2024 INSC 269

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 2595 OF 2023

SHOMA KANTI SEN ...APPELLANT(S)

VS

THE STATE OF MAHARASHTRA & ANR. ...RESPONDENT(S)

J U D G M E N T

ANIRUDDHA BOSE, J.

The appellant before us assails the order of a Division Bench of the High Court of Judicature at Bombay passed on 17.01.2023, disposing her application for bail with liberty to approach the Trial Court for filing a fresh application for bail.

2. The appellant was detained on 06.06.2018 in connection with First Investigation Report ("FIR") no. 04/2018 dated 08.01.2018 registered with Vishrambaug Police Station, Pune

alleging commission of offences under Sections 153A, 505 (1b), 117 read with Section 34 of the Indian Penal Code, 1860 ("1860 Code"). The complaints therein related to violence that broke out at a function organised by Elgar Parishad. Certain acts of violence had taken place at Shanivarwada, Pune on 31.12.2017 thereafter. The prosecution's case is that in the said programme, provocative speeches were delivered and there were cultural performances which had the effect of creating enmity between caste groups, resulting in disruption of communal harmony, violence, and loss of life. The said FIR was initially lodged against the organisers of the Elgar Parishad event, which included activists of a cultural body, known as Kabir Kala Manch. The appellant before us was not named in that FIR as an accused at that point of time.

3. Subsequently, the scope of investigation was expanded and Section 120-B of the 1860 Code was added to the list of offences on 06.03.2018. The State Police, who were investigating the case at that point of time raided houses of eight accused persons on 17.04.2018, namely (1) Rona Wilson of Delhi, (2) Surendra Gading of Nagpur, (3) Sudhir Dhawale of Mumbai, (4) Harshali Potdar of Mumbai, (5) Sagar Gorkhe of Pune, (6) Deepak Dhaeagale of Pune, (7) Jyoti Jagtap of Pune and (8) Ramesh Gaychore of Pune.

The State Police, allegedly, found incriminatory materials from the residences of the raided persons. The State Police seemed to have had discovered a larger conspiracy of which the appellant was a part, according to the prosecution. They found that Communist Party of India (Maoist) ["CPI (Maoist)"] to be behind such conspiracy. The latter is a banned terrorist organisation, and has been included in the First Schedule of the Unlawful Activities (Prevention) Act, 1967 ("1967 Act") by an order of the Union Home Ministry dated 22.06.2009. This led to invoking offences under Sections 13, 16, 17, 18, 18B, 20, 38, 39 and 40 of the 1967 Act. On 06.06.2018, appellant's residence was raided and certain literatures, electronic devices and mobile phones were seized from her. On that date itself, the appellant came to be arrested by the State Police.

4. On 02.11.2018, statement of one Kumarasai was recorded. He had also recorded two other subsequent statements on 23.12.2018 (Annexure P-6 to the appeal-petition) and 24.08.2020. All these statements form a part of the three chargesheets which have been submitted in connection with the subject case and we shall refer to the contents thereof later in this judgment. We would also point out here that on behalf of

prosecution, four sets of statements have been produced before us as statements of protected witnesses. But status of two of those witnesses as 'protected' was removed by the Special Court constituted under the National Investigation Agency Act, 2008 ("2008 Act") by an order passed on 27.04.2022. The investigation was transferred to the National Investigation Agency ("NIA") on 24.01.2020 and the same case was renumbered as RC-01/2020/NIA/MUM, with NIA police station, Mumbai. The Special Court held that prior directions to maintain secrecy in respect of identity of KW2 and KW4 ought to be set aside. The names of KW2 and KW4 thus stood removed from the list of protected witnesses. This was done mainly on the ground that copies of statements of those two witnesses had been supplied to the defence under Section 207 of the Code of Criminal Procedure, 1973 ("1973 Code"), which transmitted their names and identities. KW4 is Kumarasai, whose statement we have referred to earlier in this paragraph.

5. On 15.11.2018, the initial chargesheet was submitted by the State Police invoking allegations of commission of offences under Sections 153A, 501(1)(b), 117, 120B, 121, 121A, 124A & 34 of the 1860 Code read with Sections 13, 16, 17, 18, 18B, 20,

38, 39 & 40 of the 1967 Act. The appellant was implicated in the said chargesheet as accused no. 4 for having committed offences under the aforesaid provisions. In column 10 of this chargesheet, under the heading "Details of accused charge-sheeted (with absconding accused)" names of Sudhir Prahlad Dhavle, Rona Jacob Wilson, Surendra Pundlikrao Gadling, Shoma Sen (the appellant) and Mahesh Sitaram Raut appear as arrested accused whereas names of five other accused persons have been shown as "at present underground". A supplementary chargesheet was also filed by the State Police on 21.02.2019, broadly under the same provisions, implicating certain other individuals, Varavara Rao, Vernon Gonzalves, Arun Ferreira and Sudha Bhardwaj as accused persons in the same case.

6. After filing of the initial chargesheet, the appellant had preferred a bail application before the Sessions Court at Pune on 13.12.2018. The Additional Sessions Judge, upon going through the two chargesheets dated 15.11.2018 and 21.11.2019, rejected her bail plea by an order dated 06.11.2019. The Sessions Court applied the bail restricting provision contained in Section 43-D (5) of the 1967 Act to deny bail to the appellant. Thereafter, on 09.01.2020, the appellant had filed a regular bail application

before the High Court of Judicature at Bombay, invoking the provisions of Section 439 of the 1973 Code.

7. As the investigation had been transferred to the NIA during subsistence of the bail application before the High Court, the learned Single Judge, before whom the appellant's petition was pending, directed that the bail application ought to be placed before a Division Bench and the NIA was also impleaded as respondent to the said petition. Under normal circumstances, the bail petition would have been heard by a learned Single Judge only. This direction, however, was made considering the provisions of Section 21(2) of the 2008 Act. The order dated 17.07.2021 passed by the learned Single Judge of the High Court, placing the bail application before the Division Bench, reads: -

> *"1. Learned counsel for the applicant states that, the case is now being investigated by N.I.A. under the N.I.A. Act. He seeks leave to add N.I.A. as a party respondent. Learned counsel for the applicant seeks two weeks time to carry out amendment. Time is granted.*
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> *2. Since the N.I.A. has taken over the investigation, the matter will have to be placed before the Division bench. I have taken this view in Criminal Bail Application No.2024 of 2021 vide order dated 11/06/2021 based on the Hon'ble Supreme Court's Judgment in the case of State of Andhra Pradesh, through Inspector General, National Investigation Agency, Vs. Mohd. Hussain @ Salim, as reported in (2014) 1 Supreme Court Cases 258.*
>
> *3. Hence, the following order is passed:*
>
> *ORDER*

(i) Leave to amend is granted to add N.I.A. as a party respondent.

(ii) Amendment shall be carried out within a period of two weeks from today.

(iii) Office to take steps to place this matter before the appropriate Division Bench.

(iv) The applicant shall supply second set of this application."

8. The Division Bench heard the bail application and by an order passed on 17.01.2023, which is assailed before us, disposed of the appellant's prayer for bail, giving liberty to the appellant to approach the Trial Court for filing a fresh application for bail. Prior to the passing of the order which is impugned before us, the NIA had submitted a second supplementary chargesheet dated 09.10.2020, implicating seven more persons as accused in the case. They are Anand Teltumbde, Gautam Navlakha, Hany Babu, Sagar Gorkhe, Ramesh Gaychore, Jyoti Jagtap and Stan Swamy. It is the case of the prosecution that the second supplementary chargesheet filed by the NIA contains certain incriminating materials against the appellant as well. It is primarily on account of the second supplementary chargesheet being filed, the Division Bench of the High Court refused to consider the appellant's petition for bail on merit. The reasoning for such a course being

directed by the Division Bench would appear from the following passage of the impugned order: -

> *"2. As noted in Order dated 2nd December, 2022, the investigation of present Crime was subsequently transferred to the National Investigation Agency (for short "the NIA") in the month of January, 2020 i.e. after passing of the impugned Order. After completion of further investigation, the NIA has filed supplementary charge-sheet in the Special Court (under NIA Act) at Mumbai. The said case arising out of present crime is now pending for final adjudication in the Special Court (under NIA Act) at Mumbai.*
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> *3. It is to be noted here that, after the NIA filed supplementary charge-sheet, in view of the substantive change in circumstance, the Applicant did not approach the trial Court, at the first instance for appreciation of evidence by it. This Court therefore does not have the benefit of assessment of entire evidence on record by the trial Court. It is therefore necessary for the Petitioner to approach the trial Court afresh for seeking bail under Section 439 of Criminal Procedure Code, so that the trial Court will get an opportunity to assess entire material available on record against the Applicant. Even otherwise, in view of substantive change in circumstance it is necessary for the Applicant to approach the trial Court by filing a fresh Application for bail."*

9. Appearing on behalf of NIA, learned Additional Solicitor General, Mr. Nataraj, took preliminary objection on maintainability of the present appeal. His counter-affidavit is also founded on that factor. He stressed on the fact that since the first Court of bail had no opportunity to examine the fresh set of accusations emanating from the second supplementary

chargesheet, no error was committed by the Division Bench in remanding the matter to the Court of first instance.

10. His argument is that the High Court is an appellate forum on the question of bail, where the 2008 Act is applicable and thus ought not to examine, for the first time, a fresh set of accusations made by the investigating agency. He relied on a judgment of this Court in the case of **State of Haryana -vs- Basti Ram** [(2013) 4 SCC 200]. A Coordinate Bench of this Court observed in this case:-

> *"27. Normally, we would have gone through the entire evidence on record and decided whether the acquittal of Basti Ram should be sustained or not. However, in the absence of any discussion or analysis of the evidence by the High Court in the first appeal, we are of the opinion that a right of appeal available to Basti Ram would be taken away if we were to consider the case on its merits without the opinion of the High Court. Additionally, for a proper appreciation of the case, it is necessary for us to have the views of the High Court on record. This is important since the High Court has reversed a finding of conviction given by the trial Judge."*

11. This was a case where the respondent-accused was implicated in offences of sexual assault and kidnapping of a minor girl along with other related offences and the accused was convicted by the Trial Court. Conviction of the respondent along with the co-accused was set aside by a Single Judge of the High

Court. It was contended by the State before this Court that the judgment of acquittal was passed by the High Court ignoring the statement of prosecutrix, made under Section 164 of the 1973 Code, as also her testimony before the trial court. It was in the context of this argument that the aforesaid judgment was delivered and observations were made in the passage quoted above. The same course, in our opinion, would not be mandatory on the question of considering pre-trial bail plea.

12. So far as the initial and the first supplementary chargesheets filed by the State Police are concerned, the Court of first instance had the occasion to go through the same. But the High Court opined that after transfer of investigation to NIA and filing of the second supplementary chargesheet, which was also placed before the High Court, it should be the Special Court itself which should examine, at the first instance, the content of all the chargesheets, before considering the prayer of an accused for bail. In the present case, when the bail application was filed before the Single Judge of the High Court under Section 439 of the 1973 Code, the second supplementary chargesheet had not been submitted. Under the provisions of the 1973 Code, the jurisdiction of the High Court to consider the question of bail is

coordinate with that of the Sessions Court and it has evolved as a matter of practice that an accused seeking bail ought to approach the Sessions Court before approaching the High Court. Thus, at the point of time when the bail petition was filed by the appellant before the High Court, there was no apparent jurisdictional shortcoming in the High Court examining the appellant's plea for bail. It was also, in our opinion, the proper course which was adopted by the High Court exercising jurisdiction under Section 439 of the 1973 Code to refer the matter to a Division Bench to decide the bail plea in accordance with Section 21(2) of the 2008 Act. This course has been prescribed in the judgement of this court in the case of **State of Andhra Pradesh, through Inspector General, National Investigation Agency -vs- Mohd. Hussain alias Salim** [(2014) 1 SCC 258], which was relied upon by the learned Single Judge while placing the bail application before a Division Bench. The relevant portion of this judgement passed by a Coordinate Bench of this Court stipulates: -

> *"**27.** The order passed by this Court on 2-8-2013 in State of A.P. v. Mohd. Hussain [State of A.P. v. Mohd. Hussain, (2014) 1 SCC 706] is therefore clarified as follows:*
>
> ***27.1.** Firstly, an appeal from an order of the Special Court under the NIA Act, refusing or granting bail shall lie only to a Bench of two Judges of the High Court.*

> ***27.2.*** *And, secondly as far as Prayer (b) of the petition for clarification is concerned, it is made clear that inasmuch as the applicant is being prosecuted for the offences under the MCOC Act, 1999, as well as the Unlawful Activities (Prevention) Act, 1967, such offences are triable only by the Special Court, and therefore application for bail in such matters will have to be made before the Special Court under the NIA Act, 2008, and shall not lie before the High Court either under Section 439 or under Section 482 of the Code. The application for bail filed by the applicant in the present case is not maintainable before the High Court.*
>
> ***27.3.*** *Thus, where the NIA Act applies, the original application for bail shall lie only before the Special Court, and appeal against the orders therein shall lie only to a Bench of two Judges of the High Court."*

13. The factual position which forms the background of the present appellant's plea for bail is, however, different from that in which the aforesaid judgments were delivered. The appellant before us, at each stage, had applied for bail before the Court which, at that point of time, had regular jurisdiction to consider her application. It was because of supervening circumstances the NIA entered into the picture and then issued the second supplementary chargesheet. The Division Bench, being an appellate forum, has the jurisdiction to look into the facts which may arise subsequent to the order of bail passed by the Court of regular jurisdiction. The order by which the Single Judge, hearing the bail application under Section 439 of the 1973 Code, placed the matter before the Division Bench (in essence, giving the said

application the form or character of an appeal under Section 21(2) of the 2008 Act), had not been assailed by any of the parties. We also do not find any error in such a direction having been issued by the Single Judge of the High Court exercising jurisdiction under Section 439 of the 1973 Code. It was the same investigation which was continued by the NIA, based on the same FIR. Only the investigating agency had changed. Just because the second supplementary chargesheet had been issued by the NIA after disposal of the bail application by the Sessions Court, it was not the only legal course available to the High Court to remand the matter to the Special Court for examining the second supplementary chargesheet at the first instance. As an Appellate Forum, in the facts of the given case, it was well within the jurisdiction of the High Court exercising its power under Section 21(2) of the 2008 Act, to examine the second supplementary chargesheet as well, while sitting in appeal over the order of rejection of bail by the regular Sessions Court upon considering the first two chargesheets.

14. Now, the question arises as to whether the course adopted by the High Court ought to be invalidated by us simply because another course, which is suggested by the appellant, could also

be adopted by the High Court. In our view, under ordinary circumstances, we might not have had interfered with the High Court's judgment and order which is under appeal before us. The course adopted by the High Court was a permissible course. We, however, must take into account that the High Court had passed the aforesaid order when the appellant, a lady, was in detention for over four and a half years. At present, the appellant has been in detention for almost six years, her age is over 66 years and charges have not yet been framed. The appellant has also moved an application before us, registered as CRL MP No. 166531 of 2023, in which various ailments from which she suffers have been cited and prayer is made for bail on medical grounds as well.

15. Having taken these factors into account, we do not think it would be in the interest of justice to remand the matter to the Special Court constituted under the 2008 Act at this stage. We are taking this view as in our opinion, it would not have been beyond jurisdiction of the High Court Division Bench, even in exercise of appellate power under Section 21(2) of the 2008 Act, to examine the second supplementary chargesheet as well. For these reasons, we decline to accept the preliminary objection raised by Mr. Nataraj and shall proceed to consider here, the appellant's

plea for bail on merit. Now that we have given leave to the appellant in her petition for special leave to appeal, the same appellate jurisdiction which vested in the High Court will vest in us as well and in exercise of such appellate jurisdiction, we shall consider the appellant's prayer for bail, which was not considered by the High Court on merit.

16. It was also urged by Mr. Nataraj that in the appeal-petition, the appellant has only asked for setting aside the impugned judgment and order. No specific prayer for bail has been made. But in our opinion, the plea for bail in the context of the present appeal is implicit. The petition which was transferred to the Division Bench carried prayer of the appellant for being released on bail and argument advanced by Mr. Grover, learned senior counsel appearing for the appellant is that the High Court itself ought to have granted bail to the appellant on the basis of available materials. Moreover, the appellant in the appeal-petition has also asked for bail as interim relief. Since the appeal, in substance, is against the judgment by which prayer for bail was refused, merely based on the manner of framing of reliefs or prayers in the subject-petition, the actual relief sought by the appellant would not stand eclipsed.

17. Mr. Nataraj had also contended that the NIA must be permitted to contest the bail plea of the appellant before the first Court of bail on the basis of materials disclosed in the second supplementary charge-sheet, because the prosecution would also be entitled to a right of appeal. His submission is that such right of appeal would stand lost if the High Court itself had examined the second supplementary charge-sheet and decided the question of bail in favour of the appellant-accused. These are cogent arguments, but we must not lose sight of the fact that we are concerned here with the question of liberty of a pre-trial detenue, who is a senior citizen, in custody for almost six years, against whom charges are yet to be framed. The question of losing right of an appellate forum would have greater significance in substantive proceedings but on the question of bail, in a proceeding where the detenue herself has volunteered to forego an appellate forum by arguing before us her case for bail, the approach of this Court would be to address the question on merit, rather than to send it back to the Court of first instance for examining the materials available against the appellant.

18. This argument of the prosecution would have had stronger impact if the last charge-sheet, which the first bail Court could

not examine, had disclosed any new or egregious set of accusations against the appellant, far removed from those contained in the earlier charge-sheets. We have gone through the second supplementary chargesheet but do not find disclosure of any such material. This question shall be examined by us in the subsequent paragraphs of this judgment.

19. Another point urged by Mr. Nataraj was that the entirety of incriminating material in the chargesheets, which forms the basis for implicating the appellant did not form part of petition for special leave to appeal and to that extent the investigating agency did not have full opportunity to meet the appellant's case. But as would be evident from various paragraphs of this judgment, these materials were brought on record and both parties had the opportunity to consider these materials and advance submissions on that basis. This is not a case where equitable relief is snatched ex-parte, for instance in case of an ad-interim injunction, by not bringing to the notice of the Court the entire factual basis of a given case. In this appeal, both the parties have had sufficient opportunity to deal with the relevant materials and the appellant cannot be non-suited on the sole ground of non-disclosure of such materials.

20. We shall now test the appellant's claim for bail on merit. Having regard to the proviso to Section 43D (5)[1] of 1967 Act, the

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1 **43-D. Modified application of certain provisions of the Code**.

1) Notwithstanding anything contained in the Code or any other law, every offence punishable under this Act shall be deemed to be a cognizable offence within the meaning of clause (c) of section 2 of the Code, and "cognizable case" as defined in that clause shall be construed accordingly.

(2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that in sub-section (2),--

(a) the references to "fifteen days", "ninety days" and "sixty days", wherever they occur, shall be construed as references to "thirty days", "ninety days" and "ninety days" respectively; and

(b) after the proviso, the following provisos shall be inserted, namely:--

"Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Court may if it is satisfied with the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety days, extend the said period up to one hundred and eighty days:

Provided also that if the police officer making the investigation under this Act, requests, for the purposes of investigation, for police custody from judicial custody of any person in judicial custody, he shall file an affidavit stating the reasons for doing so and shall also explain the delay, if any, for requesting such police custody.

(3) Section 268 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that--

(a) the reference in sub-section (1) thereof

(i) to "the State Government" shall be construed as a reference to "the Central Government or the State Government.";

(ii) to "order of the State Government" shall be construed as a reference to "order of the Central Government or the State Government, as the case may be"; and

(b) the reference in sub-section (2) thereof, to 'the State Government" shall be construed as a reference to "the Central Government or the State Government, as the case may be".

(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.

(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) 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 unauthorisedly or illegally except in very exceptional circumstances and for reasons to be recorded in writing."

Court hearing the question of bail is under duty to scan through the case diary or report made under Section 173 of the Code for the purpose of forming an opinion to the effect that there are reasonable grounds for believing that the accusation against the appellant is prima facie true. This test would apply in only relation to offences stipulated under Chapters IV and VI of the 1967 Act. So far as the prosecution's accusation against the appellant is concerned, allegations of commission of offences under Sections 16, 17, 18, 18B, 20, 38, 39 and 40 of the 1967 Act come within the purview of the bail restricting clause as specified in the aforesaid provision. The manner in which the Court shall come to such a finding at the stage of considering petition for bail has been dealt with and explained in two judgments of two Coordinate Benches of this Court in the cases of **National Investigation Agency -vs-Zahoor Ahmad Shah Watali** [(2019) 5 SCC 1] and **Vernon -vs- The State of Maharashtra & Anr.** [2023 INSC 655]. (One of us, Aniruddha Bose J., was a party to the latter judgement).

21. In the case of **Zahoor Ahmad Shah Watali** (supra), it has been, inter-alia, held:-

> ***"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, 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 collated 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 the 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. Nevertheless, we may take guidance from the exposition in Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra, [(2005) 5 SCC 294 : 2005 SCC (Cri) 1057], wherein a three-Judge Bench of this Court was called upon to consider the scope of power of the Court to grant bail. In paras 36 to 38, the Court observed thus : (SCC pp. 316-17)

> *"36. Does this statute require that before a person is released on bail, the court, albeit prima facie, must come to the conclusion that he is not guilty of such offence? Is it necessary for the court to record such a finding? Would there be any machinery available to the court to ascertain that once the accused is enlarged on bail, he would not commit any offence whatsoever?*

37. Such findings are required to be recorded only for the purpose of arriving at an objective finding on the basis of materials on record only for grant of bail and for no other purpose.

38. 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. The satisfaction of the court as regards his likelihood of not committing an offence while on bail must be construed to mean an offence under the Act and not any offence whatsoever be it a minor or major offence. … What would further be necessary on the part of the court is to see the culpability of the accused and his involvement in the commission of an organised crime either directly or indirectly. The court at the time of considering the application for grant of bail shall consider the question from the angle as to whether he was possessed of the requisite mens rea."

And again in paras 44 to 48, the Court observed : (SCC pp. 318-20)

"44. 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. Similarly, the court will be required to record a finding as to the possibility of his committing a crime after grant of bail. However, such an offence in futuro must be an offence under the Act and not any other offence. Since it is difficult to predict the future conduct of an accused, the court must necessarily consider this aspect of the matter having regard to the antecedents of the accused, his propensities and the nature and manner in which he is alleged to have committed the offence.

45. It is, furthermore, trite that for the purpose of considering an application for grant of bail, although de-

tailed reasons are not necessary to be assigned, the order granting bail must demonstrate application of mind at least in serious cases as to why the applicant has been granted or denied the privilege of bail.

46. The duty of the court at this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. However, while dealing with a special statute like MCOCA having regard to the provisions contained in sub-section (4) of Section 21 of the Act, the court may have to probe into the matter deeper so as to enable it to arrive at a finding that the materials collected against the accused during the investigation may not justify a judgment of conviction. The findings recorded by the court while granting or refusing bail undoubtedly would be tentative in nature, which may not have any bearing on the merit of the case and the trial court would, thus, be free to decide the case on the basis of evidence adduced at the trial, without in any manner being prejudiced thereby.

47. In Kalyan Chandra Sarkar v. Rajesh Ranjan [(2004) 7 SCC 528 : 2004 SCC (Cri) 1977] this Court observed : (SCC pp. 537-38, para 18)

> *'18. We agree that a conclusive finding in regard to the points urged by both the sides is not expected of the court considering a bail application. Still one should not forget, as observed by this Court in Puran v. Rambilas [(2001) 6 SCC 338: 2001 SCC (Cri) 1124] : (SCC p. 344, para 8)*
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> > *"8. …Giving reasons is different from discussing merits or demerits. At the stage of granting bail a detailed examination of evidence and elaborate documentation of the merits of the case has not to be undertaken. … That did not mean that whilst granting bail some reasons for prima facie concluding why bail was being granted did not have to be indicated."*
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> *We respectfully agree with the above dictum of this Court. We also feel that such expression of prima facie reasons for granting bail is a requirement of law in cases where such orders on bail application are appealable, more so because of the fact that the appellate court has every right to know the basis for granting the bail. Therefore, we are not in agreement with the argument addressed by the learned counsel for the accused that the High Court was not expected even to indicate a prima facie finding on all points urged*

before it while granting bail, more so in the background of the facts of this case where on facts it is established that a large number of witnesses who were examined after the respondent was enlarged on bail had turned hostile and there are complaints made to the court as to the threats administered by the respondent or his supporters to witnesses in the case. In such circumstances, the court was duty-bound to apply its mind to the allegations put forth by the investigating agency and ought to have given at least a prima facie finding in regard to these allegations because they go to the very root of the right of the accused to seek bail. The non-consideration of these vital facts as to the allegations of threat or inducement made to the witnesses by the respondent during the period he was on bail has vitiated the conclusions arrived at by the High Court while granting bail to the respondent. The other ground apart from the ground of incarceration which appealed to the High Court to grant bail was the fact that a large number of witnesses are yet to be examined and there is no likelihood of the trial coming to an end in the near future. As stated hereinabove, this ground on the facts of this case is also not sufficient either individually or coupled with the period of incarceration to release the respondent on bail because of the serious allegations of tampering with the witnesses made against the respondent.'

48. In Jayendra Saraswathi Swamigal v. State of T.N. (2005) 2 SCC 13 : 2005 SCC (Cri) 481] this Court observed [(SCC pp. 21-22, para 16)]

> *'16. … The considerations which normally weigh with the court in granting bail in non-bailable offences have been explained by this Court in State v. Jagjit Singh [(1962) 3 SCR 622 : AIR 1962 SC 253 : (1962) 1 Cri LJ 215] and Gurcharan Singh v. State (UT of Delhi) [(1978) 1 SCC 118 : 1978 SCC (Cri) 41] and basically they are — the nature and seriousness of the offence; the character of the evidence; circumstances which are peculiar to the accused; a reasonable possibility of the presence of the accused not being secured at the trial; reasonable apprehension of witnesses being tampered with; the larger interest of the public or the State and other similar factors*

which may be relevant in the facts and circumstances of the case.'"

22. In the case of **Vernon** (supra), it was observed:-

> *"**36**. In the case of Zahoor Ahmad Shah Watali (supra), it has been held that the expression "prima facie true" would mean that the materials/evidence collated by the investigating agency in reference to the accusation against the accused concerned in the chargesheet must prevail, unless overcome or disproved by other evidence, and on the face of it, materials must show complicity of such accused in the commission of the stated offences. What this ratio contemplates is that on the face of it, the accusation against the accused ought to prevail. In our opinion, however, it would not satisfy the prima facie "test" unless there is at least surface-analysis of probative value of the evidence, at the stage of examining the question of granting bail and the quality or probative value satisfies the Court of its worth....."*

23. We must point out here that Mr. Nataraj has taken a fair stand in this case and in response to our query on necessity of detention of the appellant at this stage, for further investigation, he has submitted that the prosecution at present would not require custody of the appellant for such purpose. He has simultaneously emphasised on gravity and seriousness of the offences alleged against the appellant and submitted that the question of entitlement of the appellant to be enlarged on bail would have to be examined in the light of the bail restricting clause of Section 43D (5) of the 1967 Act and on that basis, he has contested the appeal. We shall first examine the applicability of the offences contained in Chapters IV and VI in relation to the

materials which have been disclosed before us and then go on to apply the normal principle of granting bail, only on our satisfaction that the materials disclosed before us do not establish reasonable grounds for believing that the accusations against the appellant under the bail restricting provisions of the 1967 Act are prima facie true. The substance of allegations against the appellant are, inter-alia, contained in paragraphs 17.4, 17.5, 17.8, 17.10.1, 17.11, 17.12, 17.15, 17.16 and 17.18 of the chargesheet dated 15.11.2018 and paragraphs 17.4, 17.5 and 17.16 of the first supplementary chargesheet dated 21.02.2019. The allegations against the appellant are, inter-alia, contained in paragraphs 17.24, 17.25, 17.29, 17.32, 17.39, 17.45, 17.55, 17.56, 17.73, 17.74, 17.75 and 17.78 of the second supplementary chargesheet dated 09.10.2020.

24. It is admitted position that appellant was present at Shanivarwada within the district of Pune on 31.12.2017 when the Elgar Parishad event took place. But there is no allegation at this stage that apart from being present, she had any further active participation on that date in the programme. For instance, there is no allegation that she had delivered any provocative speech. She was also not named in the initial FIR which was

registered at Vishrambaug Police Station, Pune on 08.01.2018. The prosecution's case is that the appellant is an active member of CPI (Maoist) and conspired with other accused persons to violently overthrow democracy and the State. There are also allegations that she provided party funds and also received party funds from another accused Mahesh Raut, she was paid a sum of Rs. five lakhs by two other co-accused persons and made constant attempts to further terrorist activities of the banned CPI (Maoist). It is also the prosecution's case that she has been encouraging youngsters and recruited them as members in the banned organization and participated in a broad conspiracy to organize Elgar Parishad programme. It is further alleged that the appellant is associated with the Indian Association of Peoples Lawyer ("IAPL"), Committee for the Protection of Democratic Rights ("CPDR") Anuradha Ghandy Memorial Committee ("AGMC") and Kabir Kala Manch ("KKM") which have been described as frontal organization of the CPI (Maoist) on the ground that they are instrumental in organizing meetings and exchange of messages for implementation of aims and policies of the said banned organization. Her involvement in the controversy hatched by two other accused and underground members has

also been highlighted. As we have already indicated, there was a search in her residential premises on 06.06.2018. It is the prosecution's case that materials recovered from her, as also other accused persons, revealed her participation in the meetings and conferences of Revolutionary Democratic Front ("RDF"), which again has been alleged to be a frontal organization to spread the propaganda of the banned CPI (Maoist). The presence of the appellant in the National Conference of RDF conducted in Hyderabad is sought to be demonstrated through the first supplementary chargesheet.

25. In the second supplementary chargesheet, allegations against her are contained in the paragraphs which we have already referred to. Here also, the video of the RDF Conference held on 22-23.04.2012 has been highlighted. It is also indicated that she took active part in the Elgar Parishad function. In this chargesheet, her conduct and coordination with other accused persons has been sought to be demonstrated, which include Anand Teltumbadde, Gautam Navlakha, Hany Babu, Jyoti Jagtap and Stan Swamy (since deceased). It is also pointed out that she was in close connection with the other members of CPI (Maoist) through e-mail and mobile phones. But we do not find these

allegations to reveal involvement of the appellant in any outrageously offensive act or activities having characters altogether different from those contained in the two earlier chargesheets. In this chargesheet, only her interaction and connection with other accused persons has been revealed and forms part of the same chain of accusations.

26. In its counter-affidavit, the NIA, being the contesting respondent before us, has primarily taken the stand confined to its preliminary objections on maintainability of this appeal, which we have already noted. But in course of hearing before us, we were addressed on merit of the appeal on the question of entitlement of the appellant to be released on bail, having regard to the proviso of Section 43D(5) of 1967 Act. The materials which form part of the three chargesheets, were brought on record before us by the appellant through two additional affidavits. Apart from these of these of the appellant, detailed written submission has been filed by Mr. Nataraj, which contains a series of documents found to be incriminating by the prosecution along with witness statements implicating the appellant.

27. So far as the appellant is concerned, the prosecution has emphasised on the following list of materials forming part of this appeal:-

(i) A Letter dated 08.06.2017 from one "Comrade M" addressed to "Comrade Surendra", which carries reference to the appellant to the limited extent that the party leadership has sent instructions to "Comrade Shomasen" for strengthening CPDR and Radical Student's Union in Nagpur, Chandrapur and Gondia region. This letter also records that necessary funds have been sent, but no specific person is named as the recipient of such funds.

(ii) Letter dated 23.12.2017 from one "R" addressed to "Comrade Prakash" which relates to constituting a fact-finding team to gauge the truth about fake encounters in Gadchiroli and it has been indicated that letter that "Shoma" will speak to the friends, presumably of the author and addressee of the letter, in Nagpur who might join the team.

(iii) Next is a letter dated 02.01.2018 from one "Com. M" to "Comrade Rona" and the offending part of this letter, so far as the appellant is concerned, is to the effect that "Com. Shoma" and "Com. Surendra" were authorised to provide funds for the future.

(iv) Next document bears the character of a minutes of a meeting dated 02.01.2008, which marks the presence of "Shomasen" as a "leading CPDR member", along with certain other accused individuals.

(v) Thereafter, an undated account statement is relied on by the prosecution, which mentions "Shoma" as recipient of "1L" (presumably Rs. one lakh) from "Surendra" who is the accused no. 3 in the present case.

(vi) The prosecution has relied on another letter dated 25.09.2017, written by "Com. Prakash" addressed to "Comrade Surendra" where the author asks the addressee to coordinate with "shomasen" and ensure that all pgp files are securely wiped out from all the computers.

(vii) Then there is another letter dated 05.11.2017 purported to have been written by "Comrade Surendra" and addressed to "Comrade Prakash" wherein the author informs the addressee that the information from the party has been communicated to "Soma" and she has destroyed all the data on her computer in addition to all the APT files sent by the party, old and new letters and the party's resolutions etc.

(viii) The last set of documents includes the panchnama of the search conducted at the house of the appellant, along with the Forensic Science Laboratory ('FSL") Report containing the analysis of the materials seized from the appellant. These documents have been cited by Mr. Nataraj to corroborate the allegations of destruction of evidence at the instance of the co-accused persons. The FSL report reveals that deleted audio and video files were retrieved from hard disk and also mentions that uninstalled softwares have been recovered, but no substantive content of the deleted materials has been placed in the chargesheets. The material placed before us only indicates that the process of deletion had taken place.

It appears that all the letters and other materials mentioned in the above list have been purported to have been recovered from the electronic devices of co-accused Rona Wilson.

28. The next set of evidences to which our attention has been drawn by Mr. Nataraj are four witness statements, two of whom were originally given the status of protected witnesses. We have referred to their present status earlier in this judgment. The accusations made by the four witnesses in their respective statements placed before us are as follows:-

(i) The first protected witness (KW1) statement carries reference to Shoma Sen as having addressed the delegates of the conference of RDF held in April 2012. The relevant part of the said recorded statement reads:-

> *".....Shoma Sen said that we have to understand the essence of the Maoist slogan 'women hold up half the sky'. To solve the problems women in our country, as well as in other countries, the struggle for New Democratic Revolution is the only way forward. Simply she was advocating women to join CPI Maoist to solve their issues....."*

(ii) The statement of KW-2 recorded by the NIA under Section 161 of the 1973 Code on 10.08.2020 reveals alleged presence of the appellant in the office of a co-accused person i.e. Surendra Gadling, when KW-2 purported to have joined the CPI (Maoist) at the instance of Surendra.

(iii) A redacted statement of KW-3, who is a protected witness, has been produced by the NIA in its written submissions. This witness, on being asked about senior Naxal members of CPI (Maoist), stated that he first met the appellant in 2007-08, during the classes of communist ideology, revolutionary movement, party working etc. in Nagpur, which were attended by some other individuals. The same witness goes on implicate the appellant in certain message channels working to exchange messages

regarding urban work of CPI (Maoist). In this regard, he has stated that:-

> *".....During year 2017, there were 3-4 message channels were working to exchange message between Deepak and Angela regarding urban work of CPI (Maoist) viz (i) Deepak -Nandu (Myself)- Kalyan Hirekhan-Gadling-Angela; for legal work (ii) Deepak-Nandu (Myself)-Kalyan Hirekhan-Angela Sontakke at Shoma Sen's house for meeting with Deepak in Nagpur (iii) Deepak-Nandu (Myself)- Arif Shaikh (WCL worker and Journalist)-Vipalav Teltumbde (Nephew of Deepak Teltumbde)-Angela; this was the second option for meeting of Deepak & Angela (iv) Deepak-Nandu (Myself)-Arif Shaikh-NT Maske- Angela Sontakke; alternative meeting channel....."*

This statement, however, does not prima facie show any direct involvement of the appellant in the offending acts with which she has been charged vis-à-vis the bail restricting provisions of the 1967 Act.

(iv) From the three statements of Kumarasai who was originally identified as "KW-4", there are only two purported incriminating references to the appellant, in the second and the third ones, recorded on 23.12.2018 and 24.08.2020 respectively. In the former statement, which was recorded by the State Police, he stated that appellant was working along with an intellectual group for solving problems of women and students. In the latter statement, recorded by the NIA, he stated that the appellant was an urban Naxalite working with CPI (Maoist). The name of the

appellant, however, does not figure in his first statement recorded by the State Police on 02.11.2018.

29. In the light of these materials we shall have to examine the strength of prosecution's case to implicate the appellant in the offences specified under Sections 16, 17, 18, 18B, 20, 38, 39 and 40 of the 1967 Act. There is also allegation against her for commission of offence under Section 13 of the same statute, but that offence does not come under the purview of the bail restricting provision of Section 43D (5) of the 1967 Act and we shall deal with that accusation in the succeeding paragraphs of this judgment. The offences under Chapter IV of the 1967 Act with which the appellant has been charged with by the prosecuting agency, mainly stem from commission of a terrorist act or any act in connection therewith. Section 15 of the 1967 Act stipulates: -

> *"**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

(iii-a) 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.

Explanation.—For the purpose of this sub-section,—

(a) "public functionary" means the constitutional authorities or any other functionary notified in the Official Gazette by the Central Government as public functionary;

(b) "high quality counterfeit Indian currency" means the counterfeit currency as may be declared after examination by an authorised or notified forensic authority that such currency imitates or compromises with the key security features as specified in the Third Schedule.

(2) The terrorist act includes an act which constitutes an offence within the scope of, and as defined in any of the treaties specified in the Second Schedule."

30. We are not concerned with sub-section (2) of the said provision. In this appeal, there is no allegation of any act of the appellant constituting an offence within the scope of the Second Schedule to the same statute. Sub-section (1) of Section 15 refers

to certain acts which would constitute a terrorist act but the first part of sub-section (1) of Section 15 cannot be read in isolation. In our reading of the said provision of the statute, to qualify for being a terrorist act, such act must be done with intent to threaten or likely to threaten the unity, integrity, security, economic security or sovereignty of India or such act must be accompanied with an 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. These are initial requirements to invoke Section 15(1) of the 1967 Act. The legislature, however, has not left the nature of such acts unspecified and in sub-clauses (a), (b), and (c) of the said sub-section, the law stipulates the manner of commission of the acts specified in first part of sub-section (1) of said Section 15. If any offender attempts to commit any of the acts specified in Section 15(1), to come within the ambit of the expression "terrorist act" under the 1967 legislation, action or intention to cause such act must be by those means, which have been specified in sub-clauses (a), (b), and (c) of the said provision. This is the line of reasoning broadly followed by this Court in the case of **Vernon** (supra) in construing the applicability of the said provision. If we examine the acts attributed to the appellant by

the various witnesses or as inferred from the evidence relied on by the prosecution, we do not find prima facie commission or attempt to commit any terrorist act by the appellant applying the aforesaid test for invoking Section 15 read with Section 16[2] of the 1967 Act.

31. On the allegations of raising funds for a terrorist act forming part of charges under Section 17 of the 1967[3] Act, most of the materials have emanated from recovery of documents from devices of third parties and at this stage, on the strength of the materials produced before us, the prosecution has not been able to corroborate or even raise a hint of corroboration of the allegation that the appellant has funded any terrorist act or has received any money for that purpose. What we can infer on the

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2 **16. Punishment for terrorist act.—**

(1) Whoever commits a terrorist act shall,—

(a) if such act has resulted in the death of any person, be punishable with death or imprisonment for life, and shall also be liable to fine;

(b) in any other case, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine.

3 **17. Punishment for raising funds for terrorist act.—**Whoever, in India or in a foreign country, directly or indirectly, raises or provides funds or collects funds, whether from a legitimate or illegitimate source, from any person or persons or attempts to provide to, or raises or collects funds for any person or persons, knowing that such funds are likely to be used, in full or in part by such person or persons or by a terrorist organisation or by a terrorist gang or by an individual terrorist to commit a terrorist act, notwithstanding whether such funds were actually used or not for commission of such act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine.

Explanation.—For the purpose of this section,—

(a) participating, organising or directing in any of the acts stated therein shall constitute an offence;

(b) raising funds shall include raising or collecting or providing funds through production or smuggling or circulation of high quality counterfeit Indian currency; and

(c) raising or collecting or providing funds, in any manner for the benefit of, or, to an individual terrorist, terrorist gang or terrorist organisation for the purpose not specifically covered under Section 15 shall also be construed as an offence.

basis of the materials produced before us, are mere third-party allegations that money has been directed to be sent to her. None of the materials reveal receipt of any funds by her or her direct role in raising or collecting funds. We are conscious of the fact that in course of trial, the prosecution will have the opportunity to bring more detailed evidence in that regard, but here we are only examining whether the offences under Part IV & VI of the 1967 Act, alleged to have been committed by the appellant, are prima facie true or not.

32. As regards the allegation against the appellant for committing an offence under Section 18[4] of the 1967 Act are concerned, which includes conspiracy or attempt on her part to commit, advocate, abet, advice, incite or facilitate commission or any terrorist act, the materials collected so far, even if we believe them to be true at this stage, applying the principles enunciated by this Court in the case of **Zahoor Ahmad Shah Watali** (supra), only reveal her participation in some meetings and her attempt to encourage women to join the struggle for new democratic revolution. These allegations, prima facie, do not reveal the commission of an offence under Section 18 of the 1967 Act.

4 **18. Punishment for conspiracy, etc.**—Whoever 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, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine.

33. KW-2 has found her to be present in the office of another co-accused Surendra, when he was being convinced by Surendra to join CPI (Maoist), but her mere presence on the spot, by itself, would not constitute an offence of recruiting any person or persons for a terrorist act, as specified in Section 18 thereof. As regards the statement of KW-3, he claims to have met the appellant in 2007-08 during her lectures on communist ideology and party-functioning of CPI (Maoist) at Nagpur. At that point of time, CPI (Maoist) had not been included in the First Schedule of the 1967 Act enumerating terrorist organisations. It came to be banned on 22.06.2009, as we have already specified. Kumarasai, i.e. KW-4 in his third statement recorded on 24.08.2020 has only stated she is an urban Naxal working for CPI (Maoist). On this thin thread, we cannot apply the rigors of Section 43D (5) of the 1967 Act against her. Apart from that, there is no evidence that she was a member of CPI (Maoist). There are no specific materials or statements produced by the prosecution which attribute acts of recruitment in banned organization by the appellant. Thus, at this stage, we cannot form an opinion that the accusation against her under Section 18-B[5] of the 1967 Act is prima facie true.

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5 1**8-B. Punishment for recruiting of any person or persons for terrorist act.**—Whoever recruits or causes to be recruited any person or persons for commission of a terrorist act shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine.

34. So far as the allegation of prosecution of the appellant being member of frontal organisation of CPI (Maoist), reference has been made to RDF, IAPL, CPDR, AGMC and KKM. But apart from mere allegations that these are frontal organizations of CPI (Maoist), no credible evidence has been produced before us through which these organisations can be connected to the aforesaid banned terrorist organization. Thus, the offence under Section 20 of the 1967 Act relating to membership of a terrorist organisation which is involved in a terrorist act, cannot be made out against the appellant at this stage, on the basis of materials produced before us. Relying on the judgement of this Court in the case of **Vernon** (supra), we have already dealt with the position of the appellant vis-à-vis terrorist acts in the earlier paragraphs of this judgement and we prima facie do not think that Section 20[6] of the 1967 Act can be made applicable against the appellant at this stage of the proceeding based on the available materials.

35. The next set of allegations against her to bring her case within the bail restricting provisions relates to offences specified under Chapter VI of 1967 Act. This set of allegations relates to being associated with a terrorist organization. We have already

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6 **20. Punishment for being member of terrorist gang or organisation.**—Any person who is a member of a terrorist gang or a terrorist organisation, which is involved in terrorist act, shall be punishable with imprisonment for a term which may extend to imprisonment for life, and shall also be liable to fine.

given our finding on such allegations and in our prima facie opinion, the allegations of the prosecution that the appellant is a member of a terrorist organisation or that she associates herself or professes to associate herself with a terrorist organization are not true, and at this stage, she cannot be implicated in the offence under Sections 38[7] of 1967 Act. Mere meeting of accused individuals or being connected with them through any medium cannot implicate one in Chapter VI offences under of the 1967 Act, in the absence of any further evidence of being associated with a terrorist organisation. Such association or connection must be in relation to furtherance of terrorist act. It has been held by this Court in the case of **Vernon** (supra):-

> *"32. "Terrorist act" as defined under Section 2(k) of the 1967 Act carries the meaning assigned to it in Section 15. This Section also stipulates that the expressions "terrorism" and "terrorist" shall be construed accordingly. This implies construction of these two expressions in the same way as has been done in Section 15.*
>
> *"terrorist organisation" has been independently defined in Section 2(m) to mean an organisation listed in the First Schedule or an organisation operating under the same name as an organisation so listed. But so far as the word*

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7 **38. Offence relating to membership of a terrorist organisation.—**

(1) A person, who associates himself, or professes to be associated, with a terrorist organisation with intention to further its activities, commits an offence relating to membership of a terrorist organisation:

Provided that this sub-section shall not apply where the person charged is able to prove—

(a) that the organisation was not declared as a terrorist organisation at the time when he became a member or began to profess to be a member; and

(b) that he has not taken part in the activities of the organisation at any time during its inclusion in the First Schedule as a terrorist organisation.

(2) A person, who commits the offence relating to membership of a terrorist organisation under sub-section (1), shall be punishable with imprisonment for a term not exceeding ten years, or with fine, or with both.

"terrorist" is concerned, in this Section also, the interpretation thereof would be relatable to the same expression as used in Section 15. It is one of the basic rules of statutory construction that an expression used in different parts of a statute shall ordinarily convey the same meaning – unless contrary intention appears from different parts of the same enactment itself. We do not find any such contrary intention in the 1967 Act.

33. Section 38 of the 1967 Act carries the heading or title "offence relating to membership of a terrorist organisation". As we have already observed, a terrorist act would have to be construed having regard to the meaning assigned to it in Section 15 thereof. We have given our interpretation to this provision earlier. "terrorist organisation" [as employed in Section 2(m)], in our opinion is not a mere nomenclature and this expression would mean an organisation that carries on or indulges in terrorist acts, as defined in said Section 15. The term terrorism, in view of the provisions of Section 2(k) of the said Act, ought to be interpreted in tandem with what is meant by 'terrorist Act' in Section 15 thereof.

34. In this context, to bring the appellants within the fold of Section 38 of the 1967 Act, the prosecution ought to have prima facie establish their association with intention to further the said organisation's terrorist activities. It is only when such intention to further the terrorist activities is established prima facie, appellants could be brought within the fold of the offence relating to membership of a terrorist organisation. To bring within the scope of Section 38 of the 1967 Act, it would not be sufficient to demonstrate that one is an associate or someone who professes to be associated with a terrorist organisation. But there must be intention to further the activities of such organisation on the part of the person implicated under such provision. But the same line of reasoning in respect of membership of a terrorist organisation under Section 20, ought to apply in respect of an alleged offender implicated in Section 38 of the 1967 Act. There must be evidence of there being intention to be involved in a terrorist act. So far as the appellants are concerned, at this stage there is no such evidence before us on which we can rely."

We, further, do not think the undated account statement has sufficient probative value at this stage to prima facie sustain a case against her and implicate her for offences relating to the

provision of support or raising of funds for a terrorist organisation, specified under Section 39[8] and 40[9] of 1967 Act. Evidence of her involvement in any fund-raising activities for the CPI (Maoist) or her support to the said organisation has not transpired through any reliable evidence before us at this stage.

36. In the light of our observations made in this judgment and on our perusal of the evidences collected against her as also the allegations made by prosecution witnesses, we are of the opinion

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8 **39. Offence relating to support given to a terrorist organisation. —**

(1) A person commits the offence relating to support given for a terrorist organisation,—

(a) who, with intention to further the activity of a terrorist organisation,—

(i) invites support for the terrorist organisation, and

(ii) the support is not or is not restricted to provide money or other property within the meaning of Section 40; or

(b) who, with intention to further the activity of a terrorist organisation, arranges, manages or assists in arranging or managing a meeting which, he knows, is—

(i) to support the terrorist organisation, or

(ii) to further the activity of the terrorist organisation, or

(iii) to be addressed by a person who associates or professes to be associated with the terrorist organisation; or

(c) who, with intention to further the activity of a terrorist organisation, addresses a meeting for the purpose of encouraging support for the terrorist organisation or to further its activity.

(2) A person, who commits the offence relating to support given to a terrorist organisation under sub-section (1) shall be punishable with imprisonment for a term not exceeding ten years, or with fine, or with both.

9 **40. Offence of raising fund for a terrorist organisation.—**

(1) A person commits the offence of raising fund for a terrorist organisation, who, with intention to further the activity of a terrorist organisation,—

(a) invites another person to provide money or other property, and intends that it should be used, or has reasonable cause to suspect that it might be used, for the purposes of terrorism; or

(b) receives money or other property, and intends that it should be used, or has reasonable cause to suspect that it might be used, for the purposes of terrorism; or

(c) provides money or other property, and knows, or has reasonable cause to suspect, that it would or might be used for the purposes of terrorism.

Explanation.—For the purposes of this sub-section, a reference to provide money or other property includes—

(a) of its being given, lent or otherwise made available, whether or not for consideration; or

(b) raising, collecting or providing funds through production or smuggling or circulation of high quality counterfeit Indian currency.

(2) A person, who commits the offence of raising fund for a terrorist organisation under sub-section (1), shall be punishable with imprisonment for a term not exceeding fourteen years, or with fine, or with both.

that there is no reasonable ground for believing that the accusations against the appellants for commission of the offences incorporated in Chapter IV and VI of the 1967 Act are prima facie true.

37. In the case of **K.A. Najeeb -vs- Union of India** [(2021) 3 SCC 713], a three Judge Bench of this Court (of which one of us Aniruddha Bose, J was a party), has held that a Constitutional Court is not strictly bound by the prohibitory provisions of grant of bail in the 1967 Act and can exercise its constitutional jurisdiction to release an accused on bail who has been incarcerated for a long period of time, relying on Article 21 of Constitution of India. This decision was sought to be distinguished by Mr. Nataraj on facts relying on judgment of this Court in the case of **Gurwinder Singh -vs- State of Punjab** [2024 INSC 92]. In this judgment, it has been held:-

> *"32. The Appellant's counsel has relied upon the case of KA Najeeb (supra) to back its contention that the appellant has been in jail for last five years which is contrary to law laid down in the said case. While this argument may appear compelling at first glance, it lacks depth and 22 substance. In KA Najeeb's case this court was confronted with a circumstance wherein except the respondent-accused, other co-accused had already undergone trial and were sentenced to imprisonment of not exceeding eight years therefore this court's decision to consider bail was grounded in the anticipation of the impending sentence that the respondent accused might face upon conviction and since the respondent-accused had already served portion of the*

maximum imprisonment i.e., more than five years, this court took it as a factor influencing its assessment to grant bail. Further, in KA Najeeb's case the trial of the respondent-accused was severed from the other co-accused owing to his absconding and he was traced back in 2015 and was being separately tried thereafter and the NIA had filed a long list of witnesses that were left to be examined with reference to the said accused therefore this court was of the view of unlikelihood of completion of trial in near future. However, in the present case the trial is already under way and 22 witnesses including the protected witnesses have been examined. As already discussed, the material available on record indicates the involvement of the appellant in furtherance of terrorist activities backed by members of banned terrorist organization involving exchange of large quantum of money through different channels which needs to be deciphered and therefore in such a scenario if the appellant is released on bail there is every likelihood that he will influence the key witnesses of the case which might hamper the process of justice. 23 Therefore, mere delay in trial pertaining to grave offences as one involved in the instant case cannot be used as a ground to grant bail. Hence, the aforesaid argument on the behalf the appellant cannot be accepted."

38. Relying on this judgement, Mr. Nataraj, submits that bail is not a fundamental right. Secondly, to be entitled to be enlarged on bail, an accused charged with offences enumerated in Chapters IV and VI of the 1967 Act, must fulfil the conditions specified in Section 43D (5) thereof. We do not accept the first part of this submission. This Court has already accepted right of an accused under the said offences of the 1967 Act to be enlarged on bail founding such right on Article 21 of the Constitution of India. This was in the case of **Najeeb** (supra), and in that judgment, long period of incarceration was held to be a valid

ground to enlarge an accused on bail in spite of the bail-restricting provision of Section 43D (5) of the 1967 Act. Pre-conviction detention is necessary to collect evidence (at the investigation stage), to maintain purity in the course of trial and also to prevent an accused from being fugitive from justice. Such detention is also necessary to prevent further commission of offence by the same accused. Depending on gravity and seriousness of the offence alleged to have been committed by an accused, detention before conclusion of trial at the investigation and post-chargesheet stage has the sanction of law broadly on these reasonings. But any form of deprival of liberty results in breach of Article 21 of the Constitution of India and must be justified on the ground of being reasonable, following a just and fair procedure and such deprival must be proportionate in the facts of a given case. These would be the overarching principles which the law Courts would have to apply while testing prosecution's plea of pre-trial detention, both at investigation and post-chargesheet stage.

39. As regards second part of Mr. Nataraj's argument which we have noted in the preceding paragraph, we accept it with a qualification. The reasoning in **Najeeb's** (supra) case would also

have to be examined, if it is the Constitutional Court which is examining prosecution's plea for retaining in custody an accused charged with bail-restricting offences. He cited the case of **Gurwinder Singh** (supra) in which the judgement of **K. A. Najeeb** (supra) was distinguished on facts and a judgment of the High Court rejecting the prayer for bail of the appellant was upheld. But this was a judgment in the given facts of that case and did not dislocate the axis of reasoning on constitutional ground enunciated in the case of **Najeeb** (supra). On behalf of the prosecution, another order of a Coordinate Bench passed on 18.01.2024, in the case of **Mazhar Khan -vs- N.I.A. New Delhi** [Special Leave Petition (Crl) No. 14091 of 2023] was cited. In this order, the petitioner's prayer for overturning a bail-rejection order of the High Court under similar provisions of the 1967 Act was rejected by the Coordinate Bench applying the ratio of the case of **Watali** (supra) judgment and also considering the case of **Vernon** (supra). We have proceeded in this judgment accepting the restrictive provisions to be valid and applicable and then dealt with the individual allegations in terms of the proviso to Section 43D (5) of the 1967 Act. Thus, the prosecution's case, so far as

the appellant is concerned, does not gain any premium from the reasoning forming the basis of the case of **Mazhar Khan** (supra).

40. Two authorities have been cited by the appellant in which gross delay in trial was held to be a ground for granting bail in statutes in which there was restriction on such grant. These are the judgements of this court in the cases of **Shaheen Welfare Association -vs- Union of India and Others** [(1996) 2 SCC 616] and **Angela Harish Sontakke -vs- State of Maharashtra** [(2021) 3 SCC 723]. But each of these cases has been decided on their own facts and so far as the appellant's case is concerned, we have examined the materials disclosed before us and given our finding as regards applicability of Section 43D (5) of the 1967 Act in her case.

41. Once we find that Section 43D (5) of the 1967 Act would not be applicable in the case of the appellant, we shall have to examine the case of the appellant in relation to accusation against her under Section 13 of the 1967 Act and also other offences under the provisions of the 1860 Code, which we have narrated earlier. We have already indicated that she is a lady of advanced age, suffering from various ailments. The ailments by themselves may not be serious enough for granting bail on

medical ground. But taking cognizance of the composite effect of delay in framing charge, period of detention undergone by her, the nature of allegations against her vis-à-vis the materials available before this Court at this stage in addition to her age and medical condition, we do not think she ought to be denied the privilege of being enlarged on bail pending further process subsequent to issue of chargesheets against her in the subject-case.

42. We repeat here that our observations as regards the nature of allegations against her are only prima facie views and the future course of her prosecution would be dependent upon framing of charge and if charges are framed, the nature of evidence the prosecution can adduce against her in trial as also her own defence. With these observations, we set aside the impugned judgment and direct that the appellant be released on bail on such conditions the Special Court may consider fit and proper but the conditions shall include the following:-

(a) The appellant shall not leave the State of Maharashtra without leave of the Special Court.

(b) The appellant shall surrender her passport, if she possesses one, with the Special Court, during the period she remains enlarged on bail.

(c) The appellant shall inform the Investigating Officer of the NIA the address where she shall reside during the period she remains enlarged on bail.

(d) The appellant shall use only one mobile number, during the time she remains on bail, and shall inform her mobile number to the Investigating Officer of the NIA.

(e) The appellant shall also ensure that her mobile phone remains active and charged round the clock so that she remains constantly accessible throughout the period she remains enlarged on bail.

(f) During this period, i.e. the period during which she remains on bail, the appellant shall keep the location status (GPS) of her mobile phone active, twenty-four hours a day, and her phone shall be paired with that of the Investigating Officer of the NIA to enable him, at any given time, to identify the appellants' exact location.

(g) The appellant, while on bail, shall report to the Station House Officer of the Police Station within whose jurisdiction she shall reside, once every fortnight.

43. In the event there is breach of any of these conditions or any other condition that may be imposed by the Special Court

independently, it would be open to the prosecution to seek cancellation of bail granted to the appellant before the Special Court only, without any further reference to this Court.

44. The appeal stands allowed in the above terms and Criminal Miscellaneous Petition No.166531 of 2023 shall also stand disposed of.

45. Pending application(s), if any, shall stand disposed of.

.....J.
(ANIRUDDHA BOSE)

.....J.
(AUGUSTINE GEORGE MASIH)

NEW DELHI
April 5th, 2024

ITEM NO.1501 COURT NO.5 SECTION II-A
(For Judgment)

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Criminal Appeal No. 2595/2023

SHOMA KANTI SEN **Appellant(s)**

VERSUS

THE STATE OF MAHARASHTRA & ANR. **Respondent(s)**

(IA No. 166531/2023 - INTERIM BAIL)

Date : 05-04-2024 This matter was called on for pronouncement of judgment today.

For Appellant(s) **Mr. Anand Grover, Sr. Adv.**
Mr. Paras Nath Singh, Adv.
Ms. Nupur Kumar, AOR
Mr. Rohin Bhatt, Adv.

For Respondent(s) **Mr. Aniruddha Joshi, Adv.**
Mr. Siddharth Dharmadhikari, Adv.
Mr. Aaditya Aniruddha Pande, AOR
Mr. Bharat Bagla, Adv.
Mr. Sourav Singh, Adv.
Mr. Aditya Krishna, Adv.
Mrs. Preet S. Phanse, Adv.
Mr. Omkar Deshpande, Adv.
Mr. Aadarsh Dubey, Adv.

Mr. K. M. Nataraj, ASG
Mr. Sharath Nambiar, Adv.
Mr. Kanu Agarwal, Adv.
Mr. Annam Venkatesh, Adv.
Mr. Siddharth Dharmadhikari, Adv.
Mr. Chitransh Sharma, Adv.
Ms. Indra Bhakar, Adv.
Mr. Vinayak Sharma, Adv.
Mr. Vatsal Joshi, Adv.
Mr. Anuj Udupa, Adv.
Mr. Yogya Rajpurohit, Adv.
Satwika Thakur, Adv.
Mr. Shubham Mishra, Adv.
Mr. Siddhant Kohli, Adv.
Mr. Anirudh Bhatt, Adv.
Mr. Arvind Kumar Sharma, AOR

Hon'ble Mr. Justice Aniruddha Bose pronounced the judgment of the Bench comprising His Lordship and Hon'ble Mr. Justice Augustine George Masih.

The appeal stands allowed; Criminal Miscellaneous Petition No. 166531 of 2023 shall stand disposed of and the appellant is directed to be released on bail in terms of the signed reportable judgment. The operative portion of the signed reportable judgment held, *inter alia,* as under:-

> "……..With these observations, we set aside the impugned judgment and direct that the appellant be released on bail on such conditions the Special Court may consider fit and proper but the conditions shall include the following:-
>
> (h) The appellant shall not leave the State of Maharashtra without leave of the Special Court.
>
> (i) The appellant shall surrender her passport, if she possesses one, with the Special Court, during the period she remains enlarged on bail.
>
> (j) The appellant shall inform the Investigating Officer of the NIA the address where she shall reside during the period she remains enlarged on bail.
>
> (k) The appellant shall use only one mobile number, during the time she remains on bail, and shall inform her mobile number to the Investigating Officer of the NIA.
>
> (l) The appellant shall also ensure that her mobile phone remains active and charged round the clock so that she

remains constantly accessible throughout the period she remains enlarged on bail.

(m) During this period, i.e. the period during which she remains on bail, the appellant shall keep the location status (GPS) of her mobile phone active, twenty-four hours a day, and her phone shall be paired with that of the Investigating Officer of the NIA to enable him, at any given time, to identify the appellants' exact location.

(n) The appellant, while on bail, shall report to the Station House Officer of the Police Station within whose jurisdiction she shall reside, once every fortnight.

43. In the event there is breach of any of these conditions or any other condition that may be imposed by the Special Court independently, it would be open to the prosecution to seek cancellation of bail granted to the appellant before the Special Court only, without any further reference to this Court."

Pending application(s), if any, shall stand disposed of.

(SNEHA DAS)
SENIOR PERSONAL ASSISTANT

(VIDYA NEGI)
ASSISTANT REGISTRAR

(Signed reportable judgment is placed on the file)