, 34 of Indian Penal Code.

2. The FIR was lodged by one Tushar Ramesh Damugade. It was alleged that there was a programme at Shaniwar Wada, at Pune on 31st December 2017 organized by Elgar Parishad. The first informant attended the programme at about 2 pm on 31st December 2017. There were few speakers, comperes, singers and other performers present on the stage. The informant was knowing Kabir Kala Manch and its members. He had read about them on social media and in the newspapers. Some of the performers enacted short plays, performed dances and sang songs. According to the first informant, the performances were provocative in nature and had effect of creating communal disharmony. Provocative speeches were delivered. Few objectionable and provocative books were kept for sale at the venue. The banned organization Communist Party of India (Maoist) (for short 'CPI (M)') was inciting violence by creating communal disharmony. The members of Kabir Kala Manch spread hatred through their songs, plays and speeches causing

enmity between different communities. As a result, there were instances of violence, arson and stone pelting near Bhima-Koregaon.

3. The FIR was registered against Sudhir Dhavale, Sagar Gorkhe, Harshali Potdar, Dipak Dhengale, Jyoti Jagtap, Ramesh Gaychor and others. The investigation proceeded. Section 120-B of IPC was added on 6th March 2018. The investigation was transferred to Crime Branch, Pune.

4. According to prosecution, during the course of investigation, search was conducted on 17th April 2018 at the residential premises and work places of Rona Wilson (R/o.Delhi), Surendra Gadling (R/o.Nagpur), Sudhir Dhavale (R/o.Mumbai), Harshali Potdar (R/o.Mumbai), Sagar Gorkhe (R/o.Pune), Dipak Dhengale (R/o.Pune), Ramesh Gaychor (R/o.Pune), Jyoti Jagtap (R/o.Pune). It is alleged that during the search documents were recovered from their respective computers/laptops/pen drives/memory cards etc.. Different documents were found to have been created or kept in the respective computers/laptops/pen drives/memory cards/devices on different dates. The seized articles were sent to Forensic Science Laboratory for analysis. The cloned copies were received by the investigating agency. According to prosecution, from the seized and

recovered material, it was revealed that other persons are also part of criminal conspiracy. Based on investigation the provisions of Sections 13, 16, 17, 18, 18-B, 20, 38 39 and 40 of Unlawful Activities (Prevention) Act, 1967 (`UAPA Act' for short) were applied on 17th May 2018 against Surendra Gadling, Rona Wilson, Shoma Sen, Mahesh Raut, Comrade M @ Milind Teltumbde, Comrade Prakash @ Navin @ Ritupan Goswami, Comrade Mangalu and Comrade Dipu. Search was conducted at the residence of Shoma Sen and Mahesh Raut on 6th June 2018. Search was carried out at the place of residence or work place of applicant, PVaravara Rao (R/o. Hyderabad), Arun Ferreira (R/o.Thane), Sudha Bharadwaj (R/o.Faridabad), Vernon Gonsalves (R/o.Mumbai).

5. The accused Surendra Gadling, Rona Wilson and Sudhir Dhavale were arrested on 6th June 2018. According to the prosecution, based on incriminating material, other persons were added as accused, viz.PVaravara Rao, Arun Ferreira, Vernon Gonsalves, Sudha Bharadwaj, applicant, Anand Teltumbade and Stan Swamy. Charge sheet was filed against arrested accused under Sections 121, 121-A, 124-A, 153-A, 505(1)(b), 117, 120-B r/w 34 of Indian Penal Code and under Sections 13, 16, 17, 18, 18-B, 20, 38, 39 and 40 of UAPA Act.

6. The applicant was added as an accused on 22nd August 2018. The applicant preferred Writ Petition No.2559 of 2018 before Delhi High Court seeking issuance of Writ of Habeas Corpus for his release from custody and questioning the legality of his arrest. The arrest of applicant was stayed by Delhi High Court and interim protection of house arrest was granted. By order dated 1st October 2018, the arrest of applicant was set aside by Delhi High Court. The said order was challenged before the Hon'ble Supreme Court by the prosecuting agency.

7. On 29th August 2018 Writ Petition No.260 of 2018 (**Romila Thapar and others Vs. Union of India and others - (2018)10-SCC-753**) was preferred before the Hon'ble Supreme Court by five eminent historians and academics challenging the action of Maharashtra Police in raiding homes and arresting human rights activists, journalists, advocates and political workers. The grievance of the petitioners was that the activists namely Gautam Navlakha (applicant), Sudha Bharadwaj, Varavara Rao, Arun Ferreira and Vernon Gonsalves were arrested on 28th August 2018 from their homes at New Delhi, Faridabad, Mumbai, Thane and Hyderabad without any credible material and evidence in connection with FIR

No.4 of 2018 registered with Vishrambagh Police Station, Pune. The prosecution-respondent opposed the petition by filing reply. During the course of hearing of the said petition, formal applications were filed on behalf of Sudha Bharadwaj, Arun Ferreira and Vernon Gonsalves, who were under house arrest, stating that they may be permitted to pursue the writ petition filed by them. The Hon'ble Supreme Court had extended protection of house arrest granted to the applicant and others. The petitioners had prayed that the investigation be monitored through SIT. The Hon'ble Supreme Court vide judgment and order dated 28th September 2018 by majority of 2:1 declined to order a Court monitored SIT. The accused were permitted to seek other remedies including quashing/bail etc. The interim protection was extended for a further four weeks to enable the accused to pursue appropriate remedies.

8. The applicant preferred Criminal Writ Petition No.4425 of 2018 before this Court by invoking jurisdiction of this Court under Article 226 of Constitution of India and under Section 482 of Cr.PC to quash the proceedings in CR No.4 of 2018. The said petition was dismissed vide judgment and order dated 13th September 2019. However, interim order granted in the petition earlier, was extended for a period of three weeks. The applicant preferred petition for

Special Leave to Appeal (Cri) No.8862 of 2019 before Hon'ble Supreme Court challenging the order of Division Bench of this Court dated 13th September 2019 passed in Criminal Writ Petition No.4425 of 2018. The special leave petition was disposed of by order dated 15th October 2019. The operative part of the order reads as follows :

“Upon hearing the counsel the Court made the following

ORDER

Learned Senior Counsel has requested that petitioner may be permitted to apply for pre-arrest bail/protection before the concerned Court.

Learned Senior Counsel has placed before us an order passed on 14th January, 2019 of co-accused in the same case “Anand Teltumbde versus The State of Maharashtra & ors.” in which interim protection was extended for a period of four weeks from the date of passing of the order during which the petitioner may apply to seek regular/pre-arrest bail from the Competent Court, if so advised.

Following the same as in this case the petitioner has enjoyed the relief of interim stay with effect from 28th August, 2018. We extend an interim protection to the petitioner for a period of four weeks from today during which he may apply for regular/pre-arrest bail.

The Special Leave Petition is disposed of in the aforesaid terms.

Pending applications, if any, shall also stand disposed of.”

9. It is apparent that the counsel appearing for applicant had placed before the Hon'ble Supreme Court the order dated 14th

January 2019 passed in Petition for Special Leave to Appeal (Cri.) No.59 of 2019 preferred by Anand Teltumbde, which reads as follows:

*“Upon hearing the counsel the Court made the following
O R D E R*

*Heard the learned counsel for the petitioner and
perused the relevant material.*

*Exemption from filing certified copy of the impugned
order and O.T. is granted.*

Permission to file additional documents is granted.

We are not inclined to interfere at this stage.

*Shri Kapil Sibal, learned senior counsel appearing for
the petitioner submits that interim protection against
arrest granted by the High Court on 15th October, 2018
to the petitioner remained in force until Friday i.e. 18th
January, 2019.*

*We extend the said interim protection for a period of
four weeks from today within which the petitioner may
seek regular/pre-arrest bail from the Competent
Authority, if so advised.*

*The Special Leave Petition is disposed of in the above
terms.”*

10. The applicant had applied for anticipatory bail before this Court. By order dated 4th November 2019, the applicant was permitted to prefer application before Special Court, as he had moved the application directly before this Court. All issues including maintainability of the application were kept open. The applicant

then preferred application for anticipatory bail before Sessions Court. During pendency of the said application interim protection was granted. The protection granted by Supreme Court was also in force. Learned Special Judge by order dated 12th November 2019 rejected the said application.

11. The co-accused Anand Teltumbade had preferred Anticipatory Bail Application No.314 of 2019 before this Court which was pending with interim protection. By order dated 15th November 2019 both the applications were fixed for hearing as common issues were involved.

12. Dr.Yug Chaudhry, learned counsel appearing for the applicant submitted that although there is bar u/s 43D(4) of UAPA Act for exercising power u/s 438 of Cr.PC; the application is maintainable in law. It is submitted that the Supreme Court by order dated 15th October 2019 granted liberty to the applicant to apply for pre-arrest bail. While passing the said order the respondents were represented by their counsel. The Supreme Court has exercised powers under Article 142 of Constitution of India in a genuine attempt to protect applicant's liberty. He contended that the order passed in petition preferred by the co-accused Anand Teltumbade dated 14th January

2019 was also considered by Supreme Court. It is submitted that interim protection was continued for a period of four weeks with liberty as stated above. He further contended that this is not the first time that the Hon'ble Supreme Court has crafted an extraordinary remedy for the applicant. Prior to this, the Supreme Court had protected the applicant's liberty by granting house arrest, which is unknown to the Code, and now by granting him the right to file an anticipatory bail application, in UAPA case. He further argued that it is settled position of law that Hon'ble Supreme Court can exercise powers under Article 142 of Constitution of India and the statutory bar did not fetter such power. Reliance is placed on the decision of Supreme Court in the case of **Union Carbide Corporation and others Vs. Union of India and others (1991)4-SCC-584**. Learned counsel stressed upon observations in paragraphs 80 and 83 of the said decision. It is submitted that the prosecution can not contend that in view of the bar envisaged under UAPA Act, this application is not maintainable u/s 438 of Cr.PC.. The respondents did not seek any clarification from the Supreme Court with regards to interpretation of the order dated 15th October 2019. The order of Supreme Court is binding on all the Courts in accordance with Article 141 of Constitution of India. It is further submitted that the Supreme Court as well as this Court in exercise of powers under Article 226 of

Constitution and Section 482 of Cr.P.C, had quashed the proceedings in relation to the offences which are non-compoundable, as enumerated under the provisions of Cr.P.C.. Thus, although the offences are not compoundable in accordance with Section 320 of Cr.P.C, the Courts have exercised power of quashing the proceedings. There are numerous instances of Hon'ble Supreme Court exercising powers unfettered by any statutory bar. Learned counsel relied upon some illustrations in support of his submissions. He submitted that Section 309 of Cr.P.C states that no adjournments shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him. However, in several judgments the Supreme Court has laid down that upon conviction, if any accused person requests an adjournment to submit on the quantum of sentence, the Trial Court must grant such an adjournment. Although above is contrary to the express bar u/s 309 of Cr.P.C; the observations made by the Supreme Court vested the Trial Court as well as High Court with a power that was barred by Cr.P.C..

13. It is submitted that the Supreme Court has not only vested the power in Lower Courts that are barred by a statute but have also curbed some of the powers vested by a statute. For instance, in 2G

case, the Supreme Court held that any appeals from the Trial Court would only lie to the Supreme Court thereby bypassing the power given to High Court. In support of his submissions, learned counsel relied upon the decisions in case of **Alladin Mia Vs. State of Bihar (1989)3-SCC-5 (Para10)**, **State of Maharashtra Vs. Raju 1997-Bom.C.R.(Cri.)-913 (paras 7, 10, 14)**, **Accused X Vs. State of Maharashtra (2019)7-SCC-1 (paras 25 and 36)** and **Shahid Balwa Vs. Union of India (2014)2-SCC-687 (paras 22 and 23)**. He submitted that extraordinary remedies crafted by Hon'ble Supreme Court have been shown in the present case to protect the accused.

Thus, it is submitted that exclusion of Section 438 of Cr.P.C, would not cause any fetters on this Court to exercise the powers in the factual matrix of this case and more particularly in light of order passed by Supreme Court.

14. Learned counsel for applicant further submitted that provisions of UAPA Act are not attracted in the present case and therefore application u/s 438 of Cr.P.C is maintainable. It is submitted that similar bar is provided u/s 18 of Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as 'Atrocities Act'). Section 18 of the said Act provides that Section 438 of Cr.P.C would not apply in relation to any case involving arrest of

any person on accusation of having committed an offence under the said Act. It is submitted that in spite of exclusion of Section 438 of Cr.P.C, the Hon'ble Supreme Court has held that in the event provisions of Atrocities Act are not applicable, then, the application for anticipatory bail would be maintainable. It is, thus, submitted that since UAPA Act is not attracted to the allegations, the present application for anticipatory bail is maintainable. Learned counsel relied upon observations in paragraphs 9 and 10 of decision of Hon'ble Supreme Court in **Vilas Pandurang Pawar and another Vs. State of Maharashtra (2012)8-SCC-795**.

15. It is further submitted that Pune Police have no jurisdiction to investigate the case as alleged acts are not connected to the alleged larger conspiracy being investigated by Pune Police. In any case, none of the actions attributed to the applicant, were committed within the jurisdiction of Pune Police. It is submitted that the applicant is a peace activist and journalist of repute and his work has to be kept in mind while scrutinizing the allegations against him. During the course of his journalism and as an activist, the applicant had visited and lived with Maoists, which he has described in detail in his book. The connection which he had with them, is in public knowledge and he cannot be prosecuted for his academic work. As a

journalist and peace activist, the applicant has kept open communications from all sides. In recognition of the applicant's work, the State had chosen him as an interlocutor to mediate the release of Policemen who had been abducted by Maoists. The applicant had written articles on Maoist thoughts. He had published interviews. The applicant is a scholar, writer and a civil rights activist based in Delhi having no criminal antecedents. Learned counsel for applicant relied upon brief profile of applicant, which has been annexed to application. It is submitted that the applicant has resorted to and written extensively on conflict areas, e.g. Kashmir under Maoist Control and North-East. The applicant has extensively written and spoken about his deeply held conviction about the need for a political resolution of disputes in these areas as the only durable way to bring lasting peace. He has also written extensively against left wing extremism. In his writings, the applicant has condemned violence by the State as well as by separatist groups. He has written several articles on conflict areas, e.g. Kashmir. His article included an interview with Comrade Ganpathy, General Secretary, CPI(Maoist), conducted by applicant and Swedish journalist, which was published in magazine in 2010. He has also published a book titled 'Days and Nights in the Heartland of Rebellion', which is report on the fortnight spent by him inside Maoist area. He also

published a book titled 'War and Politics' which analyses revolutionary warfare.

16. It is further contended that advocacy of violence is a necessary prerequisite to attract provisions of UAPA Act. Any activity that borders only on communication or at the most passive membership, is not sufficient to attract charge under UAPA Act without further incitement of violence. It is further submitted that in a recent order passed by this Court in case of **Konnath Muralidhar Vs. State of Maharashtra (Criminal Bail Application No.488 of 2018)**, decided on 25th February 2019, this Court had granted bail in UAPA case applying the aforesaid principle. It is also submitted that special leave petition challenging the aforesaid order of bail was dismissed by Supreme Court. Learned counsel heavily relied upon the decision of Supreme Court in case of **Arup Bhuyan Vs. State of Assam (2011)3-SCC-377**, **Kartarsingh Vs. State of Punjab (1993)5-SCC-569**, **PUCL Vs. Union of India (2004)9-SCC-580** and **State Vs. Nalini (1995)5-SCC-253**. It is submitted that none of the documents adduced by the prosecution would show that the applicant had conspired to commit any violence. Although the prosecution has been investigating the case since last two years, the nature of alleged evidence is only electronic documents.

17. The provisions of UAPA Act are not attracted in the present case. Similarly, the penal provisions under IPC are also not attracted. To invoke such provisions there is requirement of incitement and conspiracy to commit violence or seditious activity. It is submitted that the applicant's case is squarely covered by the decision of Supreme Court in **National Investigation Agency Vs. Zahoor Ahmad Shah Watali (2019)5-SCC-1**. It is submitted that in the said decision it was observed that while deciding the bail application in a UAPA case, the documents on record will be considered prima facie true unless contradicted or rebutted. The case of prosecution based on documents contradicts the case against applicant. The material relied upon by the prosecution, more particularly the document "Report on GN" contradicts the entire prosecution case as it shows that Maoists believe that applicant is against their interest. Thus, the document allegedly prepared by Maoists and relied upon by the prosecution shows that Maoists are critical of applicant for attacking them for being anti-maoist and for voicing that the Maoists are a criminal organization.

18. Learned counsel for applicant submitted that to invoke provisions of Section 2(O), 10 and 13 of UAPA Act, the element of

violence is required. The documents do not attract any of the provisions. Sections 2(k), 15, 38 and 40 of UAPA Act are not attracted in this case for lack of any evidence in that regard. The prosecution has relied upon certain documents which were recovered during the course of investigation from the electronic devices which form part of charge sheet filed against the co-accused. It is submitted that the letter dated 30th July 2017 was allegedly addressed to the applicant. It is the case of prosecution that the said document was recovered from laptop of co-accused Rona Wilson. The document does not bear any signature of the person who had forwarded the same. The said letter was purportedly written by one Sudarshan to the applicant. It is submitted that this is a typed, unsigned, unverified and unauthentic copy found from the applicant and co-accused Rona Wilson's electronic devices. It is an image of a letter and not the original. It is not admissible in evidence. It is submitted that the letter requests the applicant to take part in the fact finding. Merely receiving a request from a banned organization, is not an offence. The letter does not contain any material to support allegations under UAPA Act and fact finding itself is a legal activity. Six documents adduced by the prosecution against applicant do not show that the applicant has conspired to commit any violence. Learned counsel pointed out the fact finding report of 2008

submitted by an expert body constituted by Planning Commission about development challenges in extremist affected areas. It is submitted that the fact finding by themselves does not constitute any illegal activity and the State itself takes recourse to fact finding and appoints eminent and distinguished members to conduct such exercise in order to get knowledge about the true state of affairs on vital issues. It is submitted that the prosecution relied upon another document viz 'Report on GN'. The contents of the document belies the entire case of prosecution. It is submitted that the said report was purportedly found at the device of co-accused Rona Wilson. The said document corroborates the applicant's case that he is against violence and a peace activist and a journalist, who is not a member of any banned organization. He is an outsider to the Maoist party. The report shows that the applicant condemns the excessive violence of CPI(Maoist). It mentions that it is resolved to never invite him as he has released a report highlighting brutalities of CPI(Maoist). In any case, mere association with a banned organization is not a criminal offence.

19. Learned counsel for applicant then pointed out the letter from Com.Anantwa to Com.Mainibai which was found on the device of co-accused Surendra Gadling. It is submitted that this is a typed,

undated, unsigned, unverified and unauthenticated copy. There is no evidence that the person Gautam referred in this letter is applicant. Apart from that, the letter only mentions that the applicant would undertake a fact finding recourse in Jammu & Kashmir. There is no verification that such a request was indeed made to the applicant. Even otherwise the applicant has written on matters pertaining to Kashmir in newspapers & there is nothing clandestine about the same. His reports on Kashmir are openly published. Learned counsel then pointed out the document in the nature of letter addressed to Comrade R by S/S. This was found on the device of co-accused Surendra Gadling. It is submitted that the letter is undated and unsigned. There is no name of the person who has written the said letter and to whom it is written. It cannot be interpreted that the letter is written to Rona Wilson as there is reference of Rona Wilson in the contents of said letter. The letter only refers to the work of legal defence who may be accused or affected members of banned organization. Other document relied upon by the prosecution is a letter addressed to Comrade Prakash by Comrade Sudha Bharadwaj. It is contended that even this document does not bear the date or signature of the author. The applicant is not party to this communication. The other document relied upon by the prosecution, according to the applicant, is titled as "Strategic and

Tactics of Indian Revolution”. It is submitted that the said document is cited by the applicant in his book “War and Politics”, which was published six years ago. It was not a secret document. The document is available on internet. The document is reviewed by retired Major General of Army in Indian Defense Review. Thus, it cannot be held to be incriminating document against applicant.

20. Learned counsel for applicant also pointed out statement of Kumarsai @Ashok @ Ram Mohammad Singh dated 2nd November 2018 and his supplementary statement dated 23rd December 2018. It is submitted that the first statement dated 2nd November 2018 did not refer to the applicant in any manner. However, supplementary statement which was recorded on 23rd December 2018, refers to the applicant as the person working for party being associated with Janwadi Front Organization. Learned counsel also places reliance upon compilation of documents with regards to writings and books of applicant, e.g. ‘Days and Nights in the Heartland of the Rebellion’, writings of the applicant, publication of book ‘War and Politics’ in 2014 etc.. It is submitted that there is no material to show that the applicant is a member of banned organization. The document submitted by the respondents, at the most, show acquaintance, association or even membership de-hors violence. There is no

material to show the connection of applicant with the larger conspiracy. Thus, provisions of UAPA Act are not attracted against applicant. It is further submitted that custodial interrogation of the applicant is not necessary. It is not alleged that the applicant is a flight risk or will tamper with evidence or witnesses. The main evidence in this case is in electronic form which has already been seized and his house has been searched. It is submitted that triple test has to be considered for granting bail, as observed in the recent decision of Supreme Court in case of **P.Chidambaram Vs. Directorate of Enforcement (Criminal Appeal No.1831 of 2019 arising out of SLP (Criminal) No.10493 of 2019) decided on 4th December 2019**. Learned counsel for applicant submitted that Hon'ble Supreme Court in the decision of Romila Thapar in the dissenting opinion has observed that the allegations made by the respondents were taking liberty with the truth. The said observation was made on perusal of the case diary. The Sessions Court's order is based on no material. The observation with regards to conspiracy are unsupported by any document qua applicant. Although Sessions Court entertained application by applying principle laid down in relation to Section 18 of Atrocities Act by decisions of Courts, the application was rejected. It was also observed that the applicant is holding a key position in the banned organization. However, there is no evidence that the

applicant is in a decision making position. There is no material with regards to the allegation that applicant is involved in recruitment and funding or planning terror and indulging in anti national activities. The articles and books, criticism on Maoist violence, compilation of writings and report on applicant relied upon by the prosecution, absolves him of all the charges. Undisputedly the applicant was not at Bhima-Koregaon and was not present at the time of programme conducted by Elgar Parishad. He, therefore, submitted that the applicant be granted relief u/s 438 of Cr.P.C..

21. Learned Special Public Prosecutor Mrs.Aruna Pai submitted that the application itself is not maintainable in law in view of specific bar u/s 43D(4) of UAPA Act. It is submitted that there is sufficient evidence against applicant showing his involvement in the crime. Prima facie case is made out to attract provisions of UAPA Act as well as penal provisions under IPC. It is submitted that the documents were recovered from electronic devices of accused persons. The investigation has revealed the complicity of applicant in commission of crime. It is submitted that this is not the stage to appreciate the evidence or decide the issue relating to admissibility of evidence. The investigation proceeded pursuant to registration of FIR vide CR No.4 of 2018 by Vishrambagh Police Station, Pune. The

FIR was registered against accused named therein. Elgar Parishad had conducted programme on 31st December 2017 on the eve of Bhima-Koregaon Vijay Stambh Anniversary. There were riots on 1st January 2018. The FIR indicate that programme conducted by Kabir Kala Manch was provocative. The speeches were provocative. That was followed by the incident of riot, damage to public property by arson etc.. Some of the accused were named in the FIR. During the course of investigation, premises of the accused were searched. Incriminating documents were recovered from their electronic devices. Deep investigation revealed that other than the incident of riots at Bhima-Koregaon, there was a deep rooted conspiracy where several other persons were involved. The documents recovered indicate that the accused were acting in connivance with each other. The charge of conspiracy was invoked. The analysis of documents, investigation discloses offences under UAPA Act. Hence, provisions of UAPA Act were invoked. Several accused were arrested. Some of them had preferred application for bail before Special Court and this Court. Those applications were rejected.

22. It is submitted that Romila Thapar and others had filed special leave petition before Supreme Court alleging high handed act of the investigating agency. It was also prayed that special investigation

team be appointed to conduct investigation. It was also alleged that even the applicant and others were subjected to arrest without due process of law and credible evidence justifying their arrest. The Court has taken into consideration the material and by majority opinion the relief sought was not granted. It is further submitted that Section 43D(4) of UAPA Act excludes applicability of S.438 of Cr.P.C.. In the absence of provision to exercise power of anticipatory bail, this Court should not entertain such a application. It is submitted that for applying regular bail, there are fetters u/s 43D(5) of UAPA Act and bail cannot be granted unless public prosecutor has been given opportunity of being heard on the application for such release and the accused shall not be released on bail if the Court on perusal of the case diary or the report u/s 173 of the Cr.P.C is of the opinion that there are reasonable grounds for believing that accusations against such person are prima facie true. In the light of embargo u/s 43D(5), Section 438 of Cr.P.C is kept away under the Act.

23. It is submitted that material found from the computers/laptops/pen drives/memory cards were shocking and implicating the accused who were not only active members of CPI(Maoist) but clearly reflected ongoing sinister design of having

committed and in the process of committing criminal offence having the potential of destabilizing the society. Learned Special Public Prosecutor relied on the affidavit filed by the investigating officer opposing grant of relief in this application. In the affidavit it is stated that the material found from the electronic devices from the custody of accused including the applicant, would be sufficient to discard impression created by the applicant that being political dissenter who is 'intellectual', is being hounded. Per contra, the evidence makes it clear that the accused were found to be committing and were planning and preparing for series of criminal offences in furtherance of conspiracy and in connivance with each other. Based on the investigation, Sections 13, 16, 17, 18, 18(B), 20, 38, 39 and 40 of UAPA Act were invoked. The charge sheet has been filed against arrested persons. Examining the facts and material recovered from the accused and the applicant discloses that the applicant is working and is an active member of banned terrorist organization viz CPI(Maoist). It is further stated that material gathered from others as well as from the applicant shows that he is involved in selecting and encouraging the cadres to go underground in strength area. Moreover, they are found to be providing strategic inputs in furtherance of object of armed rebellion as per the strategic document of banned terrorist organization namely CPI(Maoist).

24. Learned Special Public Prosecutor submitted that the prosecution is relying upon documents which are part of charge sheet filed against co-accused, such as (1) letter to Gautam from Sudarshan, ((2) report on Gautam Navlakha, (3) letter to Comrade Mainibai from Comrade Anantwa, (4) letter to Comrade R from S/S, (5) letter from Sudha Bharadwaj to Prakash, (6) document titled “strategic and tactics of Indian revolution”, (7) letter to Prakash by Surendra, (8) letter to Sudarshan by Surendra. It is submitted that the letter to Gautam from Sudarshan reveals the role of applicant in open work activities assigned by the party and fact finding missions driven by CPI(Maoist) party all over the country. Sudarshan is none other than Katkar Sudarshan @ Anand, Secretary of Central Bureau and Central Committee of CPI(Maoist). This fact is reflected in the affidavit-in-reply filed by prosecution. The affidavit further indicate that the report on applicant elaborates his deep rooted involvement and association with CPI(Maoist) party. It also refers to applicant’s work in Kashmir and his role in mass organizations and overt activities. Learned Special Public Prosecutor submitted that version reflected in the said report is required to be investigated by custodial interrogation.

25. The letter to Comrade Mainibai refers to war on people programme in Mumbai involving students in to Anuradha Ghandy Memorial Committee Programme, internal disputes in party comrades in Delhi, fact finding missions in Jammu and Kashmir and Bastar etc. The author of the letter appreciates the efforts of Surendra Gadling, Varavara Rao, Rona Wilson, Arun Ferreira, Sudhir Dhavale and others for exclusively organizing 50th Naxalbari Anniversary Programme. It also mentions that responsibility of fact finding in Jammu and Kashmir is given to Comrade Gautam Navlakha and Varunda. The affidavit indicates that Com.Mainibai is Dandakaranya Special Zonal Committee Member of CPI(Maoist). As reflected in the affidavit, the letter to Comrade R from S/S is with regards to persecuted prisoners solidarity committee (PPSC) work in Chhatisagarh, allotment of provisional revolutionary for various urban fronts etc. The writer mentions the efforts of Sudha and Stan to conduct the work of PPSC after arrest of Comrade Prashant, who is convicted accused in Gadchiroli (Saibaba) case, who was looking after the PPSC organization. It is submitted that the accused Surendra Gadling, Gautam Navlakha, Rona Wilson and Sudha Bharadwaj have direct access and communication with central committee members and senior leaders of CPI(Maoist).

26. The letter from Comrade Sudha Bharadwaj to Comrade Prakash is regarding minutes of meeting conducted at Nagpur on 19th March 2017. The letter also refers to the minutes indicating that Gautam Navlakha and Comrade Ankit are in contact with separatists from Jammu and Kashmir. It is further submitted that the letter written by Comrade Surendra Gadling to Comrade Prakash refers to the fact that the fact of killing of 12 to 20 members of the organization would cause adverse effect on the minds of members and to disapprove that, a fact finding machinery may be appointed, which would propagate that the persons who were killed, were innocent local tribes and that they were killed deliberately out of vendetta. Media coverage would have serious impact on the image of enemies. It is further submitted that the letter written by Comrade Surendra to Comrade Prakash corroborates the letter dated 30th July 2017. The letter addressed to Comrade Sudarshan by Surendra Gadling refers to the fact that after analysing the reports from all regions future strategy will be formulated with a detailed plan of action. As a part of programme we will also pay homage to our beloved comrades and martyrs of Sukma and Malkangiri. On the student front Ramesh and Shamsul from Ambedkar Periyar Study Circle (APSC) will actively participate in programmes against the anti

poor development policies of the Centre. Comrade Anand is personally overseeing all matters related to APSC. It is submitted that the strategy and tactics of Indian revolution is one of the important document. It has quoted the strategy and tactics based upon peoples war. In order to understand the role of accused along with co-accused, it is necessary to understand the role and responsibility entrusted with urban cadres in the document. This document discloses importance of urban movement and in this context letters received and sent by applicant can be considered.

27. Learned Special Public Prosecutor relied upon the decision of Hon'ble Supreme Court in case of National Investigation Agency Vs. Zahoor Ahmad Shah Watali (supra). Reliance is placed on the observations made by Supreme Court in paragraph 52 of the said decision and submitted that it was observed that the issue of admissibility and credibility of the material and evidence presented by investigating officer could be matter of trial.

28. It is further submitted that the affidavit further indicates that there is other material pertaining to the applicant, which cannot be revealed at this stage as the investigation is still in progress and as far as applicant and others are concerned. The said material is

recovered from the devices which were seized from the residence of applicant-accused. Hence, investigating officer is submitting the documents in the sealed envelope for considering the same. Learned Special Public Prosecutor handed over the envelope containing the documents.

29. It is submitted that in the special leave petition preferred by Romila Thapar and others, there is reference of the applicant and there was a prayer for comprehensive inquiry into the arrest of activists. It is submitted that in paragraph 26 of the said decision the Supreme Court in its majority opinion has observed that this is not the case where registration and investigation of the crime is without any basis and the case of complete absence of material. It is further submitted that the applicant had preferred writ petition challenging the FIR before this Court. The said petition was dismissed. Learned Special Public Prosecutor relied upon observations of this Court in paragraph 9 of the judgment and order dated 13th September 2019 passed by this Court while dismissing the petition preferred by the applicant. It is submitted that the said order was challenged before Supreme Court by preferring special leave petition. The Supreme Court did not grant the reliefs prayed in the petition. However, on the request of petitioners and considering the order passed in the

special leave petition preferred by co-accused Anand Teltumbade, the special leave petition was disposed of by permitting the applicant/petitioner to apply for regular/pre-arrest bail. The applicant had preferred an application for anticipatory bail before Sessions Court, which has been rejected by assigning cogent reasons. Assuming that the principles enunciated in the cases relating to Atrocities Act are to be applied in the present case, for exercising power u/s 438 of Cr.PC, there is overwhelming evidence against the applicant, which would not entitle the applicant to seek such relief as the application is not maintainable in law.

30. Learned Special Public Prosecutor also preferred an application viz Interim Application No.1 of 2019 in Anticipatory Bail Application No.2461 of 2019. In the said application it is prayed that the applicant be directed to remain present at the time of passing final order by this Court in this application. The application is purportedly filed in accordance with Section 438(1-B) of Cr.PC.

31. In rejoinder, learned counsel for applicant submitted that the submissions of Special Public Prosecutor are devoid of merits. The material relied upon by the prosecution does not make out prima facie case showing involvement of the applicant. The Sessions

Court's observations are not supported by any evidence. It is submitted that at least the documents seized from the applicant cannot be kept secret. Learned Special Public Prosecutor, however, submitted that the documents relate to the applicant as well as co-accused. It is submitted that investigation is in progress and the said documents cannot be shown to the applicant. The prosecution is also relying on other material in sealed cover. Learned counsel for applicant, however, countered the submission that the prosecution is frustrating the rights of applicant of fair adjudication by withholding all the documents in sealed cover. The applicant does not know what constitutes sealed cover, whether it forms part of case diary. In the recent decision the Hon'ble Supreme Court expressed displeasure with reviewing documents under sealed cover. Reliance is placed on the decision in the case of P.Chidambaram Vs. DRI (supra). To uphold the concept of open trial secrecy must be considered an anathema to transparency as it violates the fundamental precepts of the democratic society. Disclosure of all material against accused is imperative to a fair adjudication as serious allegations are levelled against him under draconian law like UAPA Act, which has several consequences on person's liberty and reputation. The prosecution is in possession of the documents since long. The co-accused were falsely implicated in the frivolous cases which had resulted in

acquittal. The conduct of the investigating agency is dishonest. The prosecution has relied upon fabricated letters, false statements recorded under Section 161 of Cr.PC in the charge sheet. No reasons are disclosed for withholding the material except stating that the investigation is in progress. Adjudication based on material not furnished to the applicant which he has not been allowed to controvert, violates constitutional rights of applicant. Learned counsel relied upon decision of Hon'ble Supreme Court in case of **ADM Jabalpur Vs. Shivkant Shukla (1976)2-SCC-521**. It is submitted that letters which were annexed to the charge sheet dated 15th November 2018 and 21st February 2019 were submitted to the Hon'ble Supreme Court as well as this Court under a sealed cover and withheld from the applicant on the pretext of ongoing investigation. The investigating agency, however, leaked several letters to the media to create fear. This conduct was deprecated in the case of Romila Thapar. It is contended that the effect of rejection of writ petition seeking quashing of FIR would not have any adverse effect on the present application. It is submitted that in paragraph 10 of the said order this Court has made clear that the observations made therein would not have any impact on any other proceedings. It is submitted that the standards for quashing an anticipatory bail application are different and the observations from the quashing

order cannot be imported. Quashing requires complete absence of material and bail requires a prima facie test or failure of triple test. The order itself restricts observance only for quashing. The statement of applicant has not been recorded for over a year.

32. It is further submitted that the application preferred by the prosecution seeking presence of applicant at the time of passing the final order, is devoid of merits. The application is preferred at the end of concluding arguments. The application does not make out any case to grant such relief. The applicant has been granted interim protection . The application does not justify what is interest of justice. The applicant has been granted protection since beginning. The applicant has serious apprehension about the purport of making such an application.

33. The arguments of both the sides were heard extensively. The FIR was registered on 8th January 2018 for offence under Sections 153-A, 505(1)(b), 117, 34 of Indian Penal Code. Investigation proceeded. Pursuant to that Section 120-B of IPC was invoked. Search was conducted at the premises of several persons and documents were recovered. The provisions of Sections 13, 16, 17, 18, 18-B, 20, 38, 39 and 40 of UAPA Act were added. Several

persons, as stated above, were arrested. On completing investigation charge sheet has been filed against arrested persons.

34. The applicant was arrested on 28th August 2018. The applicant was produced before the Court and by order dated 28th August 2018 transit remand was granted. Writ Petition No.2559 of 2018 was preferred by applicant before Delhi High Court. The Delhi High Court by order dated 1st October 2018 set aside the order of transit remand. It was also observed that in view of Section 56 r/w Section 57 of Cr.P.C; in the absence of remand order of learned Magistrate, the detention of applicant which had exceeded 24 hours, is untenable in law and consequently the house arrest of applicant comes to an end. It was, however, clarified that the order will not preclude the State of Maharashtra from proceeding further in accordance with law. Five illustrious persons in their own field filed Writ Petition No.260 of 2018 on 29th August 2018 before Hon'ble Supreme Court alleging high handed action of Maharashtra Police in raiding the homes and arresting five well known human rights activists, journalists, advocates and political worker. The grievance of petitioners was that activists namely Gautam Navlakha, Sudha Bharadwaj, Vara Vara Rao, Arun Ferreira and Vernon Gonsalves were arrested on 28th August 2018 from their homes without credible

material. The Supreme Court extended house arrest of applicant and Sudha Bharadwaj. Formal applications were filed on behalf of Sudha Bharadwaj, Vara Vara Rao, Arun Ferreira and Vernon Gonsalves, who were in house arrest, that they may be permitted to pursue the writ petition. The said petition dismissed by majority decision by Hon'ble Supreme Court. The majority decision had expressed that there is no need to go into the disputed questions of fact or else it would prejudice trial. The accused has no say in choice of investigating agency or manner of investigation. The petitioners have not alleged any specific fact about mala fide exercise of power by the investigating agency. There were communal and caste clashes, instance of stone pelting arising due to provocative speeches, slogans and distribution of objectionable and provocative books and pamphlets in event allegedly organized by the accused. The prayer for seeking appointment of SIT and Court monitored investigation was rejected. The accused have alternative remedy under substantive and procedural criminal law and they have resorted to such remedy and avail such remedies.

In a dissenting decision it was held that the case has been made out for constitution of SIT. The conduct of government agency, police is such that it casts a doubt on credibility of their investigation.

There is violation of directions in D.K.Basu Vs. State of West Bengal (1997)1-SCC-416, as well as Section 45(B) of Cr.P.C.. The police have disclosed details of investigation to media and acts of investigating officer casts clouds on the impartiality of investigation process. Hence, SIT must be appointed and Court must monitor the case. Fair and independent investigation is crucial to the preservation of rule of law. It was also observed that the counter affidavit filed by prosecution amounts to taking the liberty with truth. In the majority decision, however, in paragraph 29, it was observed as follows :

“29. In the present case, except pointing out some circumstances to question the manner of arrest of the five named accused sans any legal evidence to link them with the crime under investigation, no specific material facts and particulars are found in the petition about mala fide exercise of power by the investigating officer. A vague and unsubstantiated assertion in that regard is not enough. Rather, averment in the petition as filed was to buttress the reliefs initially prayed for (mentioned in para 8 above) – regarding the manner in which arrest was made. Further, the plea of the petitioners of lack of evidence against the named accused (A-16 to A-20) has been seriously disputed by the investigating agency and have commended us to the material already gathered during the ongoing investigation which according to them indicates complicity of the said accused in this commission of crime. Upon perusal of the said material, we are of the considered opinion that it is not a case of arrest because of mere dissenting views expressed or difference in the political ideology of the named accused, but concerning their link with the members of the banned organization

and its activities. This is not the stage where the efficacy of the material or sufficiency thereof can be evaluated nor is it possible to inquire into whether the same is genuine or fabricated. We do not wish to dilate on this matter any further lest it would cause prejudice to the named accused and including the co-accused who are not before the Court. Admittedly, the named accused have already resorted to legal remedies before the jurisdictional Court and the same are pending. If so, they can avail of such remedies as may be permissible in law before the jurisdictional Courts at different stages during the investigation as well as the trial of the offence under investigation. During the investigation, when they would be produced before the Court for obtaining remand by the police or by way of application for grant of bail, and if they are so advised, they can also opt for remedy of discharge at the appropriate stage or quashing of criminal case, if there is no legal evidence, whatsoever, to indicate their complicity in the subject crime.” (emphasis supplied)

35. The applicant preferred writ petition challenging the FIR before this Court. The said petition was dismissed. In paragraphs 6 and 7 of the judgment it was observed that the Court had perused the material against the applicant disclosed from the charge sheet filed against other accused and the material given in the sealed envelope. The Court made a reference to the documents relied upon by the prosecution as disclosed in the charge sheet against other accused, such as, letter to applicant from Sudarshan, report on the applicant, letter to Comrade Mainibai from Comrade Anantawa, letter from S/S to Comrade R, letter from Sudha to Comrade Prakash and document relating to strategy and tactics of Indian revolution.

The Court after analyzing the said documents observed in paragraph 8 that above documents relied upon by the prosecution are placed on record and they form part of charge sheet filed against other accused. Thus, documents are recovered from electronic devices of the applicant and others. These documents are recovered from electronic devices of the applicant and others. It was also observed that apart from the said material, learned Special Public Prosecutor has placed for perusal further investigation papers in a sealed envelope which cannot be disclosed to the applicant at this stage since investigation is in progress and disclosure will result in impeding the progress of investigation. The Court, therefore, would refrain recording any comment thereupon. In paragraph 9 of the said order dated 13th September 2019 passed in Writ Petition No.4425 of 2018 it was observed as follows :

“9. Having considered the documents referred to above and submitted for our perusal by the learned APP in a sealed envelope, we are satisfied that the investigating agency has material to connect the petitioner in the subject crime. The investigation is still in progress. Considering the nature and magnitude of the conspiracy, in our opinion, the investigating agency is required to be given sufficient time to unearth the evidence against the petitioner especially when the scope of investigation is not restricted to Bhima-Koregaon incident but activities leading to the incident and subsequent activities as well are the subject matter of investigation. On the basis of material placed before us for our perusal, we are of the considered opinion that

this not the case where the registration and investigation of the crime is without any basis or case of complete absence of material against the petitioner. Therefore, we cannot accede to the prayers of petitioner. Petition is without any merit and the same is accordingly dismissed.”

Learned counsel for applicant, however, stressed upon observations in paragraph 10 of the said order wherein it was observed that by way of precaution it is made clear that the observations are prima facie in nature and made for the limited purpose of deciding the issue raised in the petition and the Trial Court or any other Court shall not be influenced by the observations made in the order.

36. The application for anticipatory bail preferred before the Sessions Court was rejected by order dated 12th November 2019. Learned Sessions Judge analyzed the documents relied upon by prosecution. While rejecting the application it was observed that the scope of investigation was not restricted to find out the object and effect of programme organized on 31st December 2017 by Elgar Parishad or to carry out investigation into the violence that followed the said event, but the investigation was extended to unearth a much larger conspiracy of seizing the political power, armed revolution by mobilizing masses. It was further observed that it appears from the documents that the banned organization was operative in different

ways to achieve its objects. Different members were entrusted with different activities, which was part of larger conspiracy. There are documents to show that the applicant was also active member of the banned organization and he was managing the affairs of the organization. Learned Sessions Judge also made reference to the statement of witness Kumarsai in paragraphs 40 and 41 of the order rejecting anticipatory bail application. It was observed that the said witness has given details of the role played by the accused in activities of the banned organization. Till August-2018 he was a member of the organization i.e. CPI(Maoist). He has specifically stated that the accused PVaravara Rao is a leader of high rank organization. The accused Milind Teltumbade is Secretary of Maharashtra committee. Accused Arun Ferreira was recruiting students in the organization and sending them for training in general. Accused Vernon Gonsalves was working in the organization in intellectual class. Accused Sudhir Dhavale, Rona Wilson, Gautam Navlakha (applicant), Anand Teltumbade, Sudha Bharadwaj, Harshali Potdar were said to be active members of the organization and working in the upper class of society. It was further observed that the statement of Kumarsai contains minute details of the role of the accused in the organization, which is not possible for the investigating officer to fabricate or concoct. The said witness was

holding the post of Secretary of Gondia, Rajnandgaon and Balaghat Division of the organization. At this stage the statement has to be taken into account to understand the strategy of the organization and the role played by the applicant and the co-accused.

37. Thus, from the aforesaid factual aspects it is apparent that the petition for quashing of FIR preferred by the applicant before this Court was rejected by assigning reason that there is prima facie evidence against applicant. The application for anticipatory bail was also rejected as stated above by the Sessions Court with reasons. The applicant had approached Hon'ble Supreme Court challenging the judgment and order dated 13th September 2019. However, the relief prayed in the special leave petition was not granted. The order of Supreme Court would indicate that special leave petition was disposed of. The request was made by senior counsel for the applicant that applicant may be permitted to apply for pre-arrest bail/protection before concerned Court. Learned counsel for applicant relied on the order passed by Supreme Court in the special leave to appeal preferred by co-accused Anand Teltumbade in which interim protection was extended during which the said petitioner may apply to seek regular/pre-arrest bail from the competent Court, if so advised. The Supreme Court further observed that following the

same as in this case, the applicant has enjoyed the relief of interim stay w.e.f 28th August 2018, the interim protection was extended for a period of four weeks with further observation that the applicant may apply for regular/pre-arrest bail and the special leave petition was disposed of in the aforesaid terms. From the aforesaid order dated 15th October 2019 it is apparent that interim protection was extended with observation that applicant may apply for regular/pre-arrest bail. The Hon'ble Supreme Court in the case of Anand Teltumbade, while passing the order dated 15th October 2019 observed that interim protection was extended within which the said applicant may seek regular/pre-arrest bail from the competent authority, if so advised. The contention of the applicant is that the Hon'ble Supreme Court in exercise of powers under Article 142 of Constitution of India has carved out this case on the factual matrix of the case permitting him to prefer an application for anticipatory bail and that his application u/s 438 of Cr.PC is maintainable in law. The order dated 15th October 2019 as well as order dated 14th January 2019 are very clear wherein the motion was made by the counsel representing the applicant and the co-accused for extension of interim protection against arrest within which the applicants were permitted to apply for regular/pre-arrest bail. In the special leave petition preferred by Anand Teltumbade, the Hon'ble Supreme Court

has also observed that the Court is not inclined to interfere at this stage. Learned counsel for applicant during the hearing of his special leave petition relied upon the order of Hon'ble Supreme Court dated 14th January 2019 for seeking extension of interim protection and the observation of Supreme Court that the petitioner Anand Teltumbade may seek regular/pre-arrest bail from competent authority, if so advised. The Hon'ble Supreme Court has not dealt with maintainability of application under Section 438 of Cr.PC in lieu of bar envisaged under Section 43D(4) of UAPA Act.

38. Learned counsel relied upon decision in the case of Union Carbide Corporation and others Vs. Union of India and others (supra) wherein it was observed that the proposition that the provision in any ordinary law irrespective of the importance of public policy on which it is founded, operates to limit the powers of Apex Court under Article 142(1) is unsound and erroneous. The power under Article 142 of Constitution is at an entirely different level and of a different quality. The Supreme Court was not inclined to entertain the petition preferred by Teltumbade and at the request of said accused, protection was continued for specified period. Relying on said order similar relief was sought by applicant. The interpretation of order as canvassed by learned counsel for applicant is not correct.

39. Section 43D(4) of UAPA Act reads as follows :

“43. Officers competent to investigate offences under Chapters IV and VI – Notwithstanding anything contained in the Code, no police officer, -

(a)
 (b)
 (ba)
 (c)

43A. Power to arrest, search etc. :

43B. Procedure of arrest, seizure etc. :
 ...

43C. Application of provisions of Code. :
 ...

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

(1)
 (2)
 (3)
 (4) *Nothing in Section 438 of the Code shall apply in relation to any case involving the arrest of any person accused of having committed an offence punishable under this Act.”*

Thus, applicability of Section 438 of Cr.PC is excluded by the aforesaid provision. Learned counsel for the applicant by relying on the decision of Supreme Court in case of Vilas Pandurang Pawar Vs. State of Maharashtra (supra) has contended that in view of the principle enunciated in the said decision, in the event offence is not made out against the accused under the provisions of UAPA Act, the application is maintainable u/s 438 of Cr.PC. It was contended that

under Section 18 of the Atrocities Act, there is exclusion of applicability of the provisions of Section 438 of Cr.PC.. Section 18 of Atrocities Act reads as follows :

“18. Section 438 of the Code not to apply to persons committing an offence under the Act.- Nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act.”

Subsequently, Section 18-A has been added to the said Act by way of amendment, which reads as follows :

18A. (1) For the purposes of this Act, -

(a) preliminary inquiry shall not be required for registration of a First Information Report against any person; or

(b) the investigating officer shall not require approval for the arrest, if necessary, or any person,

against whom an accusation of having committed an offence under this Act has been made and no procedure other than that provided under this Act or the Code shall apply.

(2) The provisions of Section 438 of the Code shall not apply to a case under this Act, notwithstanding any judgment or order or direction of any Court.”

40. In the decision of Supreme Court in the case of Vilas Pandurang Pawar Vs State of Maharashtra (supra), the Court has observed that Section 18 of Atrocities Act creates bar for invoking

Section 438 of Cr.PC. However, a duty is cast on the Court to verify the averments in the complaint and to find out whether an offence u/s 3(1) of Atrocities Act has been prima facie made out. If there is a specific averment in the complaint, namely insult or intimidation with intent to humiliate by calling caste name, the accused persons are not entitled to anticipatory bail. It was further observed that while considering the application for bail, scope for appreciation of evidence and other material on record is limited. The Court is not expected to indulge in critical analysis of evidence on record. That a provision has been enacted in the Special Act to protect the persons who belong to Scheduled Castes and Scheduled Tribes and a bar has been imposed in granting bail u/s 438 of Cr.PC.. The provision in the Special Act cannot be easily brushed aside by elaborate discussion on evidence. From these observations it is apparent that the Court is not expected to indulge in critical analysis of the evidence on record. The prosecution has contended that investigation is in progress and there is overwhelming evidence against applicant whose custodial interrogation is necessary. It is also contended that assuming that the principles laid down by the Supreme Court in the aforesaid decision is applicable in the present case, in the light of substantive evidence against the applicant, the application would not be maintainable. The Division Bench of this Court in the case of **Lahu**

Vs. State of Maharashtra (2019-SCOnLine-Bom-557) has observed that even after amendment to Atrocities Act vide Section 18A, the Court can grant anticipatory bail after considering whether there is material to make out prima facie case for commission of such offence. There is material against applicant which requires investigation.

41. Section 43D(4) of UAPA Act categorically mentions that Section 438 of Code shall not apply in relation to any case involving arrest of any person accused of having committed an offence punishable under the Act. The Legislature has omitted the applicability of Section 438 of Cr.PC with some purpose. The purpose has to be read with the object of the Act and the fetters imposed in Section 43D(5) for granting bail to the accused, who is prosecuted under the provisions of UAPA Act. The UAPA Act was enacted to provide for more effective prevention of certain unlawful activities of individuals and associations and for dealing with terrorist activities and for matters connected therewith. The preamble of UAPA Act reads as follows :

“ An Act to provide for the more effective prevention of certain unlawful activities of individuals and associations and for dealing with terrorist activities and for matters connected therewith;

[WHEREAS the Security Council of the United Nations in its 4385th meeting adopted Resolution 1373 (2001) on 28th September 2001, under Chapter VII of the Charter of the United Nations requiring all the States to take measures to combat international terrorism;]

AND WHEREAS Resolutions 1267 (1999), 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), 1566 (2004), 1617 (2005), 1735 (2006) and 1822 (2008) of the Security Council of the United Nations require the State to take action against certain terrorists and terrorist organizations, to freeze the assets and other economic resources, to prevent the entry into or the transit through their territory, and prevent the direct or indirect supply, sale or transfer of arms and ammunitions to the individuals or entities listed in the Schedule;

AND WHEREAS the Central Government, in exercise of the powers conferred by section 2 of the United Nations (Security Council) Act, 1947 (43 of 1947), has made the Prevention and Suppression of Terrorism (Implementation of Security Council Resolutions) Order, 2007;

AND WHEREAS it is considered necessary to give effect to the said Resolutions and the Order and to make special provisions for the prevention of, and for coping with, terrorist activities and for matters connected therewith or incidental thereto.”

The statements of objects and reasons of UAPA Act have been amended in 2004, 2008 and 2013. It is indicated that Unlawful Activities (Prevention) Act, 1967 has been enacted to provide for more effective prevention of certain unlawful activities of individuals and associations and for matters connected therewith. The scope of Act was widened in 2004 and terrorist activities were brought within the scope of UAPA Act. Pursuant to acceptance by the Government of

a unanimous recommendation of the Committee of National Integration and Regionalisation appointed by National Integration Council, the Constitution (16th Amendment) Act, 1963 was enacted empowering to impose, by law, reasonable restrictions in the interests of the sovereignty and integrity of India on the (i) freedom of speech and expression; (ii) right to assemble peaceably and without arms; and (iii) right to form associations or unions.

42. Section 43(D)(5) reads as follows :

“43. Officers competent to investigate offences under Chapters IV and VI.-

43A.

43B.

43C.

43D. 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 for such release.

Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under Section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true.

(6)
 (7)”

43. Thus, there are restrictions for granting bail as enumerated in the aforesaid provisions. The person who is arrested can be released on bail unless the public prosecutor has been given an opportunity of being heard on the application for such release and provided that such accused shall not be released on bail if the Court on a perusal of the case diary or the report made u/s 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusations against such person is prima facie true. The restrictions on granting bail specified in sub-section (5) of Section 43 are in addition to the restrictions under the Code or any other law for the time being in force on granting bail. Thus, it is apparent that for granting bail there is an embargo after arrest of accused having committed offence under UAPA Act and on account of bar to exercise powers under Section 438 of Cr.PC, anticipatory bail cannot be granted to the accused. It would mean that the person who is in custody will have to overcome restrictions enumerated under above provisions and in spite of specific provision that Section 438 of Cr.PC shall not apply to any case involving the arrest of any person accused of having committed offence under the said Act, the Court would consider grant of pre-arrest bail forming an opinion that the offence

is not made out. In view of the restrictions for granting bail to a person who is arrested, grant of pre-arrest bail will be against the object of UAPA Act. It would mean that the person who is arrested can be granted bail on satisfaction of the scrutiny laid down in sub-section (5) of Section 43 of UAPA Act and in absence of any such provision without any restrictions or fetters, pre-arrest bail could be granted to the accused apprehending arrest. It is also pertinent to note that fetters as envisaged under sub-section (5) of Section 43 of UAPA Act are not appearing under the provisions of Atrocities Act. The counsel for applicant had drawn analogy on the basis of decisions delivered in Atrocities Act. By virtue of proviso to sub-section (5) of Section 43, it is the duty of the Court to be satisfied that there are reasonable grounds for believing that the accusations against the accused are prima facie true or otherwise. When it comes to offences punishable under special enactments, something more was required to be kept in mind in view of Section 43(D) of UAPA Act. The Hon'ble Supreme Court in the case of National Investigation Agency Vs. Zahoor Ahmad Shah Watali (supra) has laid down as to what should be the approach of the Court in deciding bail applications involving offences under Chapters-IV and VI of UAPA Act. It would be relevant to quote paragraph 23 of the said decision, which reads as follows :

*“23. By virtue of the proviso to sub-section (5), it is the duty of the Court to be satisfied that there are reasonable grounds for believing that the accusation against the accused is prima facie true or otherwise. Our attention was invited to the decisions of this Court, which has had an occasion to deal with similar special provisions in TADA and MCOCA. The principle underlying those decisions may have some bearing while considering the prayer for bail in relation to the offences under the 1967 Act as well. Notably, under the special enactments such as TADA and MCOCA and the Narcotic Drugs and Psychotropic Substances Act, 1985, the Court is required to record its opinion that there are reasonable grounds for believing that the accused is “not guilty” of the alleged offence. There is a degree of difference between the satisfaction to be recorded by the Court that there are reasonable grounds for believing that the accused is “not guilty” of such offence and the satisfaction to be recorded for the purposes of the 1967 Act that there are reasonable grounds for believing that the accusation against such person is “prima facie” true. By its very nature, the expression “prima facie true” would mean that the materials/evidence collected by the investigating agency in reference to the accusation against the accused concerned in the first information report, must prevail until contradicted and overcome or disproved by other evidence, and on the face of it, shows them complicity of such accused in the commission of the stated offence. It must be good and sufficient on its face to establish a given fact or the chain of facts constituting the stated offence, unless rebutted or contradicted. In one sense, the degree of satisfaction is lighter when the Court has to opine that the accusation is “prima facie true”, as compared to the opinion of the accused “not guilty” of such offence as required under the other special enactments. In any case, the degree of satisfaction to be recorded by the Court for opining that there are reasonable grounds for believing that the accusation against the accused is prima facie true, is lighter than the degree of satisfaction to be recorded for considering a discharge application or framing of charges in relation to offences under the 1967 Act. ...
... ..”*

44. Thus, it is crystal clear that there is an object behind introducing Section 43D(4) of UAPA Act creating bar for applicability of Section 438 of Cr.P.C and hence the application seeking anticipatory bail in exercise of powers u/s 438 of Cr.P.C is not maintainable in law.

45. Learned counsel for applicant had vehemently contended that there is no evidence to apply the provisions of UAPA Act and hence this application has to be entertained. The submission deserves to be rejected in view of aforesaid observations. The learned counsel had urged before Sessions Court and this Court that provisions of UAPA Act are not applicable. The applicant is prosecuted for offences under IPC and UAPA Act. Even taking into consideration the submission advanced by learned counsel for applicant, on perusal of all the material on record, it can be seen that there is prima facie evidence showing complicity of applicant in the crime. Hence, in light of the material, said submission also deserves to be rejected. The Hon'ble Supreme Court in the case of National Investigation Agency Vs. Zahoor Ahmad Shah Watali (supra) in paragraph 27 has observed that the totality of the material gathered by the investigating agency and presented along with the report and including the case diary, is required to be reckoned and not by

analysing individual pieces of evidence or circumstance. In any case, the question of discarding the document at this stage, on the ground of being inadmissible in evidence, is not permissible. For, the issue of admissibility of the document/evidence would be a matter of trial. The Court must look at the contents of the document and take such document into account as it is. In paragraph 52 of the said decision it was observed that the issue of admissibility and credibility of the material and evidence presented by the Investigating Officer would be a matter of trial.

46. In case of Romila Thapar and others Vs. Union of India and others (supra) it was observed that pleading of petitioners of lack of evidence against the named accused, has been seriously disputed by the investigating agency and have commended the Court to the material already gathered during the ongoing investigation, which according to them indicates complicity of the said accused in the commission of crime. Upon perusal of the said material the Court was of the opinion that it is not a case of arrest because of mere dissenting views expressed or difference in the political ideology of the named accused, but concerning their link with the members of banned organization and its activities. This is not the stage where the efficacy of the material or sufficiency thereof can be evaluated

nor is it possible to inquire into whether the same is genuine and/or fabricated.

47. The prosecution has relied upon the documents disclosed from the charge sheet filed against arrested accused, such as : (i) letter to the petitioner from Sudarshan, which discloses role of the applicant in open work activities and fact finding missions. The fact finding missions are funded by CPI (Maoist) party, which is evident from the letters recovered from the devices of Rona Wilson and Surendra Gadling; (ii) report on the applicant. Learned counsel for applicant had urged that this report is contrary to the prosecution case as according to the said report, the applicant is acting against CPI (Maoist). The applicant has been criticized by the author of the report. The report, however, also indicate association of the applicant and his involvement with CPI (Maoist) party. It is also mentioned that the applicant was in Kashmir as per the directions of party; (iii) letter to Comrade Mainibai from Comrade Anantawa – the efforts of co-accused and other comrades were appreciated for organizing 50th anniversary of Naxalbari Movement. The letter also mentions that the responsibility of fact finding mission in Jammu & Kashmir is given to the applicant and Comrade Varunda. Comrade Mainibai is Dandakaranaya Special Zonal Committee member of CPI (Maoist);

(iv) letter from S/S to Comrade R – this letter reflects the version of Sudha Bharadwaj and Stan to conduct the work of persecuted prisoners solidarity committee after the arrest of Comrade Prashant, who has been a convicted accused in Gadchiroli (Saibaba) case, who was looking after the persecuted prisoners solidarity committee. The letter indicates that the applicant, Surendra Gadling, Rona Wilson and Sudha Bharadwaj had direct access and connections with central committee members and leaders of CPI (Maoist); (v) letter from Sudha Bharadwaj to Prakash – this relates to minutes of meeting conducted at Nagpur on 19th March 2017. There is reference of applicant and Sudha Bharadwaj mentioning that they are in contact with separatists from Jammu & Kashmir; (vi) letter from Comrade Surendra Gadling to Comrade Prakash – which refers to boosting the moral of members of organization in view of the news spread by enemies about killing 12 to 20 members; (vii) letter sent by Surendra Gadling to Comrade Prakash – which corroborates the letter dated 30th July 2017; (viii) letter sent by Surendra Gadling to Sudarshan – the contents of these documents are discussed in detail hereinabove; (ix) Strategy and Tactics of Indian Revolution – this document enumerates the strategy and tactics based upon protracted peoples war. It discloses importance of urban movement. This document was recovered from pen drive of accused Varavara Rao. It is issued

by central committee of CPI (Maoist). This document is divided into different parts and chapters. The first part refers to strategy. It is mentioned that military strategy has to be formulated on specific characteristics of the revolutionary war in India. Chapter-6 refers to seizure of political power through protracted peoples' war. Chapter-10 is about building a peoples' army. There is a reference of "peoples liberation guerrilla army". The central committee provides politico military leadership to peoples liberation guerrilla army. It is stated that peoples liberation guerrilla army was weak and it was confronting strong enemy forces and there is need to protect the leadership, our forces, people's support and arms and ammunition, keeping in view our final objective of defeating the enemy forces. The enemy's armed forces should be destroyed through guerrilla warfare modes and peoples liberation guerrilla army should be expanded by going into new forms of platoons and companies, improving the training and qualitatively developing these into battalions and companies. Chapter-4 refers to military task and sending cadre to rural areas and PLGA. Chapter-3 refers to party building and best elements emerged through strength.

48. In the statement of witness Kumarsai, the role played by the accused in the activities of the banned organization are given. The

said witness has stated that accused Varavara Rao is a leader of high rank of the organization and accused Milind Teltumbade is Secretary of Maharashtra committee. Arun Ferreira was recruiting students in the organization and sending them for training. Accused Vernon Gonsalves was working for the organization and accused Sudhir Dhavale, Rona Wilson, Anand Teltumbade, Sudha Bharadwaj and Harshali Potdar were active members of organization. Incriminating documents were seized from the accused. The applicant is yet to be arrested. The charge sheet is filed against arrested accused. Some of the accused namely Vernon Gonsalves, Sudha Bharadwaj had preferred application for regular bail before this Court, which were rejected by order dated 15th October 2019. While rejecting the said applications the Court took into consideration the rigors of Section 43D(5) of UAPA Act. Some of the documents referred to hereinabove and relied upon by the prosecution against the applicant, were also under consideration while adjudicating the application for regular bail preferred by the arrested accused. It was observed that there were reasonable grounds for believing that the accusations of commission of offences punishable under Chapters-IV and V of UAPA Act against those accused, were prima facie true and in view of embargo u/s 43D(5) of UAPA Act, the applications were rejected. The investigation is in progress.

49. During the course of arguments learned Special Public Prosecutor has tendered an envelope containing documents, which according to the prosecution is additional material showing involvement of the applicant in the crime. Learned counsel for applicant had objected and contended that such documents of which copies were not given to the applicant, cannot be relied upon. Several contentions as reproduced hereinabove, were advanced in relation to the envelope containing documents. Learned APP has contended that the documents were produced before this Court while hearing the writ petition preferred by the applicant challenging quashing of the FIR and before the Supreme Court when the special leave to petition challenging the order of this Court was preferred by the applicant. The documents were also relied upon before Sessions Court while dealing with application for anticipatory bail. Since the applicant had preferred application for anticipatory bail and on account of the fact that investigation is in progress, the documents cannot be furnished to the applicant. It is pertinent to note that this Court while dismissing the writ petition had observed that the documents which form part of charge sheet filed against other accused, which were recovered from electronic devices of the applicant and others, were placed on record by prosecution. It was

further observed that apart from the said material the prosecution has placed for perusal further investigation papers in sealed envelope which cannot be disclosed to the applicant at this stage since investigation is in progress and disclosure will result in impeding the progress of investigation. In the latest decision of Supreme Court in case of **P.Chidambaram Vs. DRI (supra)**, delivered in Criminal Appeal No.1831 of 2019, the Hon'ble Supreme Court while dealing with an application for bail had observed that the question as to whether the Court could look into the documents while considering an application for bail, had arisen for consideration in same case between parties in Criminal Appeal No.130 of 2009 wherein through judgment dated 5th September 2019 while considering the matter relating to the order dated 20th August 2019, whereby High Court has rejected the bail, the Court had held that it would be open for the Court to receive material/documents collected during investigation and perused the same to satisfy its conscience that investigation is proceeding on right lines and for the purpose of consideration of grant of bail/anticipatory bail etc. At the same time the Court has disapproved the manner in which the learned Judge of High Court in the said case has in verbatim quoted the note produced by the respondents. It is further observed that while the learned Judge was empowered to look at the material produced in a

sealed cover to satisfy his judicial conscience, learned Judge ought not to have recorded finding based on the material produced in a sealed cover. It was further observed that though it is held that it would be open for the Court to peruse the documents, it would be against the concept of fair trial if in every case prosecution presents documents in sealed cover and finding on the same are recorded as if the offence is committed and the same is treated of having bearing for grant or denial of bail.

50. The investigating agency filed charge sheet against arrested accused. The FIR was registered with Vishram Baug Police Station, Pune. During investigation search was conducted and provisions of UAPA Act were applied. Charge sheet is filed against arrested accused. The objection regarding jurisdiction to investigate by Pune Police is groundless. While giving summary of their case, in charge sheet it is stated as to how the conspiracy was spread. The summary in the charge sheet is as follows :

“Accused Rona Wilson, R/o.Delhi and accused Surendra Gadling, R/o.Nagpur, were members of CPI (Maoist). They contacted accused Sudhir Dhavale who was working through the medium of Kabir Kala Manch. Rona Wilson, absconding accused Com.M @ Dipak @ Milind Teltumbade and another absconding accused Prakash @ Navin @ Ritupan Goswami were active members of CPI (Maoist). They had conspired to

mobilize masses and to spread hatred against the Government, through provocative speeches, songs, plays etc. They incited feeling of hatred among the communities resulting in wide spread violence from 1.1.2018 onwards. The acts of the accused were not restricted to creating disharmony between the two communities, but, they were actually indulging in activities which were against the Nation. The incidents at Bhima-Kioregaon were only a part of their larger conspiracy. The investigation revealed that funds were provided by the banned organization through their members. Students from eminent educational institutes were taken to forest area occupied by Maoist guerrilla and were given training for terrorist activities.”

51. As observed above, this Court while dismissing the writ petition vide judgment and order dated 13th September 2019 refrained from recording any comments thereupon on the papers in sealed envelope. I have perused the documents. In the light of principles enunciated in the aforesaid decision of Hon'ble Supreme Court in P.Chidambaram Vs. DRI (supra), although I have perused the documents in the sealed envelope, I refrain from commenting on those documents. The other documents form part of the charge sheet filed against co-accused, which are part of this application and submissions were advanced by both parties. Even otherwise, apart from the material produced in sealed envelope, there is sufficient other material to enable the Court to record prima facie opinion regarding commission of offence under UAPA Act by the applicant. The decisions relied upon by applicant are not applicable in this case.

The investigation is in progress. I am satisfied that prima facie there is material against applicant to show his complicity in the crime. Thus, even on the test of prima facie material involving the applicant in the crime, no case is made out for entertaining the application.

52. While concluding the arguments the prosecution has filed an interim application u/s 438(1)(b) of Cr.PC seeking direction that the applicant be directed to remain present at the time of passing the order. The application was strongly opposed by applicant on several grounds as reproduced hereinabove. Since it is held that the application u/s 438 of Cr.PC is not maintainable in law, the question of entertaining the application u/s 438(1)(b) of Cr.PC does not arise. Hence, Interim Application No.1 of 2019 deserves to be rejected.

53. Hence, I pass following order :

ORDER

- (i) Criminal Anticipatory Bail Application No.2461 of 2019 is rejected;
- (ii) Interim Application No.1 of 2019 is rejected.

(PRAKASH D. NAIK, J.)

54. At this stage, learned counsel for applicant submits that the applicant was on interim protection and he intend to approach the

higher Court to challenge this order. In view of the submission, interim protection granted by this Court is extended by a period of four weeks.

(PRAKASH D. NAIK, J.)

MST